

**TRADING
WITH THE ENEMY
IN WORLD WAR II**

TRADING WITH THE ENEMY IN WORLD WAR II

By
MARTIN DOMKE

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ABBREVIATIONS: For the common law cases, reports and periodicals, the conventional abbreviations have been used, as indicated in Hicks, *Materials and Methods of Legal Research* (Third Revised Edition, 1942), p. 571.

1. Introduction.

DUE TO the increasing importance of economic warfare today, the belligerents of World War II have critically re-examined and revised their legislation regarding trading with the enemy in the light of the experience of World War I.

All belligerents of 1939 issued new and more extensive Acts: Great Britain¹, Canada², Australia³, New Zealand⁴, Union of South Africa⁵, Egypt⁶, France⁷, and Germany⁸. Italy, entering the war in 1940, had enacted War and

¹ Trading with the Enemy Act, 1939, September 5, 1939, 2 & 3 Geo. 6, c.89, as amended by the Defence (Trading with the Enemy) Regulations, 1940, as amended, Statutory Rules & Orders 1940 Nos. 1092, 1214, 1289, 1380; 1941 No. 51; 1942 No. 306; (1942) 36 Am. J. Intern. L. Supp. 3, 13. The Act as amended up to April 1st, 1943, is reprinted *infra*, Appendix N.

² Regulations Respecting Trading with the Enemy, 1939, September 5, 1939, Order in Council P.C. 2512, substituted by "Consolidated Regulations Respecting Trading with the Enemy (1939)," August 21, 1940, P.C. 3959, as amended October 3, 1940, P.C. 5353, and December 16, 1941, P.C. 9797; reprinted *infra*, Appendix P.

³ Trading with the Enemy Act 1939, September 9, 1939, No. 14 of 1939 (Commonwealth), as amended June 3, 1940, No. 33 of 1940 (Trading with the Enemy Act 1939-1940), reprinted *infra*, Appendix Q.

⁴ The Enemy Trading Emergency Regulations 1939, September 4, 1939, New Zealand Gazette Extraordinary, No. 91, September 4, 1939, p. 2355; reprinted *infra*, Appendix R.

⁵ National Emergency Regulations, r.8, September 14, 1939, Government Gazette No. 2679, September 14, 1939, p. 1054c, reprinted *infra*, Appendix S.

⁶ Proclamation No. 6 Regarding Measures as to the Trading with the Government of the German Reich or its Nationals and to Dispositions of Their Property, September 14, 1939, Journ. Off. September 15, 1939; (1939) 29 Gaz. Trib. Mixtes 359.

⁷ Decree-law Concerning the Interdiction and Restriction of Relations with Enemies and Persons Being in Enemy or Enemy-occupied Territory, September 1, 1939, Journ. Off. September 4, 1939, p. 11087, *rectificatif* p. 11322; Executive Decree, September 1, 1939, *ibid.* p. 11089, *rectificatifs* p. 11322, 11441. Decree-law Concerning the Declaration and Sequestration of Enemy-owned Property, September 1, 1939, *ibid.* p. 11091.

⁸ Decree Concerning the Administration of Enemy Property, January 15, 1940, Reichsgesetzblatt I 191; Executive Decrees, March 5, June 17, 1940, *ibid.* p. 483, 888; as amended June 30, 1941, April 14, 1942, *ibid.* 1941 I 371, 1942 I 171.

2. *Trading With the Enemy in World War II*

Neutrality Legislation as early as 1938⁹, including provisions on the treatment of enemy nationals and enemy goods, and economic relations with the enemy.

Unlike the European belligerents, the United States did not need to resort to the enactment of a new Trading with the Enemy Act upon its entry into the war. The Act of October 6, 1917, as amended¹⁰, was always regarded as an act of permanent legislation which could be applied in the event that the United States was again involved in war¹¹. Several sections however are by their wording limited to the last war and the events which followed it.¹²

Furthermore, many of the important legal and economic problems which arose during the emergency preceding the entrance of the United States into the war, were dealt with in 1940 and 1941 by the foreign funds control. The so-called freezing regulations¹³ are now integrated with the Trading with the Enemy Act of 1917, as amended, by section 302 of Title III of the First War Powers Act, 1941¹⁴.

By its foreign funds control, the United States undertook to deprive the economic exploitation of territories

Decree Concerning the Custodianship in Absentia, October 11, 1939, *Reichsgesetzblatt I* 2026; Executive Decrees, October 18, 1939, *ibid.* p. 2056, January 22, May 30, 1940, *ibid.* p. 232, 821; trans. in: *German Decrees Concerning Curatorship in Absence for Enemy-owned Property*, (1940) 3 *Compar. L. Ser.* 385.

⁹ Royal Decree Approving the Text of the Act on War and Neutrality, July 8, 1938, No. 1415, *Gazetta Ufficiale*, Suppl. Ord., September 15, 1938, n. 211 p. 4294. Cf. Steiner, *Italian War and Neutrality Legislation*, (1938) 32 *Am. J. Int. L.* 151, 154.

¹⁰ Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. Appendix. The Act as amended up to April 1st, 1943, is reprinted *infra*, Appendix A.

¹¹ Lefevre, Introduction p. 7 to Meares, *The Trading with the Enemy Act* (1924).

¹² See Editorial Note (1941) 10 U.S.L. Week Stat. Sec. 2; Woodward, *Meaning of "Enemy" Under the Trading with the Enemy Act*, (1942) 20 *Texas L. Rev.* 746 n. 4. Cf. *infra* Chapter XVII, n. 27.

¹³ Exec. Order No. 8389, April 10, 1940, 5 *Fed. Reg.* 1400 (1940), as amended. The Order as amended up to April 1st, 1943, is reprinted *infra*, Appendix C.

¹⁴ December 18, 1941, c.593, 55 Stat. 840, 50 U.S.C. Appendix §617; (1942)

occupied or controlled by Axis-powers of any extraterritorial effect and "to nullify the attempts by the Axis to gain title to the billions of dollars in assets belonging to nationals of the countries overrun by the Axis"¹⁵.

The administrative regulations issued under the authority of the Trading with the Enemy Act, as amended, not only integrated the licensing procedure under the freezing orders with the provision of sec. 3 (a) of the Act¹⁶, but also modified the interpretation of the statutory definitions. "By executive act, the statutory prohibitions were thus suspended and replaced by similar administrative regulations"¹⁷. The statutory provisions of the Trading with the Enemy Act have been construed and modified by regulations on foreign funds control, issued by the Treasury Department¹⁸. In addition, new regulations by the recently established Office of Alien Property Custodian¹⁹ have extended the application and interpretation of the trading with the enemy law to the field of administration of enemy property by General Orders and (special) Vesting Orders.²⁰

¹⁵ 36 Am. J. Int. L. Supp. 56. See Notes (1942) 42 Col. L. Rev. 105; (1942) 28 Am. Bar. Ass. J. 131.

¹⁶ Press Release, U. S. Treasury Department, April 21, 1942; Fed. Res. Bank of New York, Circular No. 2420.

¹⁷ General License under sec. 3(a) of the Trading with the Enemy Act, December 13, 1941, 6 Fed. Reg. 6420 (1941); reprinted *infra*, Appendix E.

¹⁸ *New Administrative Definitions of "Enemy" to Supersede the Trading with the Enemy Act*, Note (1942) 51 Yale L. J. 1388, 1391.

¹⁹ For a statement of the history, scope and purposes of freezing control, see Brief of United States of America as *amicus curiae*, p. 2-21, in *Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345 (1942); Hollander, *Confiscation (Soviet), Aggression (German) and Foreign Funds Control in American Law* (1942) 146; Polk, *The Future of Frozen Foreign Funds*, (1942) 32 Am. Ec. Rev. 255, 258 n. 11; Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, (1942) 56 Harv. L. Rev. 30, 33.

²⁰ Exec. Order No. 9095, March 11, 1942, 7 Fed. Reg. 1971 (1942), as amended by Exec. Order No. 9193, July 6, 1942, 7 Fed. Reg. 5205 (1942); *Administration of Wartime Financial and Property Controls of the United States Government* (Treasury Dep't, December, 1942) p. 35.

²¹ Twenty-one General Orders were issued up to April 1st, 1943, and more than one thousand Vesting Orders, filed in the Federal Register.

This practice of adapting the interpretation of statutory provisions to the ever changing conditions of economic warfare, together with the blacklisting system, prepared the way for legislation by the other American Republics. They did not merely adopt freezing regulations during the time of undeclared war but were willing to follow the pattern of a substantially uniform legislation.²¹ The Final Act of the Inter-American Conference on Systems of Economic and Financial Control, July 10, 1942,²² followed the recommendations of the Meeting of the Ministers of Foreign Affairs of the American Republics held at Rio de Janeiro in January, 1942, concerning measures "that may be necessary to impede all operations of a commercial and financial character contrary to the security of the Western Hemisphere."²³

Thus, a new concept of economic disloyalty has been developed by the American practice of freezing foreign funds since the invasion of Denmark and Norway in May, 1940. This prepared the way for the use of trading with the enemy legislation as a weapon of economic warfare, defensive as well as aggressive. "Freezing Control is but one phase of the present war effort; it is but one weapon on the total war which is now being waged on both economic and military fronts. Coupled with Freezing Control as a part of this nation's program of economic warfare are to be found export control, the promulgation of a Black List, censorship, seizure of enemy-owned property, and

²¹ A list of these Acts is contained in the monthly publication *The Americas and the War*, (1942) 76 Bulletin Pan American Union 224, 273, 344, 361, 457, 531, 591, 636, 691, (1943) 77 *ibid.* 37, 90, 158.

²² Pan American Union, Congress and Conference Series No. 39 p. 7, Proceedings, *ibid* No. 40 p. 137; (1943) 37 *Am. J. Int. L. Supp.* 9.

²³ Proceedings p. 84, 86; (1942) 36 *Am. J. Int. L. Supp.* 61, 70. See Fenwick, *Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro* (1942) 36 *Am. J. Int. L.* 169, 191; *The Inter-American Juridical Committee*, (1943) 37 *ibid.* 7, 9.

financial and lend-lease aid to allied and friendly nations."²⁴

As to Japan, no official information is available as yet on steps taken by the Japanese Government. As a Commentary of April 11, 1942,²⁵ points out, the Japanese Trading with the Enemy legislation enacted during the last war against Germany might throw some light on the views adopted by Japan in this matter.

As regards the European territories occupied or controlled by Axis Powers, particular regulations for the administration of enemy property were issued by the occupying authorities in each of these territories: Poland,²⁶ Norway,²⁷ Luxemburg,²⁸ Belgium,²⁹ the Netherlands,³⁰ and France.³¹ These regulations of course generally follow the pattern of the German Trading with the Enemy legislation.

²⁴ Brief, *supra* n. 18, at p. 18. Cf. Foley, *Control as a Weapon of Economic Defense* (Address, September 29, 1941), (1942) 107 N. Y. L. J. 4, 22; Polk, *Freezing Dollars Against the Axis*, (1941) 20 Foreign Affairs 113.

²⁵ Imperial Ordinance No. 41, April 23, 1917, quoted in C.C.H.W.L.S.F.S. ||66122.

²⁶ Decree of the Governor General (for the occupied Polish territories) on the Administration of Enemy Property, August 31, 1940, Dziennik rozporządzen Generalnego Gubernatora No. 53, p. 265.

²⁷ Decree of the Reich Commissioner for the Occupied Norwegian Territories on the Administration of Enemy Property, August 17, 1940, Forordningstidend for de besatte norske omrader, No. 2 p. 3.

²⁸ Ordinance of the German Military Authorities Regarding Enemy Property in the Occupied Territories of the Netherlands, Belgium, Luxemburg and France, May 23, 1940, Jour. Off. Gouverneur Militaire, p. 32; Executive Ordinances, July 2, August 23, October 24, 1940, *ibid.* p. 115 (*rectificatifs* p. 128, 177) 182, 263 (*rectificatifs* p. 306, 318); Legislation de l'Occupation vol. 1, p. 18 (Paris 1941, reviewed by this writer (1942) 36 Am. J. Int. L. 746).

²⁹ The Ordinance of May 23, 1940 (n. 28) has not been introduced either in Holland or in France, but only in Belgium and Luxemburg. Cf. Krieger and Hefermehl, *Behandlung des feindlichen Vermoögens. Kommentar* (1940) F II 2 p.3 (Library of Congress, LL. 610857 S. 13.41).

³⁰ Decree of the Reich Commissioner for the Occupied Netherlands Territory Concerning the Administration of Enemy Property, June 24, 1940, Verordeningblad vor het bezette Nederlandsche gebied, Stuk 7 p. 66, trans. C.C.H.W.L.S.F.S. ||65680.

³¹ Ordinance of the German Military Authorities, Putting into Force and Complementing the Ordinance Regarding Enemy Property, Sept. 23, 1940,

On the other hand, all measures enacted by the military and civil authorities in several annexed and occupied countries were declared null and void by the respective European governments-in-exile, e. g., Czechoslovakia,³² Poland,³³ Norway,³⁴ Luxemburg,³⁵ and Belgium.³⁶ Some of them enacted further legislative measures for the protection of the property of their nationals which is located abroad, by vesting title to such assets in the State represented by the government-in-exile, e. g., the Dutch³⁷ and Norwegian³⁸ governments.

Jour. Off. Gouverneur Militaire, October 5, 1940 p. 97, *Législation de l'occupation*, vol. II (Paris 1941) p. 20.

³² Declaration of the Czechoslovak Government in London, December 19, 1941, (1941) 1 *Inter-Allied Review* No. XI p. 12.

³³ Decree of the President of the Polish Republic, Regarding the Invalidity of Legal Acts of the Occupying Authorities, November 30, 1939, *Dziennik Ustaw*, Angers (France), December 2, 1939, No. 102, p. 2006; supplementary decree, No. 16, March 6, 1940, *ibid.* March 23, 1940, No. 6 p. 18; transl. C.C.H.W.L.S.F.S. ||67751. See also Decree Regarding the Administration and Disposition of Polish Property Abroad, February 26, 1940, No. 10, *ibid.* February 29, 1940, No. 4, p. 8.

³⁴ Provisional Decree Regarding the Resumption and Revision of Judicial and Administrative Decisions and Executive Orders issued in Norway Under the German Occupation, July 29, 1941, *Norsk Lovtidend* 1941 No. 2 p. 119.

³⁵ Grand Ducal Decree Determining the Effect of Measures taken by the Occupant, April 22, 1941, *Mémorial* No. 2, April 22, 1941, p. 1; Decree Regarding the Measures of Expropriation (*depossession*) taken by the Enemy, April 22, 1941, *ibid.* p. 2; transl. Fed. Res. Bank of New York, Circular No. 2268.

³⁶ Decree-law Determining the Effect of Measures Taken by the Occupying Authorities and of Orders Issued by the (Belgian) Government, January 10, 1941, *Moniteur Belge*, February 25, 1941, p. 44; Decree-law Concerning the Measures of Dispossession Taken by the Enemy, January 10, 1941, *ibid.* p. 46, transl. C.C.H.W.L.S.F.S. ||67762-64.

³⁷ Decree Relating to Certain Property of Individuals and Companies Resident in the Kingdom of the Netherlands, May 24, 1940, *Nederlandsche Staatscourant*, May 30, 1940, A 1940 No. 151; transl. C.C.H.W.L.S.F.S. ||67150, Fed. Res. Bank of New York, Circular 2091. This decree has been reviewed in New York cases discussed *infra*, Chapter XXI. See also Decree Vesting Netherlands East Indies Assets in the Royal Netherlands Government-in-exile, March 9, 1942; transl. in *Nederlandsche Staatscourant* March 31, 1942, A 1942 No. 3, C.C.H.W.L.S.F.S. ||67752, and Decrees Regarding the Requisition of Ships, March 5, 1942, transl. in *Staatsblad* No. C 17; June 5, August 20, 1942, transl. in *Nederlandsche Staatscourant* A 1942 No. 5, 6.

³⁸ Provisional Order Regarding the Monetary System, the Bank of Norway,

Similar steps were taken by the Belgian government-in-exile³⁹ in controlling and administering property in unoccupied territory which was owned by Belgian citizens residing in occupied territory or whose residence was unknown. Furthermore, the Dutch⁴⁰ and the Belgian⁴¹ governments-in-exile promulgated special Trading with the Enemy Acts prohibiting any intercourse with the enemy, the preamble to the Belgian Act stressing "the necessity to forbid any kind of commerce susceptible of giving aid and economic comfort to the enemy."

In addition, the governments-in-exile of the Netherlands, Luxemburg, and Belgium completed and made effective detailed legislation which had been enacted before the invasion in order to facilitate the transfer of the principal place of business of corporations, and the administration of property outside the occupied territory.⁴²

Other measures of governments-in-exile, such as the Norwegian decree of October 3, 1941,⁴³ relating to the acquisition of rights in Norwegian companies, purport to prevent shares of Norwegian companies from being acquired by non-Norwegians, especially in the interest of Germans. Therefore persons who have acquired Norwe-

etc., During the Present War Situation, April 22, 1940, Norsk Lovtidend No. 1, 1940 p. 21, transl. C.C.H.W.L.S.F.S. ||67704, as amended June 7, 1940, Norsk Lovtidend No. 2, 1940 p. 54. See also Provisional Order Regarding the Requisition of Ships and Charter-parties, May 18, 1940, Norsk Lovtidend No. 2, 1940 p. 40, transl. C.C.H.W.L.S.F.S. ||65,449. This order is reviewed in the Lorentzen case, *infra* Chapter XXI, n. 49.

³⁹ Decree-law Relating to the Administration and Management of Property Situated Outside the Occupied Territories, March 19, 1942, Moniteur Belge, March 31, 1942, p. 188 transl. C.C.H.W.L.S.F.S. ||67742.

⁴⁰ Decree Relating to Measures to Prevent Legal Relations in War-time from Damaging the Interests of the Kingdom of the Netherlands, June 7, 1940, Staatsblad No. A 6, transl. C.C.H.W.L.S.F.S. No. 65680, as amended March 4, 1942, Staatsblad No. C 16.

⁴¹ April 10, 1941, Moniteur Belge 1941 p. 90, transl. C.C.H.W.L.S.F.S. ||65695.

⁴² See *infra*, Chap. XIII.

⁴³ Norsk Lovtidend 1941 No. 2, p. 120.

gian citizenship since April 9, 1940, the date of the invasion by German troops, are not considered Norwegian subjects for the purposes of the decree.⁴⁴ Such a measure of a government-in-exile serves to shed light on the methods by which the Axis occupying authorities conduct economic warfare through the trading with the enemy legislation which they enacted in each occupied territory. Thus, to give a Norwegian example, one of the most important companies of the country, the Norsk Hydro (Elektrik Kvaelfstofaktieselskab) could not by any "legal" means be brought into the full orbit of the Nazi European "New Order," because considerable portions of its stock were held by foreign, especially French, shareholders. But the trading with the enemy legislation introduced by Germany in occupied France⁴⁵ furnished appropriate "legal" title to dominate the Norwegian company. Under that legislation, the French Société Norvégienne d'Azote was seized on the German concept of enemy property—Germany continuing to treat France as an enemy under the German Trading with the Enemy Act of January 15, 1940, which has not been amended in this respect. Administration of the seized French company was turned over to the German dye trust, I. G. Farben Industrie Aktiengesellschaft, the other shareholder of Norsk Hydro, so that, through the Trading with the Enemy legislation, the German corporation is now "legally" administering the Norwegian company.

In addition to the special decrees of the governments-in-exile which purport to invalidate all measures undertaken by the Axis powers in occupied and controlled territories,⁴⁷ a recent solemn declaration of the United Nations,

⁴⁴ See further, as to Norwegian denationalization decrees, Chapter VI, n. 16-18.

⁴⁵ *Supra* n. 31.

⁴⁶ *The Penetration of German Capital into Europe*, Statement of the United Nations Information Committee, London, December 30, 1942, p. 26.

⁴⁷ *Supra* n. 32-36; Yugoslavian Decree, June 18, 1942, *Sluzbene Novine* (News Service) 1942, No. 7, p. 8.

of January 5, 1943,⁴⁸ denied recognition to any forced transfers of property in enemy-controlled territory, and condemned the dispossession methods of the Axis powers. This warning was endorsed by the Commonwealth of the Philippines,⁴⁹ in order to strengthen further Filipino resistance to the Japanese occupation.⁵⁰

But the manifold forms, means and measures, under which legal titles and commercial relations were created during the time of occupation and control by the Axis powers, will not be *automatically* invalidated by legislative fiat. A careful study of the facts and legal aspects of municipal law as well as of international law will be necessary to put in force workable measures for the invalidation of the diverse and often intricate acts of economic warfare.

Measures and counter-measures of economic warfare are taken by the various belligerent countries through application of their Trading with the Enemy laws and of the numerous rules and regulations issued thereunder. Their judicial review in the different countries in some 300 decisions rendered during this war, among which are 200 in the United States, reveals the importance of the legislation enacted in this field. Its present-day application and construction by the courts of various countries, in a greater degree than the judicial proceedings resulting from the First World War, furnish the preliminary experiences for any postwar economic settlement of questions involved in the Trading with the Enemy legislation of World War II.

⁴⁸ (1943) 8 Bulletin Dep't of State p. 21.

⁴⁹ (1943) 3 United Nations Review 78.

⁵⁰ Cf. generally Scanlon, *European Governments in Exile* (Carnegie Endowment for International Peace, Memoranda Series, no. 3, January 25, 1943).

2. Enemy Governments and Their Agencies.

AS IN the Trading with the Enemy legislation of World War I, the newly issued Acts of different countries provide expressly that governments of enemy states are considered "enemies." Thus, the British Act, sec. 2 (1) a, includes in the term "enemy," "any State, or sovereign of a State, at war with His Majesty." The same definition may be found in the Canadian Act, sec. 1 (b) (i). The German Act, sec. 3 (1), contains a similar provision ("the enemy states, their provincial public bodies (*Gebietskoerperschaften*) and other public-law persons"). While the French Act does not include any provision as to enemy governments, the Egyptian Act, sec. 1 (1), expressly designates the German Government (*Gouvernement du Reich Allemand*) among the persons with whom any commercial intercourse is prohibited.

In the same way sec. 2 (b) of the United States Act defines "enemy" to include "the government of any nation with which the United States is at war." Accordingly, the Italian Government was deemed an enemy within the meaning of the Trading with the Enemy Act by the U. S. Supreme Court in *Ex parte Don Ascanio Colonna*.¹ In this case the Royal Italian Ambassador sought leave to file a petition for writs of prohibition and mandamus, directed to the U. S. District Court for the District of New Jersey. The basis of this application was the allegation that the Italian steamship "Brennero" and its cargo of lubricating oil, the subject of litigation in the District Court and in

¹ 62 S. Ct. 373, 86 L. Ed. Adv. Op. 357 (January 5, 1942); (1942) 36 Am. J. Int. L. 489; cf. 314 U. S. 510; Notes, (1942) 30 Cal. L. Rev. 358; (1942) 42 Col. L. Rev. 105; (1942) 13 Boston Bar Bull. 81.

its possession, were the property of the Italian Government and entitled to the benefit of Italy's sovereign immunity from suit. After the outbreak of war with Italy, the United States filed additional exceptions to the claim of immunity, pointing out that the Ambassador was no longer the accredited representative of a friendly foreign sovereign.²

The petitioner's application was denied, in view of the statutory provision, sec. 2 (b) of the Act, which defines an enemy government as "enemy." Recently the U. S. Supreme Court, in *Ex parte Kumezo Kawato*,³ referred to the *Colonna* case in pointing out: "That opinion emphasized that an enemy government was included within the definition of the classification 'enemy' as used in that [Trading with the Enemy] Act."

The *Colonna* decision further stated "the principle recognized by Congress and by this Court that war suspends the right of enemy plaintiffs to prosecute actions in our courts." As expressly said in the *Kawato* case, the *Colonna* opinion "has no bearing on the rights of resident enemy aliens."⁴ The temporary misapplication of the *Colonna* opinion in *Kaufmann v. Eisenberg*,⁵ will be dealt with *infra*, Chapter XV, n. 3.

While sec. 2 of the Act also qualifies as an enemy "the government of any nation which is an ally of a nation with which the United States is at war," a broader concept of a "foreign country" was adopted by Exec. Order No.

² See statement by Counsel for the United States, 1942 Am. Mar. Cas. 8, at p. 11.

³ 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942). Cf. 316 U. S. 650; Note, (1943) 28 Wash. U. L. Q. 39.

⁴ *Supra* n. 3, at n. 7 of the opinion. The fact that the Ambassador is residing in this country was of no importance inasmuch as a foreign minister cannot sue in his own name with respect to his sovereign's property, 30 Am. Jur. Intern. L. §22, p. 189. As to the general question of the Italian Ambassador's claiming of immunity, see Note on recent Argentine cases (1942) 55 Harv. L. Rev. 1379.

⁵ 177 Misc. 939, 32 N. Y. S. (2d) 450 (January 19, 1942).

8389, as amended,⁶ sec. 5 D including in the term "foreign country": "(1) The State and the government thereof on the effective date of this Order as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof, (2) Any other government (including any political subdivision, agency, or instrumentality thereof) to the extent and only to the extent that such government exercises or claims to exercise *de jure* or *de facto* sovereignty over the area which on such effective date constituted such foreign country."

However, while this definition of a foreign country by Exec. Order No. 8389, as amended, has remained unchanged in the instructions to Preparation of Reports on Form TFR-300, Series L,⁷ and recently in General License No. 30 A, relating to the administration of estates of decedents,⁸ it has been superseded, in the important field of the freezing regulations, by the new concept of an "enemy national," as defined in General Ruling No. 11, as amended.⁹ Sec. 2 (a) includes in the term "enemy national": "(1) The Government of any country against which the United States has declared war (Germany, Italy, Japan, Bulgaria, Hungary, and Rumania) and any agent, instrumentality, or representative of the foregoing Governments, or other persons acting therefor, wherever situated (including the accredited representatives of other Governments to the extent, and only to the extent, that they are

⁶ April 10, 1940, 5 Fed. Reg. 1400 (1940); reprinted *infra*, Appendix C.

⁷ Sec. II E, Public Circular No. 4 C, September 14, 1942, 7 Fed. Reg. 7274 (1942).

⁸ October 23, 1942, 7 Fed. Reg. 8633 (1942); Public Circular No. 20, *ibid.* 8632.

⁹ March 18, 1942, 7 Fed. Reg. 2168 (1942), as amended by Public Circular No. 19, September 22, 1942, *ibid.* 7518, and November 8, 1942, *ibid.* 9119; reprinted *infra*, Appendix F.

actually representing the interests of the Governments of Germany, Italy and Japan and Bulgaria, Hungary and Rumania; and (2) The government of any other blocked country having its seat within enemy territory, and any agent, instrumentality, or representative thereof, or other person acting therefor, actually situated within enemy territory."

These definitions of General Ruling No. 11, as pointed out in the Press Release of the Treasury Department,¹⁰ "modify the old 1917 restrictions against trade and communication under war-time conditions by substituting the new concept 'enemy national' for the old 'enemy' and 'ally of enemy' terminology of the last war."

The question may be raised if these broader definitions cover only the field, important as it is, of the freezing regulations, and of the United States Censorship Regulations of January 30, 1943,¹¹ issued by the Director of Censorship pursuant to sec. 3(c) of the Trading with the Enemy Act, as amended, and not other branches of the Trading with the Enemy law.

Exec. Order No. 9095, as amended July 6, 1942,¹² establishing the Office of Alien Property Custodian, did not adopt the aforesaid definition, but expressly defines, in sec. 10(a), the term "designated enemy country" as meaning "any foreign country against which the United States has declared the existence of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future." The same definition is repeated verbatim in General Orders Nos. 5, 6 and 20 of the Alien Property Custodian,¹³ whereas

¹⁰ Fed. Res. Bank of New York, Circular No. 2399, March 18, 1942.

¹¹ 8 Fed. Reg. 1644 (1943); see *infra* n. 58.

¹² 7 Fed. Reg. 5205 (1942); reprinted *infra* Appendix K.

¹³ August 3, 1942, 7 Fed. Reg. 6199 (1942); February 9, 1943, 8 Fed. Reg. 1780 (1943).

General Order No. 14¹⁴ provides in sec. 4 that "designated foreign national" shall mean individuals resident of, and business organizations organized under the laws of or having its principal place of business within: "Albania, Austria, Bulgaria, Czechoslovakia, Danzig, Esthonia, Germany, Greece, Hungary, Italy, Japan, Latvia, Lithuania, Luxemburg, Norway, Poland, Rumania, San Marino, and Yugoslavia; and those portions of Belgium, Denmark, France and the Netherlands within continental Europe."

The question which foreign government, if any, is considered an enemy of the United States, within the meaning of the Trading with the Enemy Act, is important, e. g., as to the capacity to sue and to be sued of nationals of such countries who are not residents in the United States and may be thus barred from the courts in this country.¹⁵ In *Sundell v. Lotmar*,¹⁶ in a tort action brought by Finnish residents while visiting New York, the plaintiffs were considered enemies: "Even though the United States is formally at peace with Finland, she nevertheless is actively in concert with Germany in their war against Russia, our ally." It may be mentioned that Finland was declared enemy territory neither in General Ruling No. 11, as amended¹⁷ nor in the General Order No. 14 of the Alien Property Custodian¹⁸

The determination as to who is an ally of an enemy is not conclusively made by the Secretary of State, but is obviously subject to judicial cognition, while that of a

¹⁴ December 1, 1942, 7 Fed. Reg. 10546 (1942).

¹⁵ See *infra* n. 45, and Chapter XV, n. 47.

¹⁶ 44 F. Supp. 816 (D. C. S. D. N. Y., February 17, 1942).

¹⁷ *Supra*, n. 9.

¹⁸ *Supra*, n. 14. In the United Kingdom, Finland was declared "enemy territory," by Order of the Board of Trade under sec. 15 (1A) of the Act, August 2, 1941, S. R. & O. 1941, No. 1117. Finland though not at war with the United Kingdom seized all British property in Finland under a decree which also prohibits further business dealings by Finnish citizens with enemy countries. N. Y. Herald Tribune, February 1, 1942.

state of war with a foreign country must be made by the Executive Branch, as stated in *Verano v. De Angelis Coal Co.*¹⁹ In this action to recover damages the defendant moved to dismiss or stay the action on the ground that the plaintiff, an Italian residing in this country, was an alien enemy although a state of war between the United States and Italy was undeclared.²⁰ It was held that in the absence of "any declaration or enactment indicating a recognition by the political department of the Government that a condition of war exists between this country and the Kingdom of Italy" the plaintiff could not be considered an enemy.

In any event, the freezing regulations restricted transactions with allies of the Axis-powers long before the United States declared war against those *de facto* allies. Thus, Rumania was declared "foreign country" and its assets blocked (October 9, 1940)²¹ long before the state of war was declared between the United States and Rumania (July 17, 1942);²² the same measure was taken in Britain on October 11, 1940.²³ In Canada, Rumania was declared "proscribed territory"²⁴ on October 18, 1940, "in consequence of uncertainty surrounding the present situation in Roumania and reports which indicate that enemy forces,

¹⁹ 41 F. Supp. 954 (D. C. M. D. Pa., November 18, 1941); 44 F. Supp. 726 (D. C. M. D. Pa., April 7, 1942).

²⁰ Even after the outbreak of war, the plaintiff as a resident alien of enemy nationality would not be denied the right to prosecute his action. See Chapter XV, n. 13.

²¹ 5 Fed. Reg. 4062 (1940). In the last war, Rumania though then an ally, had been treated as an enemy by virtue of the hostile (German) occupation. See *Woodman v. Steaua Romana Societate Anonima Pentru Industria Petroleului of Bucharest*, 61 F. 2d 1047 (C. C. A. Third C., 1932).

²² Public Law No. 565, 77th Cong. 2d Sess., c. 325, June 5, 1942, (1942) 36 Am. J. Int. L. Supp. 198, Presidential Procl. No. 2563, July 17, 1942, 7 Fed. Reg. 5535 (1942), *ibid.* Supp. 241.

²³ Pursuant to Defence (Finance) Regulations, 1939, Reg. 2 A, inserted by S. R. & O. 1940 No. 1329. It was declared "enemy territory," by Order of the Board of Trade, made under sec. 15 (1 A) of the Act, February 15, 1941, S. R. & O. 1941, No. 189.

²⁴ In the meaning of sec. 1(e) of the Consolidated Regulations respecting Trading with the Enemy, 1939, as amended; see Appendix P.

with or without the concurrence of the Roumanian authorities, are present or have occupied substantial areas in that country."²⁵

Under the German Trading with the Enemy law, which is also in force in the annexed territories, e. g., in the Protectorate of Bohemia and Moravia,²⁶ the incorporated eastern territories of Poland,²⁷ Eupen and Malmedy (former Belgium),²⁸ the Reich Minister of Justice is to decide which state is an enemy within the meaning of the respective Act. The United Kingdom with all possessions, the Dominions with their mandates, France, Egypt, the Sudan and Iraq were declared enemies²⁹ prior to the invasion of Russia.³⁰

As to the occupied territories of Norway, Luxemburg, Belgium and the Netherlands, these countries are not considered "enemies" of Germany, within the meaning of the German Trading with the Enemy legislation, although a state of war exists between them and Germany.³¹ For as authoritative German commentators³² point out, these states "had not taken any measures against German property"—which would indeed have been impossible in view of the blitzkrieg character of the invasion!—and "are wholly occupied by German troops." However, property

²⁵ P. C. 5764; cf. Proclamation, Canada Gazette, February 21, 1942.

²⁶ Verordnungsblatt des Reichsprotectors in Boehmen und Maehren 1939 No. 32 p. 223.

²⁷ Decree of April 18, 1940, Reichsgesetzblatt 1940 I 660; Decree Concerning the Treatment of the Property of Citizens of the Former Polish State, September 17, 1940, Reichsgesetzblatt I 1270; transl. in *The Black Book of Poland* (1942) 549. On trading with the enemy legislation in the Government General, cf. *supra*, Chap. I n. 26.

²⁸ Decree of July 10, 1940, Reichsgesetzblatt I 956.

²⁹ Executory Decree of October 18, 1939, Reichsgesetzblatt I 2056.

³⁰ Russia was added by Decree of June 30, 1941, Reichsgesetzblatt I 371, the United States and her possessions, April 14, 1942, Reichsgesetzblatt I 171.

³¹ The German Prize Court at Hamburg, for example, held that a state of war still exists between Germany and Norway, N. Y. Times, October 26, 1941, p. 6. See Procl. No. 2398, April 25, 1940, 5 Fed. Reg. 1569 (1940), 54 Stat. 2698, proclaiming "that a state of war unhappily exists between Germany and Norway."

³² Krieger and Hefermehl, *supra* Chapter I n. 29, Einf. Anm. 3 H p. 1.

of nationals of these countries or of corporations controlled by such nationals which is located in Greater Germany is considered "under enemy influence" and treated accordingly by a special German decree of May 30, 1940.³³

On the other hand, France has been dealt with differently by the German military authorities. The Armistice Convention between Germany and France of June 22, 1940,³⁴ did not affect the state of war between these two countries. But the German military authorities no longer considered France with all her possessions an enemy state, within the meaning of the Ordinance of September 23, 1940.³⁵ Sec. 1 (1) expressly omitted any part of continental France and of the French empire from the determination as an enemy. Meanwhile, this Armistice Convention, as the Italian-French of June 24, 1940,³⁶ has virtually become non-existent by the invasion of the former free zone by German and Italian troops in November, 1942. Although immediately following the Armistice Conventions the French Trading with the Enemy legislation was suspended³⁷ and later repealed in the then unoccupied zone of France,³⁸ the German legislation did not change the provisions of the principal Act of January 5, 1940,³⁹ sec. 2 (2) declaring France an enemy, within the meaning of this Act.

The trading with the enemy legislation promulgated by the German military and civil authorities in the occupied

³³ Reichsgesetzblatt I 821, General Regulations of the Reich Minister of Justice, November 14, 1940, (1940) 102 Deutsche Justiz 1296.

³⁴ (1940) 34 Am. J. Int. L. Supp. 173; see Domke, *Problems of International Law in French Jurisprudence 1939-1941*, (1942) 36 Am. J. Int. L. 26, at p. 34.

³⁵ *Supra* Chap. I n. 31.

³⁶ (1940) 34 Am. J. Int. L. Supp. 178.

³⁷ June 21, 1940, Journ. Off. des Ordonnances du Gouverneur Militaire de Paris, June 21, 1940; Executive Ordinance, July 12, 1940, *ibid.* July 12, 1940, *Legislation de l'Occupation* vol. I (1940) 33, 51.

³⁸ July 16, 1940, Journ. Off. July 17, 1940 p. 4555; July 28, 1940, Journ. Off. July 29, 1940 p. 4590; September 17, 1940, Journ. Off. September 18, 1940 p. 5042.

³⁹ *Supra* Chapter I, n. 8.

territories treats as enemy of these countries the enemies of the occupying power, arguing that the enemies of Germany are making war against the occupied countries as well. Thus, the preamble to the decree issued in Norway⁴⁰ declares: "The actual war which the enemy states forced upon (*aufgezwungen*) the German Reich and wage not only against the German Reich but also against the territory occupied by it, makes it necessary to impose restrictions upon the property of the enemies of the German Reich."

Thus, American property in the occupied territories of France, the Netherlands, Belgium, and Luxemburg was placed in the same status as that of other enemy aliens, i. e., enemies of the (German) occupying power.⁴¹ Moreover, German commentators⁴² frankly declare that by such measures Germany tries to "get bases of influence which may be used for an advantageous settlement of peace. (*Stuetzpunkte des Einflusses fuer den Friedensschluss zu erfassen*)".

The economic exploitation and looting of occupied territories by Axis powers⁴³ will have legal consequences in this country. Sec. 127 of the Internal Revenue Code, inserted as a new section by the Revenue Act of 1942, sec. 156, October 21, 1942,⁴⁴ provides for tax relief to individuals and corporations on account of war losses suffered

⁴⁰ *Supra* Chap. I, n. 27.

⁴¹ See Chapter III, n. 56-59.

⁴² Krieger and Hefermehl, *supra* n. 32, n. 1 and §1, F III2 p. 2.

⁴³ Cf. Domke, *International Aspects of European Expropriation Measures*, American Foreign Law Association, Proceedings No. 22 (1941); Hediger, *Nazi Exploitation of Occupied Europe*, (1942) 18 Foreign Policy Reports 66, *Nazi Economic Imperialism* *ibid.* 137; Segal, *The New Order in Poland*, (1942) 102; Cromley, *Loot of Asia*, Wall Street Journal, September 12, 1942, p. 1. See *Penetration of German Capital into Europe*, United Nations Information Committee, London, December 30, 1942.

⁴⁴ Public Law No. 753, 77th Congress, 2d Session, c. 619.

from seizure and destruction of property in enemy countries.

Sec. 127 (a) 2 provides: "Property within any country at war with the United States, or within an area under the control of any such country on the date war with such country was declared by the United States, shall be deemed to have been destroyed or seized on the date war with such country was declared by the United States." The section further provides that if any interest in or with respect to property deemed to be destroyed or seized in the course of military or naval operations or in an area under the control of the enemy becomes worthless, the loss thereon shall be treated as a casualty loss which results from the destruction or the seizure of the interest in such property. "Thus, stock in a corporation all of the property of which is located in an enemy country, and bonds issued by such corporation are treated as becoming worthless by reason of the destruction or seizure by the enemy of the property subject to such interests, and the loss resulting therefrom is treated as a casualty loss."⁴⁵

Governmental agencies wherever situated are declared enemies in the different Trading with the Enemy Acts. General Ruling No. 11, as amended, expressly includes in the definition of enemy nationals all accredited representatives of enemy countries to the extent that they represent these enemy governments, whereas the agents of governments of any blocked country are covered only when within enemy territory, thus excluding the agents of the governments-in-exile from the restrictions.

In *Telkes v. Hungarian National Museum*,⁴⁶ the Royal

⁴⁵ Senate Finance Committee Report No. 1631, p. 128. See Kent, *The Revenue Act of 1942*, (1943) 43 Col. L. Rev. 1, 18; the Decisions *infra* Chapter XVII, n. 52, and Mertens, *Law of Federal Income Taxation*, Temporary Supplement 1943, Chapter 28, p. 137.

⁴⁶ 178 Misc. 587, 34 N. Y. S. (2d) 565 (April 7, 1942); N. Y. L. J. May 12, 1942, p. 2014, modified 265 App. Div. 192, 38 N. Y. S. (2d) 419 (First

Swedish Legation, with the consent of the U. S. Department of State, assumed the protection of Hungarian interests in this country and as part of its duties directed the Consul-General of Sweden to close the Hungarian Reference Library in New York. The discharged director of the Library, a citizen of the United States, sued for breach of contract against the Hungarian National Museum, asserting that defendant is an autonomous foreign (Hungarian) corporation. He attempted to attach the defendant's property in the hands of the Consul-General of Sweden; the latter (appearing specially) claimed the immunity of the defendant from suit and from attachment of its property, the defendant being an agency or instrumentality of the Kingdom of Hungary.⁴⁷ The U. S. Department of State made no suggestion to the court concerning the claim of immunity.

The question arose whether the defendant, if it were an agency of the Hungarian Government, might not be sued in the courts of this country, even though a state of war exists between the United States and Hungary. The Appellate Division, in a recent opinion (December 11, 1942), did not find any controlling authority as to the effect of the existence of a state of war on the right to claim immunity.⁴⁸ In reviewing cases where the immunity was granted to non-recognized governments,⁴⁹ the court pointed out:

Dep't, December 11, 1942); *leave to appeal denied* 265 App. Div. 992 (January 15, 1943).

⁴⁷ This question was fully discussed in *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 20 N. Y. S. (2d) 825 (1940), and in *Ulen v. Bank Gospodarstwa Krajowego (National Economic Bank)*, 261 App. Div. 1, 24 N. Y. S. (2d) 201 (1940); (1942) 36 Am. J. Int. L. 695. Cf. *Lamont v. Travelers Insurance Co.*, 281 N. Y. 362, 24 N. E. (2d) 81 (1939).

⁴⁸ "No decision by the United States Supreme Court, passing on the question involved here, has been called to our attention."

⁴⁹ For cases regarding the effect of non-recognition, see Hackworth, *Digest of International Law* vol. I (1940) p. 364. Cf., as to the occupation of Latvia during this war, *The Regent*, 47 F. Supp. 995; *Estate of Grauds*, N. Y. L. J.

"Based on the reasoning that the immunity from suit is not a matter of comity, our courts hold that lack of diplomatic recognition does not affect the immunity. We see no difference in principle between a case where recognition is lacking and a case where we are at war with a sovereign. The latter case merely affords greater reason for refusing to exercise comity." In this action to recover from a foreign sovereign the compensation as a public officer of that sovereign—plaintiff had been exempted from income tax as such an official—the court further said that "a sovereign may not be sued in our courts, or have his property attached here. Existence of a state of war would not seem to alter this rule."⁵⁰

Meanwhile the Alien Property Custodian, by Vesting Order 592, December 30, 1942,^{50a} determined the Hungarian Reference Library as property owned or controlled by a national of a designated enemy country (Hungary), namely, the Hungarian National Museum, "an agency administered by the Ministry of Worship and Public Education of the Kingdom of Hungary."

The words "ally of enemy," as used in sec. 2 of the Trading with the Enemy Act, are actually omitted in the freezing regulations just as they are in the Orders of the Alien Property Custodian. The term "enemy national" in sec. 2 (a) (ii) of General Ruling No. 11, as amended, includes "the government of any other blocked country having its seat within enemy territory," and sec. 2 (b) (ii) includes expressly in the term "enemy territory": "any other territory controlled or occupied by Germany, Italy or Japan." Similarly, General Orders Nos. 5, 6, and 20 of

March 22, 23, 1943, p. 1119, 1133; Lithuania: *The Denny*, 127 F. (2d) 404; Estonia: *The Signe*, 37 F. Supp. 819, 39 F. Supp. 810.

⁵⁰ The issue as to defendant's status as an agency exercising a governmental function was sent to an official referee of the court.

^{50a} 8 Fed. Reg. 1325 (1943).

the Alien Property Custodian⁵¹ include in the term "designated enemy country": ". . . any other country with which the United States is at war in the future," whereas General Orders Nos. 14 and 15⁵² enumerate such countries.

While regulations issued by the Department of State pursuant to sec. 3 (c) of the Trading with the Enemy Act, March 5, 1943,⁵³ apply the terms "enemy" and "ally of an enemy" of sec. 2 of the Act, the integration of the new concept "enemy national" in the Trading with the Enemy legislation became recently apparent in the case of France. Though the diplomatic relations of the United States with Vichy-France were severed after the occupation of the whole of continental France by German and Italian troops in November, 1942,⁵⁴ France was neither declared an enemy nor an ally of an enemy, within the meaning of the Trading with the Enemy Act. But General Ruling No. 11 was amended November 8, 1942,⁵⁵ so as to include all of continental France within the term "enemy territory" and hence to determine the Vichy Government having its seat in that territory an "enemy national."

In *Government of France v. Isbrandtsen-Moller Co., Inc.*,⁵⁶ an action was properly commenced by filing a libel prior to the severance of the diplomatic relations between the United States and France. Said the court: "From that date [November 8, 1942] to the present time the United States has recognized no Government of France. . . . Furthermore, since November 8, 1942, the Government of

⁵¹ August 3, 1942, 7 Fed. Reg. 6199 (1942); February 9, 1943, 8 Fed. Reg. 1780 (1943).

⁵² December 1, 1942, 7 Fed. Reg. 10546 (1942); January 6, 1943, (1943) 25 J. Pat. Off. Soc. 137.

⁵³ Transportation of Enemy Aliens on American Vessels and Aircraft, 8 Fed. Reg. 2819 (1943).

⁵⁴ See Statement of U. S. Policy toward the Vichy Government, November 9, 1942, 7 Bulletin Dep't of State, p. 903.

⁵⁵ 7 Fed. Reg. 9119 (1942).

⁵⁶ 48 F. Supp. 631 (D. C. S. D. N. Y., January 15, 1943).

France has been an 'enemy alien' within the purview of the Trading with the Enemy Act and as such it is precluded from suing in our courts."⁵⁷ Therefore nobody acting on behalf of the Vichy Government had power to file the verification of the French Ambassador, under Rule 12 of the Admiralty Rules. The action was suspended "until sixty days after the date upon which a French Government is again recognized by the United States."

The determination of a government having its seat in enemy-occupied territory as an "enemy national" under the foreign funds control is also reflected in the United States Censorship Regulations of January 30, 1943, issued by the Office of Censorship pursuant to sec. 3 (c) of the Trading with the Enemy Act.⁵⁸ Sec. 1801.2 (c) determines as "enemy national" not only "the government of any country with which the United States is or may hereafter be at war, and any representative wherever situated," but also "the government of any other country having its seat within enemy territory to which the provisions of Executive Order No. 8389, as amended, have been extended."⁵⁹

Thus, the new regulations substituted "the new concept 'enemy national' for the old 'enemy' and 'ally of enemy' terminology of the last war."⁶⁰

⁵⁷ The court cites the *Colonna* decision, *supra* n. 1, which however deals with the Government of a country (Italy) formally at war with the United States, this not being the case with France.

⁵⁸ 8 Fed. Reg. 1644 (1943).

⁵⁹ As, for instance, continental France, declared enemy territory by General Ruling No. 11, as amended, *supra* n. 55.

⁶⁰ *Supra* n. 10.

3. Enemies Under the Trading with the Enemy Acts — Nationals of Enemy Countries Under Foreign Funds Control.

IN THE Trading with the Enemy Acts of this war, the tests determining the enemy character of individuals have become fairly uniform. Residence within enemy territory, or carrying on business in such territory, is usually considered decisive to establish enemy qualification. And the term "enemy territory" has been understood to include territory occupied or controlled by the enemy.

Such questions as arise out of the military occupation of territories will be dealt with in detail in Chapter XIV. In this country General Ruling No. 11, as amended, enumerates the countries which are considered enemy territory, for the freezing regulations based on Executive Order No. 8389, as amended, issued pursuant to sec. 5 (b) of the Trading with the Enemy Act. In the same way General Orders Nos. 5, 6 of the Alien Property Custodian¹ specify as "designated enemy countries" those foreign countries against which the United States has declared the existence of a state of war, and "any other country with which the United States is at war in the future." Similarly, in General Orders Nos. 14, 15,² the countries are specified wherein residence or carrying on business makes individuals and corporations "designated foreign nationals."

Residence in enemy territory, as the decisive test of the enemy character of an individual, is used in sec. 2 (a) of

¹ 7 Fed. Reg. 6199 (1942).

² 7 Fed. Reg. 10546 (1942).

the United States Trading with the Enemy Act ("individual resident within the territory"). But this term is now superseded in the important fields of the freezing regulations and of the censorship of communications,³ by General Ruling No. 11, as amended, which replaces the term "resident within enemy territory" by "individual within the territory." Similarly, Executive Order No. 9095, as amended, sec. 10 (a), adopts for the administration of foreign property by the Alien Property Custodian the term "individual within a designated foreign country." This recent authoritative ruling seems to render obsolete the discussion concerning the meaning of "residence" (in a foreign country) which arose in the early state of the freezing regulations.³

As in the United States Trading with the Enemy Act, the enemy character of individuals is determined in the Acts of other belligerents, passed during this war, by the test of "residence in enemy territory." Compare those of the United Kingdom, sec. 2 (1) b, and Canada, sec. 1 (b) II, "residing"; Union of South Africa, r. 8 (1), "person in a country with which the Union is at war"; France, sec. 2 (a), and Egypt, sec. 3 (1) 2, "domicil or permanent abode" (*Wohnsitz oder dauernder Aufenthalt*); Italy, sec. 325, "being" (*si trovi*); and the Decrees of the governments-in-exile of the Netherlands, June 7, 1940, sec. 1 (5) b, "established," and of Belgium, April 10, 1941, sec. 1, "sojourning."

Being or having been⁴ within a country which is enumerated as enemy territory is sufficient to qualify an individual as an "enemy" within the meaning of the United

³ See Note, *Foreign Funds Control Through Presidential Freezing Orders*, (1941) 41 Col. L. Rev. 1039, 1046; Harris and Joseph, *Present Problems Concerning Foreign Funds Control*, (1941) 105 N. Y. L. J. 336, and references *infra*, n. 72.

⁴ On the loss of enemy qualification, see Chap. XII.

States Trading with the Enemy Act; a "national" of a foreign country within the meaning of the freezing regulations; a "designated foreign national" within the meaning of Executive Order No. 9095, as amended; or a "national of a designated enemy country" as determined in the Vesting Orders of the Alien Property Custodian.⁵

Anyone "of any nationality" within enemy territory is considered an enemy. Even nationals of the country enacting the trading with the enemy legislation are not exempted from this definition if they are in enemy or enemy-occupied territory.⁶

The question was decided in this country after the First World War in *Vowinckel v. First Federal Trust Co.*,⁷ and *Stadtmuller v. Miller*.⁸ Naturalized American citizens of German birth, a Red Cross surgeon, and a Columbia University professor, who had been compelled to remain in enemy territory during the war, were held not to have lost, by the temporary purpose of their residence in Germany, their residence in the United States. They were thus allowed to recover seized property, as being exempted from the test of residence in enemy territory, within the meaning of secs. 2, 9 of the Trading with the Enemy Act.⁹

The holdings of these two decisions,¹⁰ that a mere

⁵ *Infra*, n. 109, *seq.*

⁶ "It has been the general doctrine that citizens domiciled in enemy territory do by the rules of international law take on the status of enemies," *Kahn v. Garvan*, 263 F. 909, 915 (D. C. S. D. N. Y. 1920). See *Faber v. U. S.*, 10 F. Supp. 602, *cert. den.* 296 U. S. 596 (1935).

⁷ 10 F. (2d) 19 (C. C. A. 9th, 1926).

⁸ 11 F. (2d) 732, 45 A. L. R. 895 (C. C. A. 2d, 1926).

⁹ For cases where naturalized Hawaiians of German birth, who as Hawaiians became American citizens and fraudulently misrepresented their status under the Trading with the Enemy Act, see *United States v. Rodiek*, 117 F. (2d) 588, 120 F. (2d) 760, 315 U. S. 783; Notes, (1940) 49 Yale L. J. 1250, (1941) 54 Harvard L. Rev. 1248; and *Isenberg v. Biddle*, 125 F. (2d) 741 (C. A. D. Col., December 15, 1941). Cf. *Estate of Johann Friedrich Hackfeld*, N. Y. L. J. January 14, 1943, p. 174.

¹⁰ Such exemptions from the territorial test may become important later, particularly since it is more difficult to leave belligerent countries now than in

transient is not a resident in foreign (enemy) country, are of much more limited effect in the present war. For, as a practical matter, residence in enemy or enemy-occupied territory is no longer the decisive test. Today the mere fact that one is within such territory subjects him to the most important restrictions under Trading with the Enemy legislation in this country, namely, to the foreign funds control and the administration of his property by the Alien Property Custodian. The whole concept of the Trading with the Enemy law and the future settlement of questions which have arisen and may further arise under the Act and the regulations issued thereunder, are influenced by the fact that even prior to the entrance of the United States into this war, the control of foreign assets located in this country had been established. This control, introduced after the invasion of Norway and Denmark by German troops,¹¹ has been extended to the freezing of funds of nationals and persons from nearly all European countries—with the exception of Turkey—as of June 14, 1941.¹² Control was further intensified by requiring reports under TFR-300,¹³ which had to be made until October 1, 1941. Control through these reports covered not only all foreigners in this country but extended to any interest that nationals of blocked countries might have in any funds in this country.¹⁴ “The total value of all property reported in the census is in excess of \$13,000 million. More than

the First World War. In *Waldes v. Basch*, 109 Misc. 306, 179 N. Y. S. 713 (1919) *aff'd* 191 App. Div. 904, 181 N. Y. S. 958 (1920), residents of Prague, Bohemia, formerly a part of the Austro-Hungarian Empire, were not considered enemies so as to allow them to recover on a pre-war debt. For instances in this war see Syria, Italian East Africa, Madagascar, *infra* p. 170, 182.

¹¹ 5 Fed. Reg. 1400 (1940).

¹² Exec. Order No. 8785, 6 Fed. Reg. 2897 (1941).

¹³ See Regulations under Exec. Order No. 8389 of April 10, 1940, as amended, reprinted Appendix D.

¹⁴ Property in which a national of a foreign (blocked) country has “an interest of any nature,” sec. 1 of Exec. Order No. 8389, as amended.

\$7,000 million of this total was reported as the property of nationals of blocked countries. Property reported as owned or held for nationals resident in the Latin American Republics amounted to more than \$1,200 million."¹⁵

Subsequently, on December 21, 1941,¹⁶ this control was strengthened by automatically freezing the assets of countries which would be occupied or controlled later on by Axis powers.

To understand fully the legal and economic significance in this country of foreign funds control, not only at present but with a view to future settlements, it must be noted that this control replaced measures that ordinarily would have been taken in application of the provisions of the Trading with the Enemy Act itself. The Act remained in force after the First World War.¹⁷ It was under the authority of the Act that the Freezing Regulations were enacted by way of Executive Orders. These Orders, and the Regulations issued thereunder, were confirmed by Congress¹⁸ and, after the entrance of the United States into this war, were integrated with the Act by sec. 302 of Title III of the First War Powers Act, December 16, 1941.¹⁹

Thus, the trading with the enemy law is governed now by the definitions contained in the freezing regulations and

¹⁵ Administration of the Wartime Financial and Property Controls of the United States Government (Treasury Dep't, December, 1942), p. 40.

¹⁶ Exec. Order No. 8998, December 26, 1941, 6 Fed. Reg. 6768 (1941); Public Circular No. 10, December 26, 1941, 6 Fed. Reg. 6792 (1941); No. 11, January 5, 1942, 7 Fed. Reg. 147 (1942).

¹⁷ The Joint Resolution of March 3, 1921, 41 Stat. 1359 (1921), declaring that certain acts of Congress should henceforth be construed as if the World War had ended, expressly exempted the Trading with the Enemy Act.

¹⁸ Sec. 5(b) of the Act was amended by the Joint Resolution of May 7, 1940, 54 Stat. 179 (1940), whereby the President or any agency designated by him was given the power to deal with property in which any foreign state or national has any interest. On the question whether or not Sec. 9 (judicial relief against seizures from a non-enemy) is now applicable, see Chapter XVII.

¹⁹ 55 Stat. 840, 50 U. S. C. App. sec. 617.

in the Orders of the Alien Property Custodian rather than by direct application of provisions as contained in the Act itself. Inasmuch as the scope of this book is concerned with the operation of trading with the enemy laws during World War II, emphasis is placed on the interpretation of regulations issued in this war and decisions dealing with them, rather than on a discussion of decisions rendered during World War I.

The term "national of a foreign country" or "national of a designated enemy country" includes not only the subjects, citizens or residents of belligerent countries, but also all persons who have been domiciled in a blocked (designated) country at such time as that country is declared "foreign country," within the meaning of Exec. Order No. 8389, as amended. Due to the development of economic warfare, emphasis is shifting from the territorial test to the loyalty test, by which even the belligerent's own nationals are subject to control by that belligerent. Decisive restrictions no longer depend on the determination whether or not individuals are enemies within the meaning of the Act.

It is true that the Trading with the Enemy Act still uses the territorial test, which was eloquently expressed as early as 1814 by Story, J., in *Society for the Propagation of the Gospel v. Wheeler*:²⁰ "It is not the private character of conduct of an individual, which gives him the hostile or neutral character. It is the character of the nation, to which he belongs, and where he resides. He may be retired from all business, devoted to mere spiritual affairs, or engaged in works of charity, religion, or humanity, and yet his domicile will prevail over the innocence and purity of his life. Nay more, he may disapprove of the war, and endeavour by all lawful means to assuage or extinguish it,

²⁰ 2 Wall. 105 (U. S.).

and yet, while he continues in the country, he is known but as an enemy."

What matters most is, rather, that the decisive control by the freezing regulations and the orders of the Alien Property Custodian, both established under the authority of the Trading with the Enemy Act, may extend to residents of this country regardless of whether they are enemies as defined by the Act, and even to citizens.

In this war, the exemption of a belligerent country's own nationals from its definition of enemies, if they are within enemy territory, is dealt with in some Acts. Under German law, an exemption of German nationals in enemy countries from being considered as enemies was not adopted. The reason given was that "German emigres in enemy countries could otherwise not have been considered enemies of Germany."²¹ On the other hand, the Act of the Dutch government-in-exile of June 7, 1940, sec. 1 (5),²² does not consider as enemies "Netherland subjects or subjects of a non-enemy state established in enemy territory." The decree of the Belgian government-in-exile of February 19, 1942, relating to the Administration of Corporations in Wartime,²³ sec. 1 (2), treats as persons "residing outside the occupied territory" only such persons as are "actually and continuously staying outside the occupied territory for at least six months."²⁴

From the very beginning of foreign funds control in the United States, individuals domiciled in a blocked country, and later, under General Ruling No. 11, as

²¹ Hefermehl, *Das feindliche Vermoegen*, (1940) 10 *Deutsches Recht* 1217, 1218. As to the exemption of internees from this regulation, see Chap. VII, n. 81.

²² *Staatsblad* No. A 6.

²³ *Moniteur Belge*, 1942, p. 174.

²⁴ The compliance with such conditions is to be certified by authorities of the government-in-exile. As to a related question regarding the transfer of business places of Dutch corporations, see *infra*, Chap. XIII, n. 6.

amended, individuals within enemy territory, were considered enemy nationals, without regard to their nationality, even if they were American citizens.²⁵ However, provisions authorizing remittances to family members abroad relieved the hardship which the freezing regulations had brought to some citizens of the United States.²⁶

Thus, in effect, anyone, even a national of a belligerent, not leaving an enemy country or enemy-occupied or controlled territory, is deemed by that belligerent to give assistance to the enemy economy.²⁷

In England, in the famous *Daimler* case,²⁸ it was said: "It is well established that trading with the most loyal British subject, if he be resident in Germany, would, during the present war, amount to trading with the enemy, and would be a misdemeanour if carried on without the consent of the Crown; the reason being that the fruits of his action result to a hostile country and so furnish resources against his own country."

Like residence, a commercial domicile or maintenance of a house of trade in enemy territory, "an anomalous species of domicile which springs into being during war,"²⁹ qualifies any individual or body of person carrying on

²⁵ Citizens of the United States returning from a blocked country "and residing only in the United States" are generally licensed nationals, General License No. 28, as amended September 9, 1941, 6 Fed. Reg. 4663 (1941).

²⁶ As to provisions allowing family remittances for Americans, see General License No. 33, as amended, February 9, 1943, 8 Fed. Reg. 1834 (1943), Public Interpretation No. 7, October 17, 1942, Fed. Res. Bank Circular No. 2523. Cf. also the Announcement of the Dep't of State: Financial Aid to Nationals in Enemy and Enemy-occupied Territories, March 12, 1942, (1942) 6 Bull. Dep't of State, p. 230, General License No. 74, as amended, February 9, 1943, 8 Fed. Reg. 1834 (1943).

²⁷ As to occupied countries, see the *Drewry* cases, Chap. IX, n. 33, Chap. XIV, n. 38, and the decision of the House of Lords in the *Uden* case (December 3, 1942), Chap. XIV, n. 40a.

²⁸ (1916) 2 A. C. 307, 319.

²⁹ Cheshire, *Private International Law* (2d ed. 1938), 204; cf. Parry, *The Trading with the Enemy Act and the Definition of an Enemy*, (1941) 4 Modern L. Rev. 161, 173; Farnsworth, *Residence and Domicil* (London 1939), p. 47, 125.

business in enemy territory as enemy. For example, the U. S. Trading with the Enemy Act, sec. 2 (a) , signifies as enemies "any individuals, partnership, or other body of individuals, of any nationality, . . . resident outside the United States and doing business with such [enemy] territory"; the British Act, as amended,³⁰ sec. 2 (e) includes in the expression enemy "as respects any business carried on in enemy territory, any individuals or body of persons (whether corporate or unincorporate) carrying on that business." Thus, all persons who are residing in non-enemy territory but are carrying on business in enemy territory are enemies within the meaning of the Trading with the Enemy Act.

Such persons are referred to in the New Zealand Enemy Trading Emergency Regulations 1939, r. 1 (2) , by the special term "enemy trader," which means "any person or body of persons of whatever nationality (and if incorporated, wherever incorporated) resident or carrying on business in an enemy country."³¹

With the adoption of residence or commercial domicile in enemy territory as the decisive test to determine an enemy within the meaning of the various Acts, the character of an enemy is no longer governed by nationality, but is taken "in a territorial sense,"³² so as to include, as Professor McNair recently³³ reiterated , "a person of any or no nationality who is voluntarily resident or carrying on business in enemy territory."

The British Act, sec. 2 (1) , as amended, expressly provides that the term "enemy" does not include "any indi-

³⁰ S. R. & O. 1940, No. 1092.

³¹ New Zealand Gazette Extraordinary No. 91, September 4, 1939, p. 2355.

³² McNair, *The Effect of Peace Treaties upon Private Rights*, (1941) 7 Cambridge L. Rev. 377, 394.

³³ *Effect of War on Contract, General Principles (excluding Frustration)*, (1942) 27 Transactions Grotius Society, p. 182, n. 2.

vidual³⁴ by reason only that he is an enemy subject." Thus, a person of enemy nationality residing in a neutral country or carrying on business there is not considered an enemy unless his name has been put on the blacklist.³⁵ "Enemy subject" is defined, in sec. 15 (1) (a) of the Act, as "an individual who, not being a British subject or a British protected person, possesses the nationality of a State at war with His Majesty,"³⁶ this definition corresponding to that of an enemy subject at common law. But the British Trading with the Enemy Act is very little concerned with enemy subjects who are not at the same time enemies within the meaning of sec. 2 of the Act.³⁷ Such individuals are affected only by the provisions that securities of British companies may not be allotted or transferred to enemy subjects without license³⁸ and that an enemy subject has to give information to the Custodian of Enemy Property, if required, on property held or managed by him.³⁹

If such an individual carries on only part of his business in enemy territory, he is deemed an enemy insofar as that part of his business is concerned.⁴⁰ In the United States, General Ruling No. 11, sec. (2) (a) (iii), expressly provides that such individuals and corporations are considered enemy nationals only "to the extent that it [the

³⁴ The word "individual" was substituted for "person" by sec. 3 of the Defence (Trading with the Enemy) Regulations, 1940, S. R. & O. No. 1092.

³⁵ Cf. also the French *Parfums Tosca* case, *infra* Chap. IX, n. 48.

³⁶ This definition differs substantially from that of an "enemy" in sec. 2, "for it extends not merely to persons resident in enemy territory but (with certain limitations) to all persons or companies possessed of enemy nationality," Krusin and Rogers, *Solicitor's Handbook of War Legislation*, Consolidated Supplement constituting Vol. II (London 1942), p. 367.

³⁷ Howard, *The Defence (Finance) Regulations*, 1939 (London 1942) p. 14.

³⁸ Sec. 5 of the Act.

³⁹ Under Trading with the Enemy (Custodian) Order, S. R. & O. 1939 No. 1198, as amended by S. R. & O. 1942, No. 10.

⁴⁰ Rogers, *The Effect of War on Contract*, (London 1940) p. 89, but p. 104: "There are, however, a number of cases in which once the taint of enemy character attaches it applies to all transactions of the person in question."

organization] is actually situated within enemy territory," thus facilitating international business even under the restrictions of actual economic warfare.⁴¹

The Egyptian Regulations,⁴² in sec. 1 (4), considers as enemy "any individuals who, though not residing within the German Reich, carries on business there" and also that "the prohibition in this case concerns such business only."

A special regulation prevails in Australian law. Sec. 3 (1) of the Trading with the Enemy Act 1939-1940, as amended June 3, 1940,⁴³ defines "enemy subject" as meaning "any person, firm or corporation trading with whom or with which would be deemed to be trading with the enemy within the meaning of sub-section (2) of this section." By sec. 3 (2) a person shall be deemed to trade with the enemy if he performs or takes part in any act or transaction which is prohibited by Proclamation, etc., or "(d) which at common law or by statute constitutes trading with the enemy." Adopting this determination of an enemy subject, the National Security (Enemy Property) Regulations, June 19, 1942,⁴⁴ r. 4, provide that this term has "the same meaning as in the Trading with the Enemy Act 1939-1940 and includes any person, firm, corporation declared by the Treasurer, in pursuance of these Regulations, to be resident or carrying on business in enemy territory, but does not include any prisoner of war."

While the French Act of September 1, 1939,⁴⁵ abandoned the nationality test of the French legislation of World War I,⁴⁶ the Egyptian Proclamation, sec. 1 (1), con-

⁴¹ Note, *New Administrative Definitions of "Enemy" to supersede the Trading with the Enemy Act*, (1942) 51 Yale L. J. 1388, 1394.

⁴² Proclamation No. 6, September 14, 1939, (1939) 29 Gaz. Trib. Mixtes 359.

⁴³ Statutory Rules 1940, No. 33.

⁴⁴ Statutory Rules No. 268, Commonwealth Gazette, February 19, 1942.

⁴⁵ Journ. Off. September 4, 1939, p. 11087.

⁴⁶ Battifol, *Commerce avec L'Ennemi*, (1929) 3 Repertoire de Droit International p. 631, 650. The statements in Halsbury's Statutes of England vol. 32 (1939, published 1940) p. 1095: "Residence as a test of enemy character is

siders as enemies "any individual national of the German Reich" (*toute personne ressortissante du Reich Allemand*).⁴⁷ In the same way, the New Zealand Enemy Trading Emergency Regulations 1939, r. 1 (2), apply the nationality test to the determination of an "alien enemy," which term denotes "every person wherever resident who is or who has at any time been a subject of any State with which His Majesty is now at war, notwithstanding the fact that such person may be also by birth, naturalization or otherwise a British subject or have in any manner ceased to be a subject of any such state, and includes the wife of an alien enemy."

This test of nationality is also to be found in the German Trading with the Enemy Act of January 15, 1940, as amended,⁴⁸ sec. 3 (1) (2), wherein enemies are individuals who are of enemy nationality (*natuerliche Personen, die einem feindlichen Staat angehoren*), irrespective of their residence, even in neutral territory. It was also applied in the German Decree of the Reichs Minister of Economics of June 24, 1941, regarding the Freezing of American Property in the German Reich,⁴⁹ which was issued pursuant to sec. 60 of the Foreign Exchange Law of December 12, 1938,⁵⁰ as a retaliation measure⁵¹ "inasmuch as the Government of the United States of America by Executive Order

here preferred to nationality, which is the usual test applied in Continental systems," and in Woodward, *Meaning of "Enemy" under the Trading with the Enemy Act*, (1942) 20 Tex. L. Rev. 746 at 747: "According to the general European view the nationality of the owner governs the classification of his property," are no longer accurate since the French Act of September 1, 1939, does not adopt the nationality test.

⁴⁷ On decisions of French and Belgian Courts regarding the notion "ressortissants allemands ou autrichiens," see the documentation in Melanges Pillet, vol. 2 (1929) p. 557.

⁴⁸ Chapter I, n. 8.

⁴⁹ Transl. C.C.H.W.L.S.F.S. ||67702, 66703.

⁵⁰ Reichsgesetzblatt I p. 1733.

⁵¹ On the invocation of "reprisal rules" by the Central Powers in the First World War, see Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942) p. 21.

of the President of June 14, 1941,⁵² has frozen German property held within the United States." Sec. 1 (1) of the Decree provides that "Citizens of the United States of America, except those who have permanently and exclusively maintained their domicile or customary residence since June 17, 1940, within the territory of the German Reich . . . may dispose of their domestic assets only with a license of the Foreign Exchange Control Board having local jurisdiction over them."⁵³

A further decree of August 4, 1941,⁵⁴ ordered the reporting of American property held within the Reich, according to the property's status on September 30, 1940, and June 30, 1941. Americans within the meaning of this decree were defined in sec. 3 (2) as "individuals who are citizens of the United States or who have their domicile or permanent abode within the United States or her possessions."

The doctrine of German law that enemy nationality, as well as residence in enemy territory, determines the enemy character of individuals, has been applied in the decrees issued by the military and civilian authorities in the European countries occupied by Germany. For instance, in all these decrees⁵⁵ British nationals are considered enemies of the occupied country, although residing or carrying on business not in another (enemy) territory, but solely within the occupied territory. This is also the case in the decrees which provide for the reporting of American

⁵² No. 8785, 6 Fed. Reg. 2897 (1941).

⁵³ Circulars of the German Foreign Exchange Agencies (*Runderlass*) No. 54/41 D. St. 19/41 R. St., June 25, 1941, provided *inter alia* that all licenses issued by the authorities which permitted transactions in free foreign exchange shall be rescinded insofar as they involve the payment of such funds to "all individuals who are United States citizens or whose permanent residence is in the United States of America or its possessions."

⁵⁴ Reichsgesetzblatt I 472, transl. C.C.H.W.L.S.F.S. ||67730.

⁵⁵ Cited in Chap. I, notes 26-31.

property, as in Poland,⁵⁶ Norway,^{56a} Holland,^{56b} France,⁵⁷ and Yugoslavia.⁵⁸ They are materially identical with those enacted in Germany itself (notes 49-55), in defining Americans as either citizens or individuals within the United States or her possessions.

The same test of nationality has been applied in sec. 324 of the Italian Act,⁶⁰ which prohibits commercial intercourse of persons resident in Italy not only with those resident in enemy or enemy-occupied territory, but also "with enemy nationals residing in neutral countries."⁶¹ The test of nationality is also used in the Japanese Act,⁶² sec. 2 (2), which includes "persons belonging to enemy countries" among enemies.

The fact that economic warfare is waged by the Axis powers from home as well as from occupied territories explains the adoption of the nationality test in the Trading with the Enemy Acts of the governments-in-exile, inasmuch as persons of enemy nationality who are within the territory occupied by the Axis powers are deemed to be helpful to the invading forces. For this reason, the Dutch decree

⁵⁶ Decrees of June 28, July 12, 1941, Gazette containing the Decrees for the Government General 1941 p. 402, 433, cited in C.C.H.W.L.S.F.S. ||66130.

^{56a} Decrees of August 17, 1940, February 12 and May 8, 1942, *ibid* ||65870, 65900, 65910.

^{56b} Decrees of July 25 and September 11, 1941, April 24, 1942, *ibid*. ||65840, 65850, 65860.

⁵⁷ Decree of December 22, 1941, Journ. Off. Gouv. Mil. 1941 p. 333, trans. *ibid* ||65800.

⁵⁸ Decree of the Military Commander, July 8, October 8, 1941, Gazette of the Military Commander in Serbia, 1941 p. 76, 133, trans. *ibid*. ||65820, 65830.

⁵⁹ The Decree for Serbia (n. 58) applies only to American property "inasmuch as these [American freezing] measures are also decreed against territories occupied by Germany." The blocking of all Yugoslavian assets, however, was enacted March 24, 1941, Exec. Order No. 8721, declaring Yugoslavia "a foreign country" within the meaning of Exec. Order No. 8389, as amended.

⁶⁰ Persone di nazionalità nemica, che si trovino in territorio neutrale.

⁶¹ As to freezing of United States assets and credits in Italy "acts of legitimate reprisal against measures adopted by the United States affecting Italian interests," see C.C.H.W.L.S.F.S. ||67694.

⁶² Chap. I, n. 25.

of June 7, 1940, sec. 1 (5),⁶³ defines as enemy subjects "subjects of an enemy state," and the Belgian Act of April 10, 1941,⁶⁴ sec. 1 (5), prohibits any agreement "with an enemy subject regardless of his residence."

The nationality test has also been adopted by some American Republics, where they provide for the freezing of assets and the prohibition of commercial transactions, e. g., Colombia⁶⁵ prohibits such intercourse "with nationals of the Axis powers or nations occupied by them"; Peru:⁶⁶ "with citizens or firms of nations signatory to the Tripartite Pact and the territories dominated by them"; Haiti:⁶⁷ "individuals of all countries with which Haiti is at war."⁶⁸

The character of economic warfare, as intensified after the occupation of Western European countries, made it necessary to prevent the Axis Powers from using such assets of residents of conquered countries as were located abroad. The extension of the freezing regulations on June 14, 1941, so as to cover nearly the whole of Europe, in addition to the enactment of the blacklisting system, changed the "emphasis of freezing control from a defensive weapon primarily intended to protect the property of invaded countries, to a frankly aggressive weapon against the Axis"⁶⁹ or, as stated in the recent publication of the U. S. Treasury Department,⁷⁰ "from one of benevolent protec-

⁶³ Staatsblad No. A 6.

⁶⁴ Moniteur Belge, 1941, p. 40.

⁶⁵ Decree No. 915, April 9, 1942, Diario Oficial, April 17, 1942.

⁶⁶ Decree No. 9586, April 10, 1942, El Peruano, April 22, 1942.

⁶⁷ Decree-law No. 80, December 18, 1941, Le Moniteur, December 18, 1941.

⁶⁸ But see the Exec. Decree regarding Requisition of Property, May 16, 1942, which applies to property "belonging to any persons resident in Haiti, whether nationals or foreigners," (1942) 76 Bulletin Pan American Union p. 535.

⁶⁹ Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property* (Address, August 24, 1942) p. 10; for a discussion of this paper, see Grant and Masterson, *The Work of the Section of International and Comparative Law of the American Bar Association, 1941-1942*, (1942) 36 Am. J. Int. L. 664, 678; revised reprint of the address, (1943) 37 *ibid* 58.

⁷⁰ Administration, *supra* n. 15, at p. 3.

tion and conservation of the assets of occupied countries to one of aggressive total economic and financial warfare."

Thus, in commenting on the freezing of Japanese assets, an English note⁷¹ rightly points out that "the ubiquity of modern trade and international conditions of exchange have led to the discovery in the 'freezing of assets' of a method of constraint more effect, it would seem, than pacific blockade, and a good deal less troublesome."

With regard to foreign funds control, the freezing regulations, Exec. Order No. 8389, as amended, made any transaction in which a "national" of a foreign (blocked) country had any interest, direct or indirect, subject to a license, general or special,⁷² a "national" being defined in sec. 5E(1) as "any person who has been domiciled in, or a subject, citizen or resident of a foreign country."⁷³ But this definition of a "national" of a foreign (blocked) country, which was issued pursuant to sec. 5(b) of the Trading with the Enemy Act, is now superseded by General Ruling No. 11 as amended, insofar as the freezing regulations are concerned.⁷⁴

The new concept of enemy national as "any individual within enemy territory," was also adopted for the regulation of communications as administered by the Office of

⁷¹ (1941) 91 Law Journal 289.

⁷² For a discussion of this definition of a "national" see *supra* n. 3; Binder, *Practical Aspect of Foreign Property Control*, (1941) 19 N.Y.U.L.Q. Rev. 1, 20; Davis, *Trading with the Enemy*, (1941) 106 N. Y. L. J. 2048; Thiesing, *Control of Foreign-Owned Property in the United States* (1941) p. 15; Bloch and Rosenberg, *Current Problems of Freezing Control*, (1942) 11 Fordham L. Rev. 71, 74.

⁷³ The term "national" under Exec. Order No. 8389, as amended, as used in the foreign funds control, both by the Treasury Department and the Alien Property Custodian, has no bearing upon the use in other regulations, as in sec. 101(a) of the Nationality Act, October 14, 1940, 54 Stat. 1137: "The term national means a person owing permanent allegiance to a State."

⁷⁴ As to financial regulations concerning "foreign nationals" in England, see Notice of the Bank of England, November 13, 1941, C.C.H.W.L.S.F.S. ||67723; Howard, *supra*, n. 37, at p. 15.

Censorship. Sec. 1801.2 (c) 3 of the U. S. Censorship Regulations, January 30, 1943,⁷⁵ provides that the term enemy national shall mean "any individual within enemy territory." This regulation applies not only to communications of a financial or commercial nature which could be helpful to the enemy but to all intercourse with enemy nationals, even if of purely private character. This concept was considered in a French decision rendered after the Armistice between France and Italy of June 24, 1940.⁷⁷ The Tribunal Maritime de Cassation Permanent at Aix-en-Provence in *Dame Dessoify*,⁷⁸ September 30, 1940, held that a French woman maintaining a completely innocent correspondence with an Italian living in Italy was to be punished because, "independent of the purpose, the matter and the consequences," the mere existence of a relation with the subject of an enemy power warrants the application of penal provisions.⁷⁹

Regulations under sec. 3 (c) of the Trading with the Enemy Act regarding communications outside the mails were issued as early as December 11, 1941,⁸⁰ and since amended.⁸¹ With the issuance of these regulations, which established strict censorship, it became possible to relax other methods of control, so as to relieve even alien residents of enemy nationality from many restrictions of the foreign funds control, which are imposed upon nationals of a foreign country under Exec. Order No. 8389, as

⁷⁵ 8 Fed. Reg. 1644 (1943).

⁷⁶ Cf. Sec. 303 of the First War Powers Act, December 18, 1941, 55 Stat. 840, 50 U. S. C. App. §618, regarding censorship of communications, penalties and forfeitures, reprinted *infra* Appendix B.

⁷⁷ (1940) 34 Am. J. Int. L. Supp. 178.

⁷⁸ *Juris-Classeurs*, Periodique 1564 (Semaine Juridique, November 30, 1940).

⁷⁹ Art. 79 (4) Code penal, as amended. See Verdun, *La Repercussion des Infractions Contre la Surete Exterieur de l'Etat d'apres le Decret-loi du 29 Juillet 1939 et les Textes Ulterieurs*, *Juris-Classeurs* 1940, Etude doctrinale 171.

⁸⁰ 6 Fed. Reg. 6404 (1941).

⁸¹ 6 Fed. Reg. 6453 (1941); 7 Fed. Reg. 616, 1973 (1942).

amended.⁸² Thus, censorship as a counter-measure and weapon of economic warfare resulted in the removal of hardships which had to be imposed indiscriminately in the early stage of freezing regulations, prior to the entrance of the United States into the war.

Asserting that "information of a strategic character has been sent to persons in foreign countries in connection with insurance contracts," the United States Attorney General⁸³ called attention to the provisions of the Espionage Act. This Act⁸⁴ makes it illegal to receive or to aid another to receive information connected with the national defense with reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation.

But these regulations did not solve the manifold legal problems as how to comply with provisions requiring notice to be given under various state laws or by-laws of corporations to persons in enemy or enemy-occupied territory. In New York, a statute⁸⁵ dispensed with the giving of notice or communication, "directly or indirectly, to or upon an enemy or ally of enemy, as defined in the Trading with the Enemy Act of the United States of America, as now enacted or hereafter amended, or to or upon any person with whom communication is made unlawful in any law of the United States now or hereafter enacted or

⁸² Cf. now sec. 1801. 2(c) U. S. Censorship Regulations, January 30, 1943, 8 Fed. Reg. 1644 (1943). Rules for Communication Companies, *ibid.* 1648.

⁸³ N. Y. Times, January 14, 1943. Cf. *Legal Profession and Information for the Enemy*, reprint from Law Society's Gazette London (November, 1942) in C.C.H.W.L.S.F.S. ¶66127. See also, as to the prohibition of the disclosure of contents of bills of lading, War Shipping Administration General Order No. 16, Supp. 4, October 5, 1942, C.C.H.W.L.S. ¶9739.

⁸⁴ On the application of secs. 3, 4 of the Espionage Act of June 15, 1917, 40 Stat. 217, as amended March 28, 1940, 54 Stat. 79, to citizens publishing assumptions of the defeat of their country in time of war, see *United States v. Pelley*, *U. S. v. Brown*, *U. S. v. Fellowship Press, Inc.* (3 cases), 132 F. (2d) 170 (C. C. A. Seventh Circuit, December 17, 1942).

⁸⁵ C. 681 of the Laws of 1942, May 6, 1942.

amended, or in any rule, regulation, proclamation or executive order, issued under any of said laws." This may relieve many corporations of the requirement of notice of bondholder meetings or of the notice of redemption of securities, but it is confined to cases where the law of the State of New York is applicable.⁸⁶

The connection between foreign funds control and the Trading with the Enemy Act is brought out by sec. 302 of Title III of the First War Powers Act, December 18, 1941, which ratifies all freezing regulations and orders and integrates them with the Trading with the Enemy Act. Though an appropriate license under the freezing regulations is also a license⁸⁷ under sec. 3 (a) of the Trading with the Enemy Act, General Ruling No. 11, as expressly stated in the Press Release of the Treasury Department, March 18, 1942,⁸⁸ "imposes an additional restriction in every general and special license now outstanding or hereafter issued under the freezing orders" and "subject to today's modifications, the prohibition against trade and communication with the enemy appearing in the old 1917 Trading with the Enemy Act are still in effect and persons violating such provisions are subject to heavy criminal penalties." Similarly, General License No. 30 A, October 23, 1942,⁸⁹ relating to the administration of estates of decedents, expressly states, sec. 6, that "any transfer or other dealing in any property authorized under this general license shall not be deemed to limit or restrict the exercise of any power or authority under sec. 5 (b) of the Trading with the Enemy Act, as amended." By sec. 10, Pub. Circ. No.

⁸⁶ On service of process upon any person within any designated enemy country or any enemy-occupied territory, see General Order No. 6 of the Alien Property Custodian, August 3, 1942, 7 Fed. Reg. 6199 (1942); *infra* Chapter XVI, n. 8.

⁸⁷ December 13, 1941, 6 Fed. Reg. 6240 (1941).

⁸⁸ Fed. Res. Bank of New York, Circular No. 2399.

⁸⁹ 7 Fed. Reg. 8633 (1942).

20,⁹⁰ attention is further "directed to the fact that General License No. 30 A does not "affect any orders, rules or regulations of Alien Property Custodian relating to estates."

A similar point of view is expressed under English law by Howard:⁹¹ "The fact that Treasury permission to any transaction has been obtained through the Bank of England does not free a person from any liability under the Trading with the Enemy Act, 1939, such permission not constituting a license from the Treasury under that Act unless expressly so stated. The provisions of the Act should therefore always be kept in mind."

The German Trading with the Enemy Act of January 15, 1940, as amended, however, expressly provides in sec. 10 that the restrictions of that Act do not apply to transactions (*Verfuegungen*) concerning enemy property that are licensed under the Foreign Exchange Regulations. A decision of the District Court (*Landgericht*) Hamburg, October 9, 1940,⁹² deals with the application of this provision to foreclosures of enemy-owned property.

On the other hand, Exec. Order No. 9095, as amended, did not adopt the actual definitions of the freezing regulations as contained in General Ruling No. 11, but provided that the term "national" shall have the meaning prescribed in sec. 5 of Exec. Order No. 8389, as amended, provided however, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a "designated enemy country" unless the Alien Property Custodian makes a specific determination. Following the new concept of a "national of a designated enemy country," the Alien Property Custodian in General Order No. 5,

⁹⁰ *Ibid.* 8632.

⁹¹ *Supra* n. 37, at p. 15.

⁹² (1941) 103 *Deutsche Justiz* p. 411, ann. by Hefermehl.

sec. 3 (c),⁹³ defined a "designated national" as "any person in any place under the control of a designated enemy country or in any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication." Sec. 4 of General Order No. 14, December 1, 1942,⁹⁴ in defining a "designated foreign national" as "any individual who is resident of," and⁹⁵ "any business organization organized under the laws of or having its principal place of business within" (enumerated enemy countries), also adopts the strict territorial concept of enemy character, irrespective of nationality.

But the concept of enemy character of an individual in the "territorial sense," i. e., residence or carrying on business in enemy territory, has been broadened in this war. Blacklisted persons and corporations are expressly declared "enemy nationals," in sec. 1801.2 (c) 4 of the U. S. Censorship Regulations, and in sec. 2 (a) (iv) of General Ruling No. 11, as they are "designated foreign nationals" in sec. c (4) (iii) of General Order No. 14, sec. f (2) (iii) of General Order No. 15 of the Alien Property Custodian.

Moreover, the powers which the President of the United States held under the Trading with the Enemy Act, as amended, were considerably enlarged at the entrance of the United States into this war. Sec. 301 of Title III of the First War Powers Act, amending sec. 5 (b) of the Trading with the Enemy Act, authorized the President to vest in himself or his agent all foreign-owned property within the jurisdiction of the United States, irrespective of the enemy character of the owners, including even property of non-enemy owners⁹⁶ and friendly governments.⁹⁷ Until now,

⁹³ August 3, 1942, 7 Fed. Reg. 6199 (1942).

⁹⁴ December 1, 1942, 7 Fed. Reg. 10546 (1942).

⁹⁵ Chapter II, n. 14; General Order No. 15, January 6, 1943, (1943) 25 J. Pat. Off. Soc. 137, enlarges the number of countries which are to be considered enemy territory.

⁹⁶ See Turlington, *Vesting Orders Under the First War Powers Act*, (1942)

this authority has been used only to the extent that "a large number of Axis business enterprises were closed down and compelled to liquidate, while some of the largest Axis business enterprises have already been vested in the Alien Property Custodian."⁹⁸

Under the delegated authority, the Alien Property Custodian proceeded to seize foreign-owned patents, copyrights and trademarks, irrespective of the nationality of the owner. So far, the Alien Property Custodian, by General Order No. 2, June 15, 1942,⁹⁹ has dealt only with "designated foreign nationals." This term includes, in addition to blacklisted persons and corporations, "any resident of any country other than the American Republics, the British Commonwealth of Nations, and the Union of Soviet Socialist Republics." Under General Order No. 3,¹⁰⁰ the term also includes "any person who moved out of a foreign country" other than the said countries "or changed his citizenship." General Order No. 14, December 1, 1942, requires reports of interest of designated foreign nationals in copyrights from such persons, individuals and corporations as are residing or carrying on business in (enumerated) countries, which list includes the enemy, enemy-occupied and enemy-controlled territories.

More recently, in Regulation No. 3 under General

36 Am. J. Int. L. 460, 462; Marcus, *The Taking and Destruction of Property Under a Defense and War Program*, (1942) 27 Cornell L. Q. p. 317, 476, at p. 499. As to "requisition" of private property for war purposes, see *Fletcher v. Maupin*, 129 F. (2d) 46 (App. D. C., June 15, 1942).

⁹⁷ Thus, Vesting Order 435, December 4, 1942, 7 Fed. Reg. 10403 (1942) vested securities of N. V. Handel-Maatschappij "Waldorf" in the Alien Property Custodian, although the Dutch Decree of the government-in-exile of May 24, 1940, vested title to assets of such corporation having its place of business in (occupied) Amsterdam in the State of the Netherlands. Cf. *infra* Chapter XXI, n. 68.

⁹⁸ Administration, *supra* n. 15, at p. 3.

⁹⁹ 7 Fed. Reg. 4634 (1942).

¹⁰⁰ 7 Fed. Reg. 4635, 5080 (1942).

Order No. 13,¹⁰¹ December 30, 1942, regarding licensing of transactions involving copyrights, the Alien Property Custodian stated, sec. (e), that the term "designated foreign country" shall mean "foreign country designated in section 3 of Executive Order No. 8389, as amended"; and "the terms 'person' and 'national' shall have the meanings defined in sections 5C and 5E, respectively, of such order."¹⁰² In this definition the concept of the early freezing regulations is used again. On the other hand, sec. 1 (d) of the same Regulation specifies that the terms "enemy national" and "trade or communication with an enemy national" "shall have the meanings defined in Treasury General Ruling No. 11 under Executive Order No. 8389, as amended." This reflects a trend to a more uniform use of definitions under the foreign funds control, both by the Treasury Department in the freezing regulations, and the Alien Property Custodian in the General and Vesting Orders.¹⁰³

However, it must be borne in mind that in the further prosecution of economic warfare the usual measures, even when supported by the blacklisting system, may appear insufficient since the ever changing conditions of World War II are to some extent altering the very basis of enemy character. It will be seen that the test of "loyalty" affects the interests not only of aliens of enemy and non-enemy nationality residing in this country, but also of American

¹⁰¹ 8 Fed. Reg. 1 (1943).

¹⁰² "Except that any person within the categories of Regulation No. 1 under General Order No. 13 shall not be considered for the purposes of this regulation to be a national of a designated foreign country." Cf. Regulation No. 1, as amended February 8, 1943, 8 Fed. Reg. 1872 (1943); *infra* Chapter XVIII, n. 42.

¹⁰³ The term Enemy National [as defined in General Ruling No. 11] is not equivalent to, but a sub-category of, the term Blocked National. All Enemy Nationals [as defined under sec. 5E(i)] are practically blocked, but many Blocked Nationals are not Enemy Nationals, although they might be Alien Enemies or Nationals of Enemy Countries, C.C.H.W.L.S. ||6031.

citizens who are supposed to be Axis supporters. It may also be recalled that being "inimical to the interests of the Western Hemisphere" is the leading test in the Recommendations of the Final Act of the Inter-American Conference on Economic and Financial Control.¹⁰⁴

Thus, the test of loyalty will become decisive for the determination of any individual as an enemy, wherever resident and of whatever nationality. Even American citizens have been treated as enemies for certain purposes of Trading with the Enemy legislation, inasmuch as they appear as potential enemy sympathizers in wartime. Thus, "the ideological and racial nature of the present war appears, in many respects, to have cut across national lines and destroyed the value of old distinctions based on nationality."¹⁰⁴

Under statutes other than the Trading with the Enemy Act, the test of loyalty led to a different treatment of American citizens of Japanese ancestry,¹⁰⁵ and to cancel the naturalization certificates of former members of the American-German Bund, in order to distinguish those classes of enemy sympathizers from other citizens and also from law-abiding resident aliens of enemy nationality.

Adoption of the test of loyalty to determine the "enemy" character of an individual (or a corporation) was rendered possible in the early stage of freezing regulations. Exec. Order No. 8389, April 10, 1940,¹⁰⁶ sec. 5E (iv), included in the term national "any other person who there is reasonable cause to believe is a national as herein defined," and gave the Secretary of the Treasury full power to deter-

¹⁰⁴ Note, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls*, (1942) 51 Yale L. J. 1318, 1337.

¹⁰⁵ The property of "evacuee nationals" has been declared "special blocked property" by Special Regulation No. 1 under Exec. Order No. 8389, as amended, and sec. 5(b) of the Trading with the Enemy Act, as amended. See Chapter VII, n. 46.

¹⁰⁶ 5 Fed. Reg. 1400 (1940).

mine that any person "is, or shall be deemed to be a national within the meaning of this definition."

As the U. S. Treasury Department has pointed out,¹⁰⁷ "the regulatory features of the Order cover any business within the United States which is owned or controlled by any individual or concern which is found to be acting directly or indirectly for the benefit of or on behalf of any blocked country or any blocked national, even though such individual may be an American citizen or such concern an American entity. Under the power given the Secretary of the Treasury to define as a national any person determined by him to have been acting directly or indirectly for the benefit of or under the direction of a blocked country, many of our own citizens, and the business enterprises owned or controlled by them, have been declared to be nationals of blocked countries."

The Treasury Department further stated:¹⁰⁸ "From information obtained from all sources concerning Axis-owned or dominated enterprises, more stringent forms of control have been exercised by subjecting some enterprises to rigid supervision, requiring the dismissal of a number of executives and employees, by compelling the liquidation of many enterprises, and by vesting the capital stock in large enterprises owned or controlled by Axis nationals. Since a number of those business enterprises had been used as a base of operations to carry out Axis plans to control production, to hold markets in this hemisphere, to support fifth-column movements, and to weld our post-war economy to Axis plans, the forms of control thus exercised have been of inestimable value in the war on the economic front."

¹⁰⁷ Administration, *supra* n. 15, at p. 32.

¹⁰⁸ *Ibid.* p. 4.

A final method of classifying the disloyal individual of whatever nationality so as to include him in the class of those whose property must be controlled, is to be made by way of administrative determination. Administrative control is operative in the freezing regulations, by the blacklisting system, or by the test "acting on behalf of an enemy." Likewise, the Alien Property Custodian pursuant to sec. 10 of Executive Order No. 9095, as amended, has assumed a broad authority to deal with the property of any individual or corporation over which strictest control seems indispensable in the interest of successful war-time administration of foreign-owned property. Such determination of a national of a foreign country is necessary not only where "property within the United States is owned or controlled by nationals of a designated enemy country,"¹⁰⁹ but also in the following circumstances: (1) where property is concerned in which "nationals of a foreign country or countries have interests";¹¹⁰ (2) where "such property represents an interest in and is evidence of ownership";¹¹¹ (3) where such property "represents control of said business enterprise which is a national of a designated enemy country";¹¹² (4) where "such property represents an interest in said business enterprise which is owned by nationals of a designated enemy country";¹¹³ (5) where "such business enterprise is a national of a designated enemy country";¹¹⁴ and finally (6) where "an interest in a business enterprise (is) held by a national of an enemy country, and also is property within the United States owned or controlled by a national of a designated enemy country."¹¹⁵

¹⁰⁹ Vesting Order 822, 8 Fed. Reg. 2792 (1943).

¹¹⁰ No. 201, 8 Fed. Reg. 625 (1943).

¹¹¹ No. 362, 7 Fed. Reg. 9469 (1942).

¹¹² No. 512, 8 Fed. Reg. 1154 (1943).

¹¹³ No. 714, 8 Fed. Reg. 2451 (1943).

¹¹⁴ No. 596, 8 Fed. Reg. 2449 (1943).

¹¹⁵ No. 426, 8 Fed. Reg. 34 (1943).

Thus, Vesting Orders of the Alien Property Custodian contain the usual determination that "if such nationals (of a designated enemy country) are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country."¹¹⁶

The authority of the Alien Property Custodian as an official of the United States acting in the national interest was recognized in *United States v. The Pietro Campanella*, and in *United States v. The Euro*.¹¹⁷ It was here stated that the Alien Property Custodian's statutory authority to make Vesting Orders in himself flows from the powers delegated to him under sec. 3 (a) and 5 (b) of the Trading with the Enemy Act and sec. 301 of the First War Powers Act.¹¹⁸

The trend toward administrative determination of the enemy character of individuals, without regard to their nationality, friendly or enemy, including even a nation's own national, has also developed in other countries. The British Trading with the Enemy Act, sec. 2 (2), confers to the Board of Trade the proper power of determining an individual (or a corporation) an enemy, whereas the Canadian Consolidated Regulations respecting Trading with the Enemy, 1939, sec. 1 (b) VI, include in the term "enemy" "any person who is declared by the Governor in Council to be an enemy." In Australia, the Trading with the Enemy Act 1939-1940, r. 1 (b), authorizes the Attorney-General to determine the enemy qualification of any

¹¹⁶ No. 562, 8 Fed. Reg. 192 (1943).

¹¹⁷ 47 F. (2d) 374, 378 (D. C. D. Maryland, October 13, 1942); see Chapter XVI.

¹¹⁸ In General Order No. 20, February 9, 1943, 8 Fed. Reg. 1780 (1943), "designated national" is determined as "any person in any place under the control of a designated enemy country." Cf. U. S. Censorship Regulations, *supra* n. 75.

corporation, whether incorporated in an enemy country or not, whereas the New Zealand Emergency Regulations, 1939, r. 3, confer to the Minister of Industries and Commerce the power of declaring individuals and corporations "enemy traders."¹¹⁹

¹¹⁹ The texts of the British, Canadian, Australian, and New Zealand Regulations are to be found in the Appendices.

4. Resident Aliens of Enemy Nationality.

IT HAS been shown in Chapter III that the prevailing test to determine an enemy, in the meaning of the Trading with the Enemy Acts of the different countries, is territorial, i. e., residence or carrying on business in enemy territory. But the new trend which is emerging during the present war, and which is caused by the new measures of economic warfare, may render another test more important; this is the loyalty test. This test may work to expand the concept of alien enemy so as to include citizens who belong to a class of potential enemy sympathizers. This is to be seen not only in the practical application of foreign funds control to American enterprises under Axis influence but also in the regulations issued as a result of the Japanese evacuation of the West Coast. (See Chapter VII.)

Generally speaking, aliens of enemy nationality, who are not enemies within the meaning of the various Trading with the Enemy Acts, being neither residents within enemy territory nor carrying on business there, are not regarded as enemies for the purpose of such Acts if the additional test of nationality has not been adopted. Thus, aliens of enemy nationality who are legally admitted to the country of their actual domicil are not considered enemies within the meaning of the Acts and within the provisions restricting the prosecution of lawsuits in wartime. (See Chapter XV.) As Prof. McNair has pointed out:¹ "An enemy national in British territory, who has complied with any requirements and restrictions imposed upon him as a matter of general policy, is deemed to have the permission of the King to be in this country and is said to be within

¹ *Procedural Capacity of Alien Enemies*, (1942) 52 L. Q. Rev. 191, at p. 193.

the protection of the King; he is not an enemy for procedural purposes. We shall call him an enemy 'in protection.' "

The same view prevails in the United States. The President is authorized under sec. 2 (c) of the Trading with the Enemy Act to include within the term enemy any individual of enemy nationality "wherever resident or wherever doing business," "if he shall find the safety of the United States or the successful prosecution of the war shall so require." No proclamation has yet been issued in this war concerning aliens of enemy nationality residing within the United States. This state of affairs was expressly set forth in the Bulletin of the Department of Justice, January 31, 1942:² "No such proclamation under sec. 2 of the Trading with the Enemy Act has been issued." More recently, the United States Supreme Court in *Ex parte Kumezo Kawato*,³ made it clear that the Presidential Proclamations under the Alien Enemy Act⁴ have "no bearing on the power of the President under the Trading with the Enemy Act," and further said that "the President has not made any declaration as to enemy aliens under this [Trading with the Enemy] Act." Said the Court: "'Alien enemy' as applied to petitioner [a resident Japanese fisherman since interned] is at present but the legal definition of his status because he was born in Japan, with which we are at war. Nothing in his record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them."

² N. Y. L. J. February 5, 1942, p. 545, quoted fully in the Szanti decision, *infra* n. 15.

³ 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942).

⁴ 40 Stat. 531 (1918), 50 U. S. C. sec. 21 (1940).

The reason why no Proclamation has been issued under sec. 2 of the Trading with the Enemy Act may be found in the fact that activities of persons within the United States "which are inimical to the war effort and the security of the Western Hemisphere are dealt with by effective internal controls, including the control of aliens by the Department of Justice as well as freezing control."⁵

The measures of restrictions to which resident aliens of enemy nationality are subject (see Chapter V) are complemented by the regulations of the foreign funds control. The situation has been explained by the U. S. Treasury Department⁶ as follows: "If a resident of the United States who is not blocked is found to be participating in transactions which enable some blocked nationals to evade the operation of the Control, his accounts can be blocked, his business put under surveillance or supervision, and all transactions in which he is interested subjected to a rigorous supervision. These measures may be and are taken even if the individuals involved are American citizens. A blocked national who is found to be violating any licenses under which he may be conducting his operations may have such licenses revoked and may be excluded from the privileges of various general licenses to which he would otherwise be entitled." Again:⁷ "It is our policy to purge from all business enterprises within this country the poison of Axis influence, so that they may not be used in ways harmful to the United States and hemispheric defense. In this matter we have prevented their being used as focal points of Axis operations and nerve centers of the Axis economic empire to control production, to hold markets in

⁵ Press Release Treasury Dep't, March 18, 1942, Fed. Res. Bank of New York, Circular 2399.

⁶ *Administration of the Wartime Financial and Property Controls of United States Government* (December, 1942) p. 7.

⁷ *Ibid.* at p. 16.

this hemisphere, to support subversive activities and to weld the post-war economy of this hemisphere to Axis plans. In a similar manner we have acted to prevent United States business, funds and goods from being used by the same Axis interests to work harm to us and to the other American Republics through our hemisphere trade."

Supervision over all activity of aliens, especially upon aliens of enemy nationality, is necessary in wartime. Restrictions imposed upon the economic and financial conditions of resident aliens of enemy nationality are by no means different from those to which all nationals of a foreign country, within the meaning of Exec. Order No. 8389, as amended, are subject.

In *Ex parte Kumezo Kawato* the United States Supreme Court made it clear that "the Trading with the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all." The Act was passed with its declared purpose "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit under careful safeguards and restrictions, certain kinds of business to be carried on."

It must be borne in mind that we are dealing in this chapter with enemy qualification only within the meaning of the Trading with the Enemy Acts of the different countries and not with the determination of enemy character at common law (Chapter V). Careful distinction between these two concepts is necessary to avoid any confusion that may otherwise result from the use of the term "enemy" or "alien enemy" at common law and in the different statutes and regulations. This confusion of terms is perhaps inevitable in these times of emergency legislation. As suggested in a recent English note:⁸ "It is true that there are many persons who are enemies for the purposes of the

⁸ "Enemy Status," (1942) 42 Law Journal 129.

[British Trading with the Enemy] Act who are also enemies at common law; it is equally true that there may be common law enemies who do not come within the statutory definition. The *Scheepvaart* case⁹ shows that there are statutory enemies who are not common law enemies. This overlapping makes the use of the same word even more unfortunate, but there may well be no convenient alternative."

Confusion of this kind arose in the first months after the entrance of the United States into the war with regard to the important question whether resident aliens are able to prosecute actions. This ability of enemy aliens residing in this country to prosecute, though governed by common law, is affected by sec. 7 of the Act, which contains a special provision concerning enemies. But the fact that the Proclamation provided for in sec. 2 has not been issued, and for this very reason residents of alien nationality are not to be considered enemies within the meaning of the Act, for a time produced misunderstandings in opinions of federal and state courts. (Chapter XV.)

Thus, in *Kaufmann v. Eisenberg*,¹⁰ the New York Supreme Court in a carefully reasoned opinion held that, unlike the non-resident alien of enemy nationality, one legally residing in this country is not to be considered as an enemy within the meaning of the Trading with the Enemy Act, in the absence of a Presidential Proclamation to the contrary. This decision has not only been followed by numerous state court decisions, but the same view has also been adopted by federal courts, especially in *Bernheimer v. Vurpillot*,¹¹ where the absence of the Presidential

⁹ Chapter XIV, n. 38, reversed by the recent decision of the House of Lords, December 3, 1942, *ibid.* n. 40a.

¹⁰ 177 Misc. 939, 32 N. Y. S. (2d) 450 (January 19, 1942).

¹¹ 130 F. 2d 396 (C. C. A. 3d, August 3, 1942), reversing 42 F. Supp. 830 (D. C. E. D. Pa. January 14, 1942). For criticism of this (reversed) decision, see Notes (1942) 37 Ill. L. Rev. 814, (1942) 55 Harv. L. Rev. 105.

Proclamation was held to be decisive to permit resident aliens of enemy nationality to institute and prosecute lawsuits in the courts of this country during the war. More recently the United States Supreme Court in *Ex parte Kumezo Kawato* sustained this position.

Aliens of enemy nationality who are resident in this country are not enemies within the meaning of the Trading with the Enemy Act. But, for this reason, it is necessary that they comply with the requirement of residence, namely, that they be legally admitted into this country.¹² Residence presumes a legal admittance, as pointed out in *United States v. Shapiro*,¹³ referring to *U. S. v. Goldstein*, 30 Fed. Supp. 771, where it was said: "The term residence, as used in this Act, is 'legal residence,' and anyone who enters this country illegally cannot thereby acquire a legal residence."¹⁴

Accordingly, in *Szanti v. Teryazos*,¹⁵ an alien of enemy nationality (Hungarian) who had been employed as a fireman on board the *S. S. Leontios Teryazos* (which was of Greek registry) and who had overstayed his shore leave of sixty days, was regarded as staying in this country illegally since that time; he was therefore deemed a non-resident of the United States and hence an enemy within the meaning of the Trading with the Enemy Act. In a scholarly opinion, discussing the meaning of the definition "resident," the Court said: "A seaman or any other person who remains in this country illegally and who is subject to deportation cannot be regarded as a resident for the pur-

¹² Cf. Note, *Aliens—Naturalization—Proof of Entry for Permanent Residence*, (1942) 10 Geo. Wash. L. Rev. 225.

¹³ 43 Fed. Supp. 927 (D. C. S. D. Cal., March 30, 1942). Cf. *Petition of Wright*, 42 Fed. Supp. 306 (D. C. E. D. Michigan, December 23, 1941).

¹⁴ For a recent discussion of the term "residence," see *Harshbarger v. Sherron Metallic Corp'n*, N. Y. L. J. February 20, 1943, p. 714.

¹⁵ 45 F. Supp. 618 (D. C. E. D. N. Y., June 26, 1942, as corrected July 21, 1942).

pose of maintaining an action under the Trading with the Enemy Act." But in *Dezsofi v. Jacoby*,¹⁶ a Hungarian who had entered this country illegally was not denied the right to seek redress in the courts of the State of New York to recover for services rendered or for breach of contract after his entry into the United States, "even though such entry and continued presence is unlawful."¹⁷

In this connection, the concept of "residence" becomes important again. The definition of an enemy national in General Ruling No. 11, March 18, 1942, as "any individual within enemy territory" rendered obsolete the discussion on the meaning of the term "residence" (in enemy territory) under the regulations of the foreign funds control. But this trend to consider every person, even the transient, in a blocked country a national of a foreign (blocked) country, or a national of a designated enemy country, has not led to consider correspondingly any person outside enemy territory as non-enemy within the meaning of the Trading with the Enemy Acts, especially persons who are temporarily in this country. Such question arises out of the presence in the United States of numerous persons who are admitted to this country but temporarily. These persons, many of whom came here under the so-called "emergency visa," issued to save them from Axis persecution, especially since the invasion of Western Europe in 1940, were unable until now to change their status into that of lawfully admitted immigrants. The difficulties for

¹⁶ 178 Misc. 851, 34 N. Y. S. (2d) 672 (July 2, 1942).

¹⁷ The court invoked the Fourteenth Amendment to the Constitution which makes no discrimination and provides that no state shall "deny to any (italics of the court) person within its jurisdiction the equal protection of the laws." As to the question of deportation of a Greek seaman illegally in the United States (which was not permitted to England for the purpose of placing him within the jurisdiction of the Greek government-in-exile), see *Moraitis v. Delany*, 46 F. Supp. 425 (D. Md., August 28, 1942); Note (1942) 42 Col. L. Rev. 1343; Knauth, *Alien Seamen's Rights and the War*, (1943) 37 Am. J. Int. L. 74.

aliens in departing from and reentering into this country in wartime,¹⁸ and the necessity of the issuance of a visa approved by the Interdepartmental Visa Review Committee (since June, 1941)¹⁹ obliged such persons to stay in this country as visitors. These temporarily admitted aliens or visitors may claim to be residents. Recent New York Supreme Court decisions qualified visitors as resident persons, in *Greiner v. Bank of Adelaide*,²⁰ applying sec. 225 of the General Corporation Law (action against a foreign corporation by a resident), and in *Townsend v. Townsend*,²¹ sec. 1162, subd. 1 (2) of the Civil Practice Act (action for separation).

In the field of the freezing regulations, General License No. 42 as amended,²² expressly declared that any individual who was residing in the United States on February 23, 1942, and who does not thereafter enter any blocked country is a generally licensed national. Thus, the position of visitors who entered this country legally before that date is similar to that of residents, as to the provisions of foreign funds control.²³ These resident aliens of enemy nationality insofar as they arrived before June 14, 1940, in this country, are not "nationals of a foreign country" and thus not subject to the regulations which are imposed upon generally licensed nationals, to wit, the prohibition²⁴ from purchasing directly or indirectly securities of any corporation

¹⁸ Proclamation No. 2523 establishing control of Persons entering and leaving the United States, November 14, 1941, 6 Fed. Reg. 5821, 5869 (1941), Regulations December 9, 1941, 6 Fed. Reg. 6349 (1942), January 14, 1942, 7 Fed. Reg. 376, 381 (1942).

¹⁹ Rules and Regulations, January 26, 1942, 7 Fed. Reg. 574 (1942). Cf. Biddle, *Proposed Presidential Control on Tariff and Immigration Laws*, (1943) 22 Congr. Digest 6.

²⁰ 176 Misc. 315, 26 N. Y. S. (2d) 517 (1941).

²¹ 176 Misc. 19, 26 N. Y. S. (2d) 515 (1941).

²² 7 Fed. Reg. 1492 (1942).

²³ Press Release, Treasury Dep't, Fed. Res. Bank of New York, Circular 2383.

²⁴ Public Circular No. 14, February 3, 1942, 7 Fed. Reg. 698 (1942).

in such a manner that more than one per cent of the outstanding securities of any one class of the corporation would be held by blocked nationals.

On the other hand, Public Circular No. 4C, relating to reports to be filed on Form TFR-300, Series L, September 14, 1942,²⁵ excepts in sec. II A(1) (a) from the requirements of reporting "a national (of a foreign country) entering the United States on a purely transitory visit, whether for business or pleasure."²⁶ All aliens who entered the country after February 23, 1942, including legally admitted immigrants, are treated as nationals of a foreign (blocked) country and cannot avail themselves of the benefits of General License No. 42, as amended, which other individuals enjoy, even those who, though entering before that date, have not yet been granted legal residence.²⁷

Failure to be legally admitted to residence in this country may have additional effects. In *Sundell v. Lotmar Corp.*,²⁸ an action by Finnish residents visiting New York was dismissed when it was found that they were not qualified to maintain an action here, as they were enemies within the meaning of the Trading with the Enemy Act, being nationals of a country acting "in concert with Germany in their war against Russia, our ally."²⁹ It will be

²⁵ 7 Fed. Reg. 7274 (1942).

²⁶ As to treaty-traders, i. e., persons admitted as traders "in pursuance of the provisions of a treaty of commerce and navigation," 47 Stat. 607 (1932), 8 U. S. C. §203(6) (1934), see (1941) 41 Col. L. Rev. p. 1062, n. 165.

²⁷ For the question of residence in the freezing regulations, before the enactment of General License No. 42, as amended, February 23, 1942, 7 Fed. Reg. 1492, see references Chapter III, n. 3, 72.

²⁸ 44 F. Supp. 816 (D. C. S. D. N. Y., February 17, 1942).

²⁹ In *The Lawhill*, (1942) 85 South African L. J. 46 (Sup. Ct. of South Africa, Cape Provincial Division, September 15, 1941), an application was made by the Crown for the requisition of a Finnish vessel in the custody of the Prize Court after Finland had become an ally of Germany and was fighting on the side of Germany, although at that time Finland had not declared war on Great Britain or the Union of South Africa. Application was granted. -See

shown in Chapter XV, however, that the new trend of decisions in this country is to permit claims of non-resident aliens of enemy nationality, provided the profits cannot be used on behalf of enemies. But though this trend follows the law as settled before this war,³⁰ persons like the Finnish residents temporarily in New York were considered enemies within the meaning of the Trading with the Enemy Act because they did not legally reside in this country, and therefore, as allies of an enemy, were precluded from prosecuting claims in the courts.

Similar questions regarding the rights and disabilities of resident aliens of enemy nationality arose in other countries, too.

French courts during this war did not regard non-interned aliens of enemy nationality (*ressortissants allemands*) as enemies, in the meaning of the French Trading with the Enemy Act, so that sequestration of the property of corporations controlled by such persons was not upheld. In *Société Etablissements Le Zénith*,³¹ the partners, German refugees in France, were considered persons "showing sufficient guarantees of loyalty to France." In *Spielman, Hermann et Spielman, Ernst*,³² the partners who had emigrated to Montreal and New York, respectively, were deemed not to maintain any connection with their old Viennese firm and were therefore no longer bound by any allegiance to an enemy nation. Consequently, their Paris business was not considered controlled by enemies within the meaning of the French Trading with the Enemy Act.

Annual Digest and Reports of Public International Law Cases, Years 1938-1940 (Ed. by Lauterpacht, 1942), Note to this case No. 218, p. 575.

³⁰ *Birge-Forbes Co. v. Heye*, 251 U. S. 317 (1920).

³¹ Trib. Civ. Seine, November 3, 1939, *Dalloz Hebd.* 1940, 22; *Rec. Gaz. Pal.* 1939 II 338.

³² Trib. Civ. Seine, March 7, 1940; *Rec. Gaz. Pal.* 1940 I 370.

A difficult question has arisen where a person of enemy nationality is residing neither in an enemy country nor in the country of the forum nor is he blacklisted. In *I. G. White Engineering Corp. v. Canadian Car & Foundry Co.*,³³ a German refugee of Polish origin domiciled in the United States and residing in Paris, France, then unoccupied, sued jointly with others for the purchase price of goods. The Quebec Superior Court held that the definition of "enemy alien" in the Defence of Canada Regulations, 1939,³⁴ relates only to defense matters and does not apply to financial and trading purposes which are governed by the Regulations respecting Trading with the Enemy. The Court did not consider the non-resident alien an enemy "inasmuch as defendant did not allege that his [plaintiff's] conduct in the country of his domicile [U. S. A.] was that of an enemy or even that there might be reason to believe that he might be in sympathy with Germany and acting in aid of its policy."³⁵

³³ (1940) 4 Dom. L. Rep. 812 (Superior Ct. Quebec, March 6, 1940).

³⁴ September 3, 1939, P. C. 2483, reg. 2(1)c: "enemy alien means a person who, not being a British subject, possesses the nationality of a State at war with His Majesty," was replaced by Defence of Canada Regulations (Consolidation), 1940, September 12, 1940, P. C. 4750, which did not change the wording of this former regulation.

³⁵ Cf. *Trefnicek v. Martin*, (1939) 4 Dom. L. Rep. 737 (Ontario Sup. Ct., November 22, 1939), *infra* Chapter XV, n. 37.

5. Alien Enemies Under Other Regulations and at Common Law.

IT HAS been pointed out in Chapter IV that all definitions of "enemy" contained in the different Trading with the Enemy Acts apply only to questions regulated by these Acts and by the orders issued thereunder, such as the Foreign Funds Control exercised by the Treasury Department and the General Orders and Vesting Orders made by the Alien Property Custodian.

In all Trading with the Enemy Acts, the definitions are expressly restricted "for the purpose of this Act,"¹ "in these Regulations,"² or "as used in this Act."³

In the same way, the definitions of "enemy" or "alien enemy" contained in other statutes and regulations are confined in their application to these particular enactments.

In the United States, "alien enemies" are generally defined as persons who owe allegiance to a country at war with the United States.⁴ "The appellation of 'alien enemy,' with its indiscriminate implication of disloyalty, is an unfortunate survival from early common law dogma. It is regrettable that most of the statutes in this field still retain this archaic terminology. The modern tendency is to describe this category of individuals as 'enemy aliens,' 'aliens of enemy nationality,' 'enemy nationals,' 'aliens

¹ British Act, sec. 2(1), Canadian Regulations, sec. 1(1).

² Australian Act, sec. 3(1), New Zealand Regulations, r. 2.

³ U. S. Trading with the Enemy Act, sec. 2, Dutch Decree, June 7, 1940, sec. 1.

⁴ See Perry, *Aliens in the United States*, (1942) 223 *Annals Am. Acad. Pol. Soc. Sc.*, p. 1; Correa, *The Enemy Alien Problem* (Address), N. Y. L. J. April 29, 1942, p. 1799.

from enemy countries,' or in some similar manner which will not suggest disloyal attachments."⁵

This is the definition used in the Nationality Act of 1940, as amended December 13, 1941,⁶ which provides in sec. 326 (a) : "An alien who is a native, citizen, subject or denizen of any country, state, or sovereignty with which the United States is at war, shall be considered an alien enemy for the purpose of the naturalization laws. A native of such an enemy country who subsequent to birth has become a citizen or subject of a nation with which the United States is not at war shall nevertheless be considered an alien enemy." In view of the definition of alien enemy as a subject of any country with which the United States is at war, the question arose whether sec. 2171 of the Revised Statutes of the United States⁷ denied naturalization to an alien whose country was at war with the United States "at the time of his application." This section was repealed by the Act of May 9, 1918.⁸ In a decision rendered after the repeal, it was held *In re Pollack*⁹ and *In re Blechschmidt*¹⁰ that an alien enemy who had filed his petition for naturalization prior to the act, could avail himself of the benefits of the act.

An alien enemy may "in the discretion of the President of the United States, upon investigation and report by the Department of Justice fully establishing the loyalty of such alien enemy, be excepted from such classification of alien enemy, whereupon he shall have the privilege of having a

⁵ Gordon, *Status of Enemy Nationals in the United States*, (1942) 2 *Lawyers Guild Rev.* 10, n. 10.

⁶ 54 Stat. 1150. See Regulations Governing the Naturalization of Alien Enemies, December 13 and 20, 1941, 6 Fed. Reg. 6450, 6747 (1941).

⁷ For cases pro and con, see Hackworth, *Digest of International Law*, vol. 2 (1941), p. 52.

⁸ 40 Stat. 545.

⁹ 257 Fed. 350 (D. C. S. D. N. Y. 1918).

¹⁰ 291 Fed. 99 (D. C. E. D. Pa. 1923).

final hearing upon his petition for naturalization.”¹¹ It was held in *In re Schuster*¹² that the Statute contemplated personal action of a judicial character by the President and that an alien enemy could not file a petition for naturalization until he had been exempted from that classification by the President.

In this war, Exec. Order No. 9106, March 20, 1942,¹³ exempted certain persons from this classification of alien enemies for the purpose of permitting them to apply for naturalization. The burden of establishing that all provisions, especially the certificate of loyalty granted by the Attorney General, are complied with, is on the alien petitioner who is, only for this proceeding of naturalization, exempted from the classification as alien enemy.

Furthermore, the Selective Training and Service Act, 1940, as amended August 18, 1941,¹⁴ sec. 3, applied to “every male alien residing in the United States who has declared his intention to become a citizen between the ages of 21 and 36.” This section was amended December 20, 1941,¹⁵ so as to make all male persons between the ages of 20¹⁶ and 45, residing in the United States, liable for

¹¹ §335.5 of the Regulations, *supra* n. 6. On the other hand, a Mexican Exec. Order prohibits naturalization papers from being granted to nationals of Bulgaria, Hungary, and Rumania (as well as of Germany, Italy, and Japan), and to persons who, having been nationals of those countries, lost that nationality or acquired another prior to December 31, 1938 (Diario Oficial, January 24, 1942). Cf. Bulletin Dep’t of Justice, N. Y. L. J. February 18, 1943, p. 663.

¹² 111 Misc. 649, 182 N. Y. S. 357 (1920).

¹³ 7 Fed. Reg. 2199. See Instruction No. 69, Immigration and Naturalization Service, May 27, 1942, cited by Gordon, *supra* n. 5, at p. 19, n. 99.

¹⁴ 54 Stat. 885, 55 Stat. 627; Exec. Orders No. 8545, 5 Fed. Reg. 3779 (1940); No. 9279, 7 Fed. Reg. 10177 (1942). See M. M. Jr., *Judicial Review and Treatment of Alien Under the Selective Service and Training Act of 1940*, (1942) 28 Virginia L. Rev. 624; Wilson, *Facilitation of Naturalization Through Military Service*, (1942) 36 Am. J. Int. L. 454; Koessler, *Rights and Duties of Declarant Aliens*, (1942) 91 U. of Pa. L. Rev. 321, 331.

¹⁵ Public Laws No. 360, 77th Cong., 1st Sess.

¹⁶ Public Law No. 772, 77th Cong., 2d Sess., November 13, 1942, amending sec. 3(a) by substituting the age of “eighteen” for “twenty.”

training and service in the land or naval forces of the United States, the non-declarant aliens (those who do not take out their "First Papers") being classified in the same manner as other registrants. It is further provided that "no citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to land or naval forces."¹⁷

Persons of enemy nationality, like other aliens, who feel the duty to serve in the armed forces of this country, are favored with respect to naturalization. The Second War Powers Act¹⁸ facilitated naturalization of alien members of American armed forces by waiving certain requirements (declaration of intention, residence of five years in any state of the United States) and thus made it possible to grant citizenship to alien members of the American armed forces who are stationed outside the jurisdiction of naturalization courts,¹⁹ and even to aliens of enemy nationality, insofar as they were lawfully²⁰ admitted to the United States.²¹

In order to distinguish enemy aliens from other aliens,

¹⁷ DSS Form 307 entitled "Notice of Alien's Acceptability" has been discontinued, December 31, 1942, 8 Fed. Reg. 79 (1943).

¹⁸ Public Law No. 507, 77th Cong., 2d Sess., March 27, 1942.

¹⁹ Bulletin, Dep't of Justice: Naturalization of Alien Members of American Armed Forces, N. Y. L. J. December 5, 1942, p. 1757. In proceedings held for the first time in history outside the United States, 289 aliens serving in the armed forces were naturalized, fifty-six of whom were nationals of enemy countries; cf. N. Y. L. J. January 30, 1943, p. 407.

²⁰ The Immigration and Naturalization Service has ruled that if the temporary admission was lawful, as in the case of visitors or seamen, the fact that such persons remained illegally in this country does not disqualify them from the benefits of the Second War Powers Act.

²¹ See the Report of the Committee on Immigration and Naturalization to the Bill (H. R. 6731) to permit the naturalization of certain persons whose sons or daughters are serving or have served in the armed forces of the United States since December 7, 1941, No. 2582, October 17, 1942.

an Amendment to the Selective Service Regulations, Second Ed., of December 22, 1942,²² states that the term "citizen or subject of a neutral country" is to be used to designate an alien who is "a citizen or subject of a country which is neither a cobelligerent country nor an enemy country."

These aliens of neutral countries are permitted to request Relief from Military Service,²³ but are then forever barred from acquiring American citizenship. For the purpose of these regulations the term neutral countries included France, Hungary, Bulgaria and Rumania. Those territories, however, were declared enemy territory under provisions of the Trading with the Enemy Act and the orders issued thereunder. (See Chapter XIV.)

However, aliens of enemy nationality who are liable to service in the armed forces remain enemy aliens until they are naturalized. They are merely freed, "during their term of military service in the armed forces of the United States,"²⁴ from the restrictions to which alien enemies are now subject.

Upon the entry of the United States into war, the Presidential Proclamations Nos. 2525, 2526, 2527, of December 7 and 8, 1941,²⁵ ordered "all natives, citizens, denizens, or subjects" of the enemy countries who are not actually naturalized to comply strictly with the regulations governing alien enemies.²⁶ The term "alien enemy" was used in this country as early as July 6, 1798, in the Alien Enemy

²² 7 Fed. Reg. 10802 (1942); cf. Fitzhugh and Hyde, *The Drafting of Neutral Aliens by the United States*, (1942) 36 Am. J. Int. L. 369.

²³ Amendment 115 to Selective Service Regulations Second Ed. §622.43(b), January 2, 1943, 8 Fed. Reg. 77 (1943); Revision of DSS Form 301, *ibid.* p. 1709.

²⁴ Dep't of Justice, February 19, 1942, 7 Fed. Reg. 1474 (1942).

²⁵ 6 Fed. Reg. 6321, 6323, 6324 (1942); 36 Am. J. Int. L. Supp. p. 236.

²⁶ Presidential Proclamation No. 2563, July 17, 1942, 7 Fed. Reg. 5535 (1942) imposed similar restrictions upon nationals of Hungary, Rumania and Bulgaria.

Act of that date,²⁷ under the authority of which Act the recent Proclamations were made.

These restrictions govern the conduct of aliens of enemy nationality in the United States who are not actually naturalized. The Regulations Controlling Travel and Other Conduct of Aliens of Enemy Nationality, of February 5, 1942,²⁸ provide for further limitations such as prohibited ownership or possession of radios, cameras, firearms and other articles, exclusion from restricted areas, and the necessity for travel permits.²⁹ A further proclamation, No. 2537, January 14, 1942,³⁰ required that aliens of enemy nationality shall apply³¹ for Certificates of Identification.³²

Special measures became necessary on account of the military precautions to be taken on the West Coast. Exec. Order No. 9066 of February 19, 1942,³³ authorized the Secretary of War and military commanders designated by the President to prescribe military areas from which "any

²⁷ 1 Stat. 577 (1798), Rev. Stat. Sec. 4067 (1878), as amended April 16, 1918, 40 Stat. 531.

²⁸ 7 Fed. Reg. 844 (1942).

²⁹ 7 Fed. Reg. 1084, 1474, 8247, 8555 (1942). See the pamphlet issued by U. S. Dep't of Justice: Questions and Answers concerning Aliens of Enemy Nationality, May 5, 1942; Public Proclamation No. 13, October 22, 1942, 7 Fed. Reg. 8565 (1942); Bulletin, Dep't of Justice: War Activities of the Department Since the Japanese Attack on Pearl Harbor, N. Y. L. J. December 14, 1942, p. 1887.

³⁰ 7 Fed. Reg. 329 (1942).

³¹ The Alien Registration Act of June 28, 1940, 54 Stat. 673, already provided for the registration and fingerprinting of all aliens. See Biddle, *Identification of Alien Enemies*, (1942) 8 Vital Speeches 279; Hill, *The Mechanics of Alien Enemy Control*, (1942) 10 Geo. Wash. L. Rev. 851, 853; Correa, *The Enemy Alien Problem*, (1942) 107 N. Y. L. J., p. 1799.

³² In *Hines v. Davidowitz*, 312 U. S. 52, 61 S. Ct. 399, 85 L. Ed. 366 (January 20, 1941), a majority of the United States Supreme Court held that the Federal Alien Registration Act of 1940 rendered ineffective a Pennsylvania statute for the registration of aliens resident in Pennsylvania, since it involved an aspect of foreign relations in a field where the Federal Government is supreme. See Kuhn, *Conflict of Federal and State Law in Respect to the Registration of Aliens*, (1941) 35 Am. J. Int. L. 326, and Wilson, *Treatment of Civilian Alien Enemies*, (1943) 37 *ibid.* 30, 41.

³³ 7 Fed. Reg. 1407 (1942).

or all persons" might be excluded, and within which any or all persons might be subjected to restrictions. Public Proclamations issued by the Commander of the Western Defense Area³⁴ and the orders thereunder affected not only enemy aliens but also native born American citizens of Japanese ancestry. They gave rise to numerous proceedings before federal courts which will be dealt with in Chapter VII. The measures enacted, especially that concerning evacuation, were, incidentally, approved by Congress³⁵ when it passed a law which made violation of any restrictive order promulgated for a military area by a military commander³⁶ a misdemeanor punishable by fine and imprisonment.³⁷

Besides aliens of enemy nationality, during their term of service in the armed forces of the United States, various other groups of alien enemies have been exempted from the restrictions and obligations of the Presidential Proclamations. They include former German, Italian, or Japanese citizens or subjects who before December 7/8, 1941, became and are citizens or subjects of any nation other than Germany, Italy, or Japan,³⁸ persons of Greek and Turkish ex-

³⁴ Public Proclamations Nos. 1-4, March 2, 16, 24, 27, 1942, 7 Fed. Reg. 2320, 2405, 2543, 2601 (1942), as amended by Public Proclamations Nos. 14, 15, December 23, 24, 1942, 8 Fed. Reg. 282 (1943). These restrictions affect not only enemy aliens but also native born American citizens of Japanese ancestry. See Civilian Restrictive Orders Nos. 1-28, 8 Fed. Reg. 982, 1597 (1943), and Statement of U. S. Citizens of Japanese Ancestry, Selective Service Act, DSS Form 304 A January 23, 1943, 8 Fed. Reg. 1493 (1943).

³⁵ Public Law No. 503, 77th Cong., 2d Sess., March 21, 1942.

³⁶ By Public Proclamation No. 13, October 19, 1942, 7 Fed. Reg. 9743 (1942), Italians were exempted from curfew and travel restrictions; curfew restrictions were further lifted for German aliens by Public Proclamation No. 15, December 24, 1942, 8 Fed. Reg. 282 (1943).

³⁷ The Eastern Defense Command issued Public Proclamations No. 1-4, regarding Areas Restricted for National Defense Purposes, May 16, September 7, December 21, 1942, 7 Fed. Reg. 3830, 7335, 11107 (1942); January 27, 1943, 8 Fed. Reg. 1331 (1943).

³⁸ Regulations, sec. 30.2(a) of February 5, 1942, 7 Fed. Reg. 844 (1942).

traction who emigrated from the Dodecanese and other islands of the Aegean Sea,³⁹ Koreans,⁴⁰ and Austrians or Austro-Hungarians,⁴¹ and more recently Italian nationals living in this country.⁴²

But it is expressly provided⁴³ that these exemptions shall not be construed as "defining or limiting the classes of 'alien enemies' who are subject to apprehension, detention or internment, or to any of the other provisions of the Presidential Proclamations of December 7 and 8, 1941, and regulations heretofore or hereafter issued pursuant thereto."⁴⁴

It was emphasized in the Bulletin of the Department of Justice, January 31, 1942,⁴⁵ that the declarations affecting such assumption were not "in any way an exercise of the power vested in the President by sec. 2 (c) of the Trading with the Enemy Act," which restricts their importance to fields other than those regulated by the Trading with the Enemy Act. The United States Supreme Court in *Ex*

³⁹ Dep't of Justice, February 19, 1942, 7 Fed. Reg. 1474 (1942). Cf. the memorandum: "*The Dodecanesians are not Enemy Aliens*," published by The Dodecanesian League of America (New York, 1942).

⁴⁰ Bulletin, Dep't of Justice, N. Y. L. J. March 28, 1942, p. 1310.

⁴¹ See Hofmannsthal, "*Austro-Hungarians*," (1942) 36 Am. J. Int. L. 292. On sources regarding the recognition of the Anschluss, see Hackworth, *Digest of International Law*, vol. 1 (1940), p. 448, and statement of the Dep't of State: "This Government has never taken the position that Austria was legally absorbed into the German Reich, (1942) 7 Bulletin Dep't of State, p. 660.

⁴² October 19, 1942, 7 Fed. Reg. 8247 (1942).

⁴³ Regulations, §30.52(d), February 24, 1942, 7 Fed. Reg. 1477 (1942).

⁴⁴ For a further limitation on aliens of enemy nationality, in the exercise of their rights, namely, discrimination against their employment, see Gordon, *supra* n. 5 at p. 15 n. 85-91, citing various statements and regulations. Cf. Chamberlain, *Aliens in the United States*, in MacKenzie, *The Legal Status of Aliens in Pacific Countries* (1937) p. 317, 331; O'Connor, *Constitutional Protection of Alien's Right to Work*, (1941) 18 N.Y.U. L. Q. Rev. 483; Bulletin of U. S. Employment Service; *Hiring of Aliens by War Contractors*, N. Y. L. J. November 14, 1942, p. 1457.

⁴⁵ Bulletin, Dep't of Justice, January 31, 1942; N. Y. L. J. February 5, 1942, p. 545, quoted fully in *Szanti v. Teryazos*, 45 F. Supp. 618 (D. C. E. D. N. Y., July 21, 1942), and in *Caparell v. Goodbody*, 29 A. (2d) 563 (Ch., N. J., December 29, 1942).

*parte Kumezo Kawato*⁴⁶ said that "this Proclamation⁴⁷ has no bearing on the Power of the President under the Trading with the Enemy Act."

In other federal statutes and regulations, where the term "enemy alien" is used in order to impose restrictions upon persons thus defined, the meaning of the term is likewise confined to the purpose of the particular enactment. In the Regulations No. 3, Amendment No. 3, of the United States Citizens Defense Corps, sec. 1903 (5) b,⁴⁸ "the term 'alien of enemy nationality' means citizen of Germany, Italy, or Japan, or such other country as shall be designated by order of the Director" (of Civilian Defense); the Order of the U. S. Maritime Commission, December 12, 1941,⁴⁹ provides for the immediate elimination from membership and participation in agreements of "all nationals and/or their agents or representatives of any country at war with the United States"; and the regulations relating to the Control of Vessels in the Navigable Waters of the United States, as amended October 27, 1942, sec. 6 (1) c,⁵⁰ include in the term enemy alien "citizens or subjects of Germany and Japan, and aliens who at present are stateless but who at the time at which they became stateless were citizens or subjects of Germany or Japan."

The restriction of the meaning of the term "enemy alien" to the particular regulation in which it is used becomes clearer when exemptions from some restrictions are granted to certain classes of enemy aliens. Thus, contrary to views sometimes expressed in public discussion, exemp-

⁴⁶ 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942).

⁴⁷ No. 2525, December 6, 1941, 6 Fed. Reg. 6321 (1942).

⁴⁸ August 28, 1942, 7 Fed. Reg. 6900 (1942). For the terms of the oath taken by each alien appointed to membership in the Defense Corps, see Regulation 3 of the Office of Civilian Defense, Amendment 5, January 7, 1943, 8 Fed. Reg. 376 (1943).

⁴⁹ 1942 Am. Mar. Cas. 155.

⁵⁰ 7 Fed. Reg. 8902 (1942).

tions such as those granted to Austrians, Koreans and later to Italians from restrictions do not further exempt them from the concept of alien enemies. The only restrictions lifted are the possession of cameras, short-wave radios, and the requirement of traveling permits.

The restrictions imposed upon alien enemies in this country, as well as the exemptions from such restrictions (in favor of certain groups as for instance Italians), are confined to the purposes of the specific statutes and orders where these restrictions or exemptions are contained. With regard to the Italians the Department of Justice stated on October 12, 1942:⁵¹ "The protection of our internal security and safety of this country demands that the Department of Justice continue to arrest and intern, if necessary, those few Italians, who have proven, or who may hereafter show, their disloyalty to the United States." In particular, questions regulated by the Trading with the Enemy Act and the orders issued thereunder are by no means affected by such exemptions. The regulations regarding foreign funds control by the Treasury Department and the orders regarding administration of foreign property by the Alien Property Custodian take no account of the changes, if any, in the status of such persons while resident in this country.

For instance, the recent relaxation of alien enemy control with respect to resident Italians in no way affects the power of the Alien Property Custodian over the property of such persons.

An opinion of the Chief Counsel of the Alien Property Custodian, October 29, 1942,⁵² dealing with the authority of the Alien Property Custodian over property of Italians residing in this country stated that this "authority is rooted in the Trading with the Enemy Act, an enactment unre-

⁵¹ Circular No. 3737, quoted in C.C.H.W.L.S. ||9751.

⁵² C.C.H.W.L.S. ||9754.

lated to the Alien Enemy Act. It has repeatedly been held that the Trading with the Enemy Act and the Alien Enemy Act are independent, so that one who was an "alien enemy" for purposes of the latter was yet not an "enemy" who was barred from bringing suits under sec. 7 (b) of the former."

The test of loyalty which has thus been introduced becomes an important weapon in the field of economic warfare. Loyalty creates exemption from restrictions, as in the case of resident Italians, but disloyalty may result in apprehension, even of citizens. This question of disloyalty has been dealt with in different ways by the regulations issued under the Trading with the Enemy Act and under other federal statutes.

Under the orders issued under the Trading with the Enemy Act anyone, even American citizens, may be subjected to the freezing of assets and the administration of their property, if the competent authorities, the Secretary of the Treasury or the Alien Property Custodian, make such determination.⁵³ Under other federal statutes, however, special circumstances lead to group measures⁵⁴ such as those regarding American citizens of Japanese ancestry,⁵⁵ or judicial proceedings toward the denaturalization of American citizens, especially of former members of the American-German Bund.⁵⁶ The Government is seeking to cancel the naturalization certificates of such persons⁵⁷ whose persistent and constant course of conduct, activities

⁵³ On the judicial review of such determination, see Chapter XVII.

⁵⁴ See Note, *Special Legislation Discriminating against Specified Individuals and Groups*, (1942) 51 Yale L. J. 1358; McClung Lee, *Subversive Individuals of Minority Status*, (1942) 223 Ann. Am. Acad. Pol. So. Sc., p. 162.

⁵⁵ Chapter VII, n. 44.

⁵⁶ Cf. Preuss, *Denaturalization on the Ground of Disloyalty*, (1942) 36 Am. Pol. Sc. Rev. 701; Cushman, *Civil Liberties*, (1943) 37 *ibid.* 49, 53.

⁵⁷ For cancellation of certificates of naturalization see Hackworth, *Digest of International Law*, vol. 3 (1942), p. 89; Note, (1942) 51 Yale L. J. 1215 1222, n. 45. Cf. *U. S. v. Bergmann*, 47 F. Supp. 765; *U. S. v. Polzin*, 48 F. Supp. 476; *U. S. v. Jentzsch*, *ibid.* 482.

and utterances unmistakably evidence their disloyalty to the United States and their attachment and allegiance to a foreign country."⁵⁸ The Government maintains that such persons took the oath of allegiance required for citizenship with mental reservations. Thus, these Bund members face loss of citizenship and internment as alien enemies.⁵⁹

Since each of the regulations applicable to the Trading with the Enemy Act, Freezing Regulations, Alien Property Custodianship, the Enemy Alien Act and the Presidential Proclamations is restricted in its application to the field for which it was issued, judicial decisions must be carefully considered in order to determine the exact scope and significance of the regulations.

This caution applies particularly to decisions regarding the internment of alien enemies. The questions arising in connection with internment will be dealt with in Chapter VII. Suffice it to say in passing that a decision declaring that an arrested person is an alien enemy within the meaning of the Alien Enemy Act, *per se*, may have no bearing upon the legal status of that alien enemy and of his property in this country, and upon questions arising therefrom under the Trading with the Enemy Act and the Orders issued thereunder.

As we are dealing here with statutory trading with the enemy law, our considerations are confined to the legal questions which may arise out of the situation of alien enemies under the Trading with the Enemy Acts of the different belligerent countries. It should be noted, however, that a certain confusion regarding the legal determination of the enemy character of resident individuals, only too understandable in time of emergency legislation and

⁵⁸ Press Release, Dep't of Justice, Proceedings to Cancel Naturalization Certificates, N. Y. L. J. May 9, 1942, p. 1972.

⁵⁹ Cf. Mexican Decree of July 25, 1942, cancelling naturalization papers deceitfully obtained, *Diario Oficial*, August 20, 1942.

its interpretation, occurred not only in this country,⁶⁰ but elsewhere as well. In England the question of who is an enemy at common law⁶¹ led an authoritative English writer⁶² to comment as follows: "It is essential not to confuse the question of a character with the question of Trading with the Enemy. For example, the question, whether a person is an alien enemy within the meaning of the rule which prohibits a person of enemy character from suing in the King's Court, must be distinguished from the question, whether he is dealing with a person on the 'Black List' and so infringing the rules against Trading with the enemy. An enemy subject, resident in England, can sue in the Courts, but he must not trade with the enemy. The distinction is much easier stated than applied."⁶³

This confusion in England about the meaning of "enemy subject" at common law seems now to be clarified by the recent decision of the House of Lords in *N. V. Gebr. van Uden's Scheepvaart en Agentuur Maatschappij v. V/O Soufracht*.⁶⁴ There the question was to determine if a Dutch corporation doing business at Rotterdam was an enemy subject, at common law, while residing in enemy-occupied territory, and thus excluded from arbitration pro-

⁶⁰ On the temporary misinterpretation of the *Colonna* case, and the failure to consider the fact that a proclamation under sec. 2(b) of the Trading with the Enemy Act as to resident alien enemies has not yet been issued. See Chapter XV.

⁶¹ "An enemy at common law is: an individual national of or a corporation incorporated under the laws of an enemy state, i. e., the same as an 'enemy subject' as defined in sec. 15(1) of the [British Trading with the Enemy] Act," Howard, *The Defence (Finance) Regulations*, 1939 (1942) p. 11.

⁶² Trotter, *The Law of Contract During and After War* (4 ed. London 1940) p. 662.

⁶³ See: *The Position of Aliens in Great Britain During the War*, Report by the British Library of Information, New York, March 20, 1942, reprinted as Exhibit 13 to Hearings on National Defense Migration (H. Res. 113), Part 31 (1942) p. 11861; Bentwich, *Wartime Britain's Alien Policy*, (1942) 5 Contemporary Jewish Record 41; *infra* Chapter VII, n. 42. On classification of aliens in time of war, see Fraser, *Control of Aliens in the British Commonwealth of Nations* (1940) p. 193.

⁶⁴ December 3, 1942, (1943) 1 All E. R. 76; 74 Lloyd's L. L. Rep. 59; 59 T. L. R. 101.

ceedings in England (unless a license thereto would be granted). Reversing the decisions of the lower courts,⁶⁵ the House of Lords stated that such corporation must be considered an enemy subject at common law. Not the test of nationality is decisive, but the fact of residence or carrying on business in a territory wholly controlled by the enemy.

In the United States, the trend toward application of the loyalty test has broadened the usual concept of enemy under the Trading with the Enemy Act, in the freezing regulations and the administration of property by the Alien Property Custodian so as to include even resident American citizens. On the other hand, the loyalty test has led to exemptions from restrictions to which aliens of enemy nationality are subject under other federal regulations.

This loyalty test has recently been considered in decisions of the New York Supreme Court in other legal fields not regulated by federal law, but by New York State statutory law and at common law. The decisions deal (1) with the rights and duties of alien enemies as guardians of the person and the property of their children, and (2) with the disabilities of (loyal) aliens of enemy nationality under New York Real Property Law.

The disability of aliens of enemy nationality at common law may arise in rather unusual situations. For instance, the question has arisen if resident alien enemies are qualified to guardianship of their own children. In *Matter of Ralf Manfred Weinmann*,⁶⁶ an infant of fourteen years applied for the issuance of letters of guardianship of his person and estate to his father, with whom he resided in

⁶⁵ Chapter XIV, n. 37.

⁶⁶ N. Y. L. J. January 19, 1942, p. 278; cf. *Matter of Marianne Stern*, *ibid.* April 2, 1942, p. 1393.

this country. The mother of the petitioner had consented to such appointment. The father, a former subject of the Republic of Czechoslovakia, was denied the guardianship over the property of his son. Though the statute⁶⁷ does not prohibit the appointment of a resident alien nor even of a resident alien of enemy nationality as a guardian or other fiduciary, the nomination is subject to the approval of the court. The Appellate Division,⁶⁸ reversing the decree of the Surrogate's Court, directed the appointment of the father as guardian of the property, and of the Guaranty Trust Company of New York as custodian of the money and securities of the infant. The court said: "There is nothing in this record that discloses any disability or disqualification on the part of the infant's nominee to act as the guardian of his property. On the contrary it affirmatively appears that he is especially qualified to act and that the best interests of the infant will be subserved by his appointment. The rejection, therefore, of the infant's nominee was an improvident exercise of discretion."

On the other hand, a person who is "contaminated with the germ of Nazism" is "totally unfit to rear and guide the destiny of any living being," said the New York Supreme Court in *Reimann v. Reimann*.⁶⁹ A father was refused custody over his three-year-old daughter as there was sufficient proof that the father was "tainted with Nazism." The court stated that "it becomes the sacred duty of all Americans to safeguard and protect the rising generation from the ravages wrought by Nazism. This duty is as real as our duty to protect them from the bacilli of disease."

The internment of the father, as an alien enemy, was not the decisive factor in this case; it was the test of loyalty

⁶⁷ Sec. 175, N. Y. Surrogate's Court Act.

⁶⁸ N. Y. L. J. June 30, 1942, p. 2736.

⁶⁹ N. Y. L. J. December 28, 1942, p. 2055.

that provided the underlying principle of the decision.

The test of loyalty might also play a role in the question of disabilities of aliens under state statutes on real property. In New York same as in several other states,⁷⁰ resident aliens of enemy nationality are faced with the disability to devise real property, because the state reserves the power to assert its sovereign right of escheat.⁷¹ The question is of far-reaching importance. For, if an alien enemy cannot transmit an indefeasible title at the time of his death, free from any claim that the State may assert, any prospective purchaser would refuse to accept a deed from the devisee.

In the State of New York, the capacity to hold real property is regulated by sec. 10 of the Real Property Law.⁷¹ Subdivision 1 of this section allows the taking and holding of real property by citizens of the United States. Subsection 2 contains the only statutory provision concerning aliens and reads: "Alien friends are empowered to take, hold, transmit and dispose of real property within this state in the same manner as native-born citizens and their heirs and devisees take in the same manner as citizens." It must be emphasized that the statute expressly grants rights to an alien friend, but not to an alien enemy. "The omission to do so is significant for it clearly implies that the [New York] Legislature intended that the right of an alien enemy to acquire and to dispose of real property in this state shall be governed, not by the statutory prescription, but only by such principles as were pertinent to aliens generally at common law. Concisely stated, the above section is wholly inapplicable in the determination of

⁷⁰ See for a summary Hackworth, *supra* n. 57, at p. 679.

⁷¹ Laws of 1913, c. 152; Consol. Laws, c. 50. See Steckler and Rosenberg, *Real Property of Enemy Aliens*, (1942) 107 N. Y. L. J. 1674, 1692, 1710; Pratt, *Present Alienage Disabilities Under New York State Law in Real Property*, (1942) 12 Brooklyn L. Rev. 1.

questions relating to the property rights of alien enemies."⁷² The court further said that "there is no escape from such conclusion is made manifest by the holding of our Court of Appeals in *Techt v. Hughes*."⁷³ In this case, Mrs. Techt had lost her American citizenship by marriage to an Austro-Hungarian; she continued to reside with her husband in New York. Her father, an American citizen, died intestate in December, 1917, and left real property in New York. The question was whether an Austrian could inherit real property in New York from an American decedent after the outbreak of war between the United States and Austria-Hungary. The Court of Appeals reversed the decision of the lower court,⁷⁴ which had considered Mrs. Techt an "alien friend,"⁷⁵ and held that she could not inherit under state law. Judge Cardozo, speaking for the Court, referred to subjects of enemy nationality in these terms: "Sometimes, though loosely we speak of them as friends for the purpose of characterizing their status when they are brought within the range of exemption, tacit or proclaimed. The truth is that they are enemies, who within the limits placed by the sovereign upon a revocable license enjoys the privileges of friends. Their identification with friends is never complete." He further said: "If the plaintiff's capacity to inherit depended solely on the statute, I should feel constrained to hold against her. I cannot follow the Appellate Division in its view that she is in law an 'alien friend.' The wisdom of the statute, I make no attempt to vindicate. Our duty is done when we enforce the law as it is written. In the primary meaning of the

⁷² *George v. People*, N. Y. L. J. December 23, 1942, p. 2021.

⁷³ 229 N. Y. 222 (1922).

⁷⁴ 106 Misc. 524, 176 N. Y. S. 356; 188 App. Div. 743, 177 N. Y. S. 420.

⁷⁵ Cf. 2 Am. Jurisprudence (1936), Aliens ||3, p. 464. "Aliens may also be classified as alien friends and alien enemies, the former being citizens or subjects of a nation with which the United States is at peace, and the latter subjects or citizens of some hostile state or power."

words, an alien friend is the subject of a foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States."

Although Mrs. Techt was not entitled under the New York statute to inherit real property in this state, the court found her disability removed by the Treaty between the United States and Austria of May 2, 1848.⁷⁶ This treaty was held to be still in force, and compliance with the treaty, so to sustain the title of the plaintiff to the real property, was held in no way incompatible with the safety of the nation.⁷⁷

Under this opinion, resident aliens of enemy nationality are not entitled to acquire, hold and dispose of real property in the State of New York, except by virtue of treaty provisions which, while continuing in force, supersede the state law of real property.

The opinion of *Techt v. Hughes* was followed recently in *George v. People*.⁷⁸ There an Italian immigrant living in this country more than fifty years without becoming an American citizen, died in Brooklyn, N. Y., on February 3, 1942, after the outbreak of the war with Italy, and left real estate. Plaintiffs, his devisees, sought a determination that the property was held free of any claim to an escheat by the People of the State of New York. Upon the authority of *Techt v. Hughes* the court refused to regard the decedent as an alien friend. "There is no basis upon which to draw a line of demarcation between an enemy who is considered such only technically in law and one who is

⁷⁶ 9 Stat. 944.

⁷⁷ Treaties between the United States and Germany, such as the Treaty of Friendship, Commerce and Consular Rights of 1923 (Treaty Series No. 725), providing for "that degree of protection (of nationals) that is required by international law," are considered to be still in effect; see Turlington, *Vesting Orders Under the First War Powers Act*, 1941, (1942) 36 Am. J. Int. L. 460, 461; Steckler and Rosenberg, *supra* n. 71, at p. 1674.

⁷⁸ N. Y. L. J. December 23, 1942, p. 2021, *ibid.* March 17, 1943, p. 1058.

considered such in actual fact. The sympathy that an alien or a particular class of aliens might have towards our institutions and traditions cannot sway the result." The court was fully aware of the recent exemption of Italians in this country from certain restrictions imposed upon alien enemies, but insisted nevertheless that title to real property held by such persons in the State of New York must "still remain subject to the disabilities applicable at common law" In this connection, the court said: "Where such persons as a class have demonstrated their loyalty to our country and its institutions to such convincing extent as to evoke federal recognition of such fact, the Legislature, in plain justice, should enact a remedial statute, applicable to the situation, whereby their right of acquisition, tenure and disposition of real property will be clearly validated both prospectively and retroactively. Surely, legislation of such character under the circumstances would meet with public approbation." In the instant case the plaintiffs had acquired title to the property, nevertheless, in spite of the common law disability of alienage which confronted their devisor upon death. As American citizens they were persons vested with capacity to acquire real property, according to sec. 10 (1) of the Real Property Law. Consequently, they were entitled to invoke the benefit of sec. 15 of that statute; it reads as follows: "The right, title or interest in or to real property in this State, now held or hereafter acquired by any person, entitled to hold the same, cannot be questioned or impeached by reason of the alienage of any person through whom such title may have been derived. Nothing in this section affects or impairs the right of any heir, devisee, mortgagee, or creditor by judgment or otherwise."

The opinions in *Techt v. Hughes* and in *George v. People* make it clear that the fact that resident aliens of

enemy nationality are not considered enemies, within the meaning of the Trading with the Enemy Act, by no means influences the effect of a state law, dealing with disabilities of aliens as to real property. Moreover, General Ruling No. 12, April 21, 1942,⁷⁹ excludes property from its application so that the question of the validity of any transfer, even when made under license, is not thereby settled, but remains within the exclusive regulation of the law of the state where the property is situated. In the same way, rights of the Alien Property Custodian have no bearing whatever upon the question of the disability of aliens of enemy nationality to acquire, hold, or devise real property.⁸⁰

On the court's own motion, *George v. People* was re-argued.⁸¹ Referring to the historical background of the statutory provisions of the New York Real Property Law, the court affirmed its original determination and said: "Read in the light of the common law, the composite effect of these statutes is to enable any alien, friend or enemy, to make a will but to allow only an alien friend to devise realty to any person, citizen or alien friend or enemy. This interpretation must logically follow because by statute only an alien friend may transmit realty by descent (R. P. L. sec. 10) and because under the common law an alien, friend or enemy, *may hold* realty, always subject of course to the sovereign's right to escheat. In this respect the common law still prevails."

New Jersey law takes the same view. In *Caparell v.*

⁷⁹ 7 Fed. Reg. 2991 (1942).

⁸⁰ As to stateless persons formerly of enemy nationality, see Chapter VI, n. 50.

As to pilot certificates to friendly aliens, see sec. 20.142(c) of the Civil Air Regulations, added February 22, 1943, 8 Fed. Reg. 2470 (1943): "A person who is in sympathy with the objectives of the United States and who is a trustworthy citizen of a friendly foreign government not under the domination of, or associated with any government with which the United States is at war."

⁸¹ N. Y. L. J. March 17, 1943, p. 1058.

Goodbody,⁸² two resident alien enemies of Italian nationality brought an action in a friendly litigation to determine the marketability of real property owned by them. In a scholarly opinion the court declared it to be a principle of common law that an alien enemy cannot extinguish the sovereign's power of seizure by conveying his interest to a citizen before the sovereign's power is exercised. The New Jersey legislature had then taken no measures to modify the law on this subject. Therefore, the court held that the common law prevailing at the time of the adoption of the State Constitution was still in effect.

⁸² 29 A. 2d 563 (Ch., N. J., December 29, 1942).

6. Stateless Persons Formerly of Enemy Nationality.

SPECIAL problems may arise from the presence of numerous refugees from European territories now in this country who are deprived of their former nationality.

Expatriation and denaturalization¹ have recently been adopted as a general principle of policy by totalitarian regimes, as in Germany,² Italy,³ and Hungary.⁴ Originally directed against the political foes and potential enemies who were supposed to violate their allegiance,⁵ these measures were extended to undesirable individuals irrespective of whether they were nationals by birth or by naturalization.

The device of individual denationalization was also adopted by the legislation of the Vichy government of

¹ The term "denaturalization" is used to denote the revocation of a naturalization, whereas "denationalization" refers to the status of nationality acquired on grounds other than naturalization, such as birth or marriage. "Expatriation" is the voluntary act of an individual, as "natural and inherent right of all people" (Joint Resolution July 7, 1868, 15 Stat. 223). As to the position of the United States on the question of expatriation, see Conference for the Codification of International Law, held at the Hague in 1930, Acts vol. II, *passim*, and Hackworth, *Digest of International Law*, vol. 3 (1942), p. 161. The loose usage by which "denationalization" is sometimes referred to as "expatriation" is not followed in this chapter.

² Statute concerning revocation of naturalization and cancellation of German citizenship, *Gesetz ueber Widerruf von Einbuengerungen und Aberkennung der Staatsangehoerigkeit*, July 14, 1933, Reichsgesetzblatt 1933 I 480, as amended July 10, 1935, Reichsgesetzblatt 1935 I 1015.

³ Royal Decree-law Concerning the Revocation of Citizenship of Jews Naturalized after January 1, 1919, September 7, 1938, *Gazzetta Ufficiale*, September 12, 1938.

⁴ Statute to Restrict Jewish Participation in Public and Economic Life, May 4, 1939, *Országos Toelvénytar* (National Law Record) May 5, 1939, transl. in (1939) 5 *Contemporary Jewish Record*, 64.

⁵ See Makarov, *Gesetze ueber Fragen der Staatsangehoerigkeit 1933-1938*, (1940) 9 *Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht* 531, at p. 551.

France, under which every Frenchman who is supposed to have broken his allegiance to France (especially by leaving France without appropriate official authorization in the critical period between May 10 and June 30, 1940) might be deprived of his French nationality and his property.⁶

All measures pursuant to the legislative acts of these governments are made by special decrees listing the names of the persons in question.

A recent German decree, however, of November 25, 1941,⁷ of general application, denationalizes all Jews living abroad and confiscates their property. This German decree with its detailed provisions probably serves as a model for the governments of occupied or Axis-controlled countries as long as Axis influence in those countries prevails.⁸ Anti-Semitism does not furnish the only pretext for such measures; denationalization and expropriation of property may likewise be directed against all persons supposed to be foes of the regime.

The German decree, which applies to a great number of former German nationals, scattered over various countries, is the first decree, since that of Soviet Russia of December 15, 1921,⁹ to provide for denationalization measures in general terms. Its legal effects, especially as regards

⁶ *Loi Relative a la Procedure de Decheance de la Qualite de Francais*, July 16, 1940; *Loi Relative a la Decheance de la Nationalite a l'Egard de Francais Qui Ont Quitte la France*, July 23, 1940 (*Journal Officiel* July 17 and 24, 1940).

⁷ Eleventh Decree for the Execution of the Statute concerning German Citizenship (*Reichsbuergerrecht*), *Reichsgesetzblatt* 1941 I 722; transl. (1942) 5 *Contemporary Jewish Record* 202.

⁸ Cf. Weinryb, *Jewish Emancipation Under Attack*, Research Institute on Peace and Post-War Problems of the American Jewish Committee (1942) p. 62.

⁹ Cf. Fisher Williams, *Denationalization*, (1927) 8 *British Year Book of International Law* 45. *Supplement au Repertoire de Droit International* (1934) sub verbo "refugies," p. 241; Note to *In re Antonowicz*, Court of Appeal at Aix-en-Provence, *Recueil Sirey* 1938 II, 213, in *Annual Digest and Reports of Public International Law Cases*, Years 1938-1940 (Ed. by Lauterpacht, 1942), Case No. 118, p. 363.

its application abroad, are very similar to those of the other foreign decrees providing for individual denationalization.¹⁰ These effects relate to both the status¹¹ of expatriated persons and to their property.¹²

Many interesting questions of international law¹³ and conflict of laws¹⁴ will result from the application of those decrees.¹⁵ The Norwegian question is one in point. The

¹⁰ See Jennings, *Some International Law Aspects of the Refugee Question*, (1939) 20 British Year Book of International Law 98.

¹¹ Note, *Domicil of Refugees*, (1942) 42 Col. L. Rev. 640; Lowensohn, *The Law of Domicil as Applied to Refugees*, (1940) 52 Juridical Review (Edinburgh) 28; Note, *Domicil of Political Refugees*, (1941) 192 L. T. 28; Feist, *The Status of Refugees*, (1941) 5 Modern L. Rev. 51. On proof of the status of a denationalized person, see Kempner, *Who Is Expatriated by Hitler? An Evidence Problem in Administrative Law*, (1942) 90 U. of Pa. L. Rev. 824, 827.

¹² In *Bollack v. Societe Generale*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (March 27, 1942), recognition was denied to expropriation by a decree of the Vichy-Government of France, *supra* n. 6, as to assets situated in the State of New York; the denationalization to which the plaintiff was subjected by the same measures was not considered.

¹³ On a related question, the non-recognition of the Nuremberg Law of September 15, 1935, in this country, see Hackworth, *Digest of International Law*, Vol. 2 (1941), p. 354. Stateless persons who at the time they became stateless were citizens or subjects of the Axis powers or of their allies are considered as being enemy nationals for licensing purposes under sec. 22.7, Transportation Regulations, March 5, 1943, 8 Fed. Reg. 2819 (1943).

¹⁴ Kaufmann, *Denationalization and Expropriation*, (1942) 92 Law Journal 93, points out at p. 94, as to a denationalized dying as resident abroad and leaving movable property in England: "If such a person dies, having had his abode in one of the countries where generally *lex patriae* is the personal law governing succession of aliens, but the law of the place of residence or ordinary abode (*residence habituelle*) is applied to cases of stateless persons, e. g., in France, Brazil, China, Japan, the question of the deceased's national status becomes material, whether he had acquired domicile in the English sense in the country of his residence or retained his domicile of origin."

On the other hand, denationalized German Jews living in this country cannot acquire anything either by descent or by will or gift from a German national, even not from their own relatives living in Greater Germany, sec. 4 of the German decree, *supra* n. 7. Earlier a similar measure was enacted as to persons who were individually denationalized by reason of the law of July 14, 1933, *supra* n. 2. The German statute of November 5, 1937, provided that such persons and their families cannot acquire anything from a German national as heir or devisee (*aktive Erbunfaehigkeit*) or as donee. Sec. 48 of the German Statute on Wills (*Testamentsgesetz*) of July 31, 1938 (*Reichsgesetzblatt I 973*) provides that wills conflicting with provisions of the law are null and void.

¹⁵ As to the general importance of these questions, Professor Philip Marshall

Quisling authorities in occupied Norway deprived Norwegians, living abroad, of their citizenship "because of their hostile attitude toward the Norwegian state,"¹⁶ while the Norwegian government-in-exile recently promulgated the Loss of Public Trust Act¹⁷ depriving all Axis collaborationists residing in occupied Norway of their citizenship and of the right to carry on a trade or profession after the war.

Apart from conflicting governmental authorities (as in the case of Norway)¹⁸ there arises the general question whether and to what extent foreign denationalization decrees are to be recognized abroad at all. That question cannot be decided solely along the practice which originated from the Russian denationalization measures and led to discussions about "statelessness" in the League of Nations.¹⁹ Even the renewed discussion which was caused by the emigration from Germany since Hitler's rise to power²⁰ and which resulted in further activities of Committees inaugurated by the League of Nations,²¹ so far has

Brown, (1942) 36 Am. J. Int. L. 450, may be quoted: "The tangles of human relationship resulting from migrations, exile, and armed occupations, such as marriages, divorces, deaths, wills, taxes, etc., will have to be dealt with intelligently, liberally, and justly, according to the generally accepted norms of judicial procedure. They cannot be left to the conflicting ideas and the confusion of diverse local jurisdictions. Here is a task demanding the highest intelligence and devotion of the friends and defenders of international law, which must be renovated and adapted to the needs of a world in revolution. The people of all countries will regain confidence in international law only insofar as it ministers to their actual interests."

¹⁶ (1942) 2 News of Norway, p. 189.

¹⁷ N. Y. Times, January 6, 1943.

¹⁸ See further the Norwegian decree of October 3, 1941, cited Chapter I, n. 43, and, generally, Lessing, *Los Momentos de Conexion en el Derecho de Nacionalidad*, Reprint from *Revista Argentina de Derecho Internacional* 1942, p. 58.

¹⁹ See League of Nations, C. 25. M. 25. 1942 XII "International Assistance to Refugees"; Report on the Work of the League of Nations 1941-1942, C. 35. M 35. 1942 (Geneva 1942) p. 65.

²⁰ Emerson, *Postwar Problems of Refugees* (Address to members of the Exec. Comm. of the Intergovernmental Committee dealing with refugee problems, (1943) 21 Foreign Affairs 211.

²¹ See Warren, *The Refugee and the War*, (1942) 223 Ann. Acad. Pol. Soc.

provided no adequate basis for a solution of the manifold legal problems involved in the status of stateless persons.

It may be mentioned that the Convention Concerning the Status of Refugees Coming from Germany, February 10, 1938,²² defines such refugees as follows: "(a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government; (b) Stateless persons who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government; (c) Persons who leave Germany for reasons of purely personal convenience are not included in this definition."

The position of stateless persons formerly of enemy nationality in this country is to be discussed only to the extent that it bears upon the trading with the enemy law of the United States, and especially upon the question whether such individuals are exempt from certain restrictions to which war-time regulations subject aliens of enemy nationality. Generally speaking, statelessness does not alter the legal situation of such aliens. Several Federal regulations expressly apply also to stateless individuals who were formerly of enemy nationality. In such cases, no question arises as to what influence foreign denationalization may have upon the legal status abroad of denationalized aliens of (former) enemy nationality, for such persons by statutory provision remain in the same category as other aliens of their (former) nationality.

However, the Regulations Controlling Travel and Other Conduct of Aliens of Enemy Nationalities, February

Sc. p. 92; Loewenfeld, *Status of Stateless Persons*, (1942) 27 Transactions Grotius Society p. 59, 80.

²² League of Nations, C. 75 M. 30. 1938 XII.

5, 1942,²³ do not apply to persons who formerly were German, Italian, or Japanese citizens or subjects, and who before December 7/8, 1941, became citizens or subjects of any nation other than Germany, Italy or Japan. On the other hand, the War Damage Corporation, in establishing general exceptions,²⁴ declared null and void a policy of insurance against property loss or damage resulting from enemy action, to the extent that such policy covered property owned by a national of Germany or Japan.²⁵ This provision was extended to stateless refugees by the Regulations of November 17, 1942,²⁶ which in sec. 1 provides: "As used herein the words 'nationals of Germany or Japan' are intended to include nationals or former nationals of Germany or Japan, wherever resident, notwithstanding loss of their former citizenship pursuant to law or decree of either such country, and notwithstanding the filing of first papers manifesting an intention on the part of such persons to become citizens of the United States."²⁷

Stateless persons of former enemy nationality, like all other alien enemies, are not subject "during their service in the armed forces of the United States"²⁸ to the restric-

²³ 7 Fed. Reg. 844 (1942).

²⁴ Policies covering property owned by nationals of Italy, Bulgaria, Hungary, or Rumania, who do not reside and are not doing business in enemy territory or enemy-occupied territory, will be construed as valid, though such owners are nationals of a "country with which the United States is at war."

²⁵ A further amendment to the Rules of the War Damage Corporation provided that mortgagees or other persons holding by way of security interest in property in which nationals of Germany or Japan may hold an interest may be insured against bombardment risk provided such interest was acquired before December 7, 1941. *N. Y. Times*, November 24, 1942.

²⁶ Memorandum No. 16 to Fiduciary Agents, *Journal of Commerce and Commercial*, November 23, 1942; cf. No. 13, October 5, 1942, *ibid.* October 8, 1942.

²⁷ As to the participation of enemy aliens in the scheme of Australian war damage legislation (*Aliens' Compensation Account*), see r. 43A of the National Security (War Damage to Property) Regulations, as amended, *Stat. Rules* 1942 No. 222; Mitchell and Baalman, *War Damage to Property in Australia* (1942) p. 243.

²⁸ Dep't of Justice, February 19, 1942, 7 Fed. Reg. 1474 (1942).

tions imposed upon alien enemies. Furthermore, while property of stateless refugees remains excluded from insurance against so-called bombardment risk, even if they are in the armed forces, the Soldiers' and Sailors' Civil Relief Act, as amended October 6, 1942,²⁹ includes in the term "insured," "any person on active duty with the military and naval forces of the United States (including Coast Guard) and any member of the Women's Army Auxiliary Corps, whose life is insured under and who is the owner and holder of and has an interest in a policy."

Unlike the regulations prevailing in this country up to the present with regard to refugees of Axis-controlled countries, the Australian National Security (Aliens Service) Regulations of February 3, 1942, r. 2,³⁰ contain an express definition of "refugee alien." The term as there defined means "an alien who has no nationality, or whose nationality is uncertain, or who is an alien enemy, in respect of whom the Minister of State for the Army, or a person authorized by that Minister to act on his behalf, is satisfied (a) that the alien was forced to emigrate from enemy territory on account of actual or threatened religious, racial or political persecution, and (b) that he is opposed to the regime which forced him to emigrate." Statelessness is the test which exempts a group of refugees of former enemy nationality from the restrictions imposed upon aliens of such nationality. Under the Regulations, the same classification is granted individually to persons on the basis of investigation by Australian authorities.

As to the foreign funds control in the United States, refugees, stateless or not, who have come to this country from any of the blocked countries, are subject to the pro-

²⁹ §10.3320, 7 Fed. Reg. 10232 (1942), issued under Public Law No. 732, 77th Cong., 2d Sess.

³⁰ Statutory Rules 1942 No. 39, Commonwealth Gazette February 3, 1942.

visions of Executive Order No. 8389, as amended, and are generally licensed nationals under General License No. 42, as amended,³¹ if they were residing in this country on February 23, 1942, and had not thereafter entered any blocked country.³² But their position under the foreign funds control of the United States is by no means different from that of other resident aliens, whether of enemy or of non-enemy nationality, stateless or not.³³

The decree of the Dutch government-in-exile of May 24, 1940,³⁴ vesting in the State of the Netherlands title to assets abroad of nationals residing in occupied territory, was made applicable, sec. 2(1), to those nationals³⁵ only who before May 15, 1940, were not domiciled outside of the territory of the Kingdom in Europe now occupied by the enemy.

Stateless refugees of other than German origin are not treated differently from those who are expatriated by a measure of general application such as the German decree regarding German Jews living abroad. Thus, Frenchmen living in this country, even those who were expatriated, are treated as "nationals of a foreign country" within the meaning of Executive Order No. 8389. Only if they were residing in the United States since February 23, 1942, are they exempted from the restrictions imposed upon those coming from the originally unoccupied zone of France

³¹ 7 Fed. Reg. 1492 (1942).

³² See Press Release, Treasury Department, February 23, 1942, Fed. Res. Bank of New York, Circular 2383.

³³ Persons who formerly were domiciled in an enemy-occupied territory and are living as refugees in the United Kingdom with a Home Office permit to reside there (not being a transit permit) as the Belgian, Dutch, and French refugees, are regarded as residents, within the meaning of the financial regulations. Howard, *The Defence (Finance) Regulations, 1939* (1942) p. 6.

³⁴ Staatsblad No. A 6, *infra* Chapter XXI.

³⁵ "Persons who according to the Law of the Netherlands are 'Nederlandsche onderdanen,'" Staatscourant No. 152, June 10, 1940.

(Vichy-France), which zone was declared enemy territory on November 8, 1942.³⁶

As to money placed at the disposal of refugees while they were still in the country from which they wanted to emigrate, the question arose if the persons who furnished such money in order to facilitate the immigration of those refugees, could be reimbursed. The legal question turned on whether such sums were paid "on behalf of enemies" in favor of individuals residing in enemy territory. The question was considered in England in *Weiner v. Central Fund of Jewry*,³⁷ and in this country in *Hansen v. Emigrant Bank*³⁸ and in *Dobschiner v. Levy*.³⁹ A discussion of these cases will be found in Chapter XI.

Incidentally, the numerous refugees from occupied European countries who entered the United States since the summer of 1940 are not yet aware of the benefit they derived from the freezing of their assets in this country. Immediately after the invasion of Western European countries by the German armies, the assets of nationals of foreign countries were blocked in the United States. As early as April 8, 1940 (Norway and Denmark), May 10, 1940 (the Netherlands, Belgium and Luxemburg), and June 17, 1940 (France), these assets could not be withdrawn by their owners, and German occupation authorities could not cause any disposition of such assets in favor of persons designated by such authorities.⁴⁰ Thus, the freezing regulations were the decisive reason why the German pattern of imposing a heavy "capital flight tax" (*Kapitalfluchtsteuer*) upon all persons leaving the country was not fol-

³⁶ General Ruling 11, as amended, November 8, 1942, 7 Fed. Reg. 9119 (1942).

³⁷ (1941) 2 All E. R. 29 (K. B., February 18, 1941).

³⁸ N. Y. L. J. March 27, 1942, p. 1305; September 9, 1942, p. 539.

³⁹ 39 N. Y. S. (2d) 277 (December 21, 1942, rehearing January 15, 1943).

⁴⁰ Cf. Jessup, *The Litvinov Assignment and the Pink Case*, (1942) 36 Am. J. Int. L. 282, 283.

lowed in the territories occupied or controlled since spring 1940. Most probably, such tax might have been levied upon persons to whom exit permits were granted if there had been any possibility of utilizing their property abroad. Precisely because these assets were frozen at a date which followed very closely upon the invasion of Western European territories, immigrants and visitors in this country were thus enabled to use these assets for themselves, as generally licensed nationals under General License No. 42, as amended. Otherwise, these assets might have been used to pay for taxes or ransoms for the granting of exit permits. (This recent technique of German authorities extorting money from friends of prospective emigrants living abroad is mentioned *infra* Chapter XI, n. 26.)

Generally, loss of citizenship by denationalization has not been recognized insofar as enemy qualifications under the Trading with the Enemy Act are concerned. In cases dealt with during the last war,⁴¹ persons pretended to have lost their nationality, under the laws of the country of their origin, on the ground of long absence from that country.⁴² The question was whether such persons had completely lost their (enemy) nationality.⁴³

David Dudley Fields⁴⁴ proposed the rule that "a person who has ceased to be a member of a nation, without having acquired another national character, is nevertheless deemed to be a member of the nation to which he last belonged, except so far as his rights and duties within its territory, or in relation to such nation are concerned."

⁴² For English cases regarding the loss of German nationality during the First World War, see the authorities cited in *Stoeck v. Public Trustee*, (1921) 2 Ch. 67.

⁴³ See, generally, on the effect of change of sovereignty upon nationality, Hackworth, *Digest of International Law*, vol. 3 (1942), p. 302; Mann (1942) 5 *Modern L. Rev.* 218.

⁴⁴ *Outlines of an International Code*, 2d ed. (New York 1876) 130.

But such a rule, as Professor Borchard⁴⁵ has said, can "hardly be considered as a recognized rule of international law." Professor Borchard's view appears more fully justified at the present time when, for instance, a totalitarian state in a recent enactment changed its conflict of law rules with special reference to stateless individuals. Article 29 of the Introductory Law of the German Civil Code, as amended by the Statute Amending and Modifying the Law of Domestic Relations and the Status of Stateless Individuals, of April 12, 1938,⁴⁶ now provides that the law of the state where a stateless individual has or has had his permanent domicile shall govern the legal status of such an individual in cases governed by the national law of the individual.

But the situation of stateless refugees in this war calls for quite different considerations. Whereas in the last war the question was whether a person's nationality was lost completely, in this war no doubt exists as to the completion of the expatriation and denationalization of refugees by a unilateral act of their original sovereign. The question now is rather whether, as a matter of principle, such a measure is to be recognized abroad.⁴⁷ This question may

⁴⁵ Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1927) 592.

⁴⁶ Reichsgesetzblatt 1930 I 380, 417. See Raape, *Deutsches Internationales Privatrecht*, vol. 2 (1940), p. 384, and as to the general shifting from the nationality to the domicile principle, Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, (1942) 42 Col. L. Rev. 189, at p. 204.

⁴⁷ "Nationality is the status of a person in relation to the tie binding such person to a particular sovereign nation. That status is fixed by the municipal law of that nation," Administrative Decisions I, Mixed Claims Commission, United States and Germany, Decisions and Opinions, vol. 1, p. 189, 193, quoted by Hackworth, *supra* n. 43, p. 5. "It is for each State to determine under its own law who are its nationals," Hague Convention on Nationality Conflicts, Hudson, *International Legislation*, vol. 5 (1936), 359, 364.

It would seem to follow that municipal law is also competent to make the negative decisions involved in this determination, i. e., to decide on the loss of nationality.

be considered here only insofar as it bears upon trading with the enemy law.

It may be recalled (Chapter V) that exemptions from restrictions of certain classes of aliens of enemy nationality in this country, such as the Austro-Hungarians and Italians, do not depend on whether or not such individuals residing in this country are expatriated nationals. On the contrary, expatriation of refugees residing in this country is no reason to distinguish them from other nationals of their country of origin, as, for instance, under the War Damage Regulations. Even the acquisition by expatriated refugees of another nationality (other than citizenship of the United States) results in exemption only from travel restrictions, but not from restrictions imposed upon alien enemies in naturalization proceedings.

The question of allegiance may indeed play a definite role in connection with disability of alien enemies with regard to real property. This question, which has been discussed in Chapter V, is whether stateless refugees formerly of enemy nationality are to be treated as "friendly aliens."⁴⁸ They do not, it is true, owe any allegiance to the country of their origin, since that country itself refused to take care of the interests of the individuals concerned, by refusing passports, denying diplomatic protection, prohibiting reentry into their home country, and even denationalizing them. Allegiance, as the "obligation of fidelity which an individual owes to the government under which he lives, or to his sovereign *in return for protection which he receives* (italics supplied)⁴⁹ is a reciprocal atti-

⁴⁸ Cf. Eagleton, "Friendly Aliens," (1942) 36 Am. J. Int. L. 661; Davie, *Immigrants from Axis-conquered Countries*, (1942) 223 Ann. Am. Acad. Pol. Soc. Sc. p. 114.

⁴⁹ *Carlisle v. United States*, 16 Wall. 147, 154 (1872). "Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obliga-

tude and no longer binds those stateless refugees to the government of their country of origin. They do not fall into the class of aliens who are excluded from the benefits of statutory state law such as sec. 10 of New York Real Property Law. An informal opinion of the Attorney General of the State of New York of July 1, 1942,⁵⁰ dealing with the capacity of refugees to take, hold and transmit real property, points out: "Germany (and possibly also this would apply to other Axis enemy nations) has expatriated Jewish refugees by law (November 25, 1941). There would appear to be no sound reason why New York courts would not recognize that these refugees have lost their citizenship in enemy countries." The opinion further points out that, "the Federal Statute furnishes no definition of 'enemy aliens.' It deals with a matter of war-time regulation. Title to real property is governed by the law of the State."⁵¹

Possibly state courts, though not bound by the opinions of the Attorney General, informal or otherwise, will recognize the denationalization as enacted by the law of the country of origin of the stateless person. It is true also that the federal statute to which the opinion refers, namely, the Alien Enemy Act,⁵² does not contain any definition of "alien enemies" that may be applied to real property questions in the State of New York.

tions, one being a compensation for the other," *Luria v. United States*, 231 U. S. 9, 22 (1913).

⁵⁰ Letter to the Jewish Agricultural Society, Inc., New York, N. Y. Times, July 6, 7, 1942. "The conclusion of the Attorney General is subject to one contingency—the title, while in the refugee may be subject to divestment by the State of New York itself as sovereign." See Pratt, *Present Alienage Disabilities Under New York State Law in Real Property*, (1942) 12 Brooklyn L. Rev. 1.

⁵¹ See Steckler and Rosenberg, *Real Property of Enemy Aliens*, 107 N. Y. L. J. 1710; Rosenberg, *Alien—Friends and Enemies*, (1942) 5 Contemporary Jewish Record 282.

⁵² 40 Stat. 531 (1918).

This statutory federal law which declares all citizens, natives, denizens and subjects of an enemy country to be "alien enemies," covers also stateless persons formerly of enemy nationality because they are, if not subjects, evidently natives of that country. But this statutory federal law has no bearing upon New York state law. There is no doubt that the New York statute admits to trading in real estate only specific aliens, namely, "friendly aliens." It was held in *Techt v. Hughes* and recently in *George v. People*⁵³ that resident Austrians in the First World War and resident Italians in this war, who were neither denaturalized nor denationalized, are not to be considered "friendly aliens," because the country the nationals of which they are is at war with the United States. Stateless persons formerly of enemy nationality, not only Jews who are collectively denationalized, but also other, individually denationalized persons, do not owe allegiance any more to that country of their origin which refuses them all protection, as mentioned above. Though such persons are not exempted from the federal restrictions imposed upon aliens of enemy nationality, they are not to be excluded from the benefits which New York Real Property Law grants "friendly aliens."

On the other hand, stateless persons, as individuals generally licensed under General License No. 42, as amended,⁵⁴ on the ground of their residence in this country, continue to be subject to the Foreign Funds Control. A general license under the freezing regulations does not amount to an exemption from the freezing regulations. Thus, though stateless refugees may no longer be considered citizens of a foreign (blocked) country, they are still subjects of that country, in the meaning of sec. 5E(i) of

⁵³ N. Y. L. J. December 23, 1942, p. 2021.

⁵⁴ 7 Fed. Reg. 1492 (1942).

Exec. Order No. 8389 as amended, although they may have acquired in the meantime another nationality, even citizenship of the United States.

The particular situation of stateless refugees, formerly of enemy nationality, may make it necessary to differentiate⁵⁵ their treatment from that of other such aliens living in this country, who have retained their nationality. Such differentiation might result in making the legal situation of stateless refugees comparable to that of foreigners other than aliens of enemy nationality. The distinction between these two classes under the Trading with the Enemy Act and especially under the amendment by sec. 301 of the First War Powers Act, 1941, is emphasized by Turlington⁵⁶ who puts the question: "To what extent does the position of nationals of countries with which we are at war differ, as regards the action of our Government with respect to their property, from the position of other foreigners?"⁵⁷

Similar rulings in other countries, for instance in Guatemala⁵⁸ and in Peru,⁵⁹ exempted stateless Jewish refugees from the restrictions which were there imposed upon the funds and securities of nationals of the countries of their origin. Likewise, in Brazil, confiscatory measures⁶⁰ against

⁵⁵ On "reclassification" see Rowe, *The Alien Enemy Program—So Far, Common Ground*, Summer 1942, p. 19; Harrison, *Alien Enemies*, (1942) 13 Penn. Bar Ass. Q. 196, 198; Letters to the N. Y. Times by W. C. Dennis, April 13, 1942, P. J. Eder, April 15, 1942, and J. McDonald, June 8, 1942.

⁵⁶ *Vesting Orders Under the First War Powers Act, 1941*, (1942) 36 Am. J. Int. L. 460, 463.

⁵⁷ On questions arising out of the (British) Czecho-Slovakia (Financial Claims and Refugees) Act of 1940, 3 & 4 Geo. VI, c. 4, see Cohn, *The Settlement of Czechoslovakian Financial Claims—A Contribution to the Problem of Post-War Readjustment*, (1941) 16 Tulane L. Rev. 59.

⁵⁸ Decree No. 2655, December 23, 1941, sec. 41, reads as follows: "The Government may rule that persons who are nationals of the countries at war with the Republic but have suffered persecution because of race or religion may be exempted from the application of the provisions contained in the present law. For these persons, pertinent provision will be made in each individual case by the Secretary of Foreign Affairs."

⁵⁹ See (1942) 1 Bulletin, World Jewish Congress No. 2, p. 12.

⁶⁰ N. Y. Times, March 13, 1942.

citizens of the Axis powers which were enacted "in compensation for the losses suffered by Brazil at the hand of those Powers" were later⁶¹ lifted for Jewish refugees.

However, under the Trading with the Enemy Acts of the different countries, the legal status of refugees results in certain anomalies in situations such as the following: A German Jew left Germany in 1933, emigrated to France and because of his German birth was interned there in September, 1939, after the outbreak of the war between France and Germany. He finally came to the United States in April, 1942, from Marseilles, in the then unoccupied zone of France. He is and remains an enemy within the meaning of the German as well as the French and British Trading with the Enemy Acts, and he is not "a generally licensed national" in the United States, since he acquired residence in the United States after February 23, 1942.

For the purposes of the German Act of January 15, 1940, as amended, sec. 3 (1),⁶² he is an enemy because at the outbreak of the war he resided in France, an enemy country. Though the German Act does not regard Germans interned in enemy countries as enemies, Jews are expressly excluded from this provision.⁶³ Thus his insurance policies with companies situated in Germany—even neutral companies with agencies in Germany—were sequestered and subsequently confiscated, as property of a Jew of German origin living abroad.⁶⁴

At the same time he is and remains an enemy within the meaning of the French Trading with the Enemy Act of September 1, 1939,⁶⁵ sec. 3 (c), as an enemy national

⁶¹ N. Y. Times, October 7, 1942.

⁶² Chapter I, n. 8.

⁶³ Decree of June 27, 1940, (1940) 102 Deutsche Justiz, p. 732.

⁶⁴ *Supra* n. 7.

⁶⁵ Journal Officiel September 4, 1939, p. 11089.

(*ressortissant allemand*) interned in France. Accordingly, his banking accounts in Paris, his former residence, were sequestered. Though this French legislation was formally repealed after the Armistice of June 22, 1940,⁶⁶ no release of his funds in Paris banks was authorized, still less any transfer to unoccupied France.

Since the British Trading with Enemy (Specified Areas) Order No. 1⁶⁷ declared all of France, including the zone of Vichy-France (unoccupied until November 11, 1942) enemy territory, his property in England was transferred to the Custodian of Alien Property. It is not *ipso jure* released although the owner is now in the United States, as a lawfully admitted immigrant. This example may show that legal provisions framed with a view to fairly simple situations are inadequate to meet the special problems with which refugees are faced.

The question of the legal position of refugees in the different American Republics was recently dealt with by the Inter-American Juridical Committee,⁶⁸ whose reporter prepared an elaborate questionnaire for submission to the Governments, asking for information, *inter alia*: "What test did the particular Government apply in classifying persons as refugees? Were there any administrative regulations applicable exclusively to refugees as distinct from other aliens, and in this connection was any distinction made between refugees who kept the nationality of their State of origin and others who had lost it?" The term "refugee" as used by the reporter refers to "a person who, whether or not deprived of his nationality, in consequence of serious and notorious political conditions in the country

⁶⁶ Chapter II, n. 34-38; Domke, *El Convenio de Armisticio Germano-Frances y el Derecho Internacional* (1942) 21 *Revista de Derecho Internacional* 192.

⁶⁷ S. R. & O. 1940, No. 1219.

⁶⁸ Fenwick, *The Inter-American Juridical Committee*, (1943) 37 *Am. J. Int. L.* 5, 16.

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from which he comes, has left the territory of his own accord in order to preserve his liberty or has been constrained to leave it by the public authorities, and who, moreover, does not enjoy the diplomatic protection of another State." This refers to refugees of non-American origin, and does not include American political exiles or emigrants. The Chairman of the Committee, referring to the case of stateless refugees (*apatridas*), expressed the view that "inasmuch as nationality is exclusively a matter of domestic legislation, a refugee should not be considered by a third State as being a national of the State which has expressly deprived him of his nationality."⁶⁹

⁶⁹ *Ata da 23a Sessao*, p. 3, quoted by Fenwick at p. 17.

7. Internees, Evacuees, and Prisoners of War.

INDIVIDUALS of enemy nationality who are interned in the country of their residence are expressly declared enemies in some Trading with the Enemy Acts. Thus, the French Act of September 1, 1939,¹ sec. 2 (d), includes in the term "enemy" "all enemy nationals (*ressortissants ennemis*) interned in France or in an allied country." The Canadian Consolidated Regulations Respecting Trading with the Enemy (1939) not only adopt the point of view of the French Act, treating an individual interned even in the country of an allied power as enemy,² but they go further in recognizing the fact of seizure of property as indicative of an enemy attitude of its owner, regardless of his residence. An amendment of December 16, 1941,³ included in the term "enemy," sec. 1b VI: "any person who has been interned or detained under the authority of the Government of a power allied or associated with His Majesty or whose property within the territory of such power has been treated by that power as enemy property."

In Australia, the National Security (Internment Camps) Regulations⁴ provide that the Camp Commandant shall be a virtual custodian of the property of any internee. But no title to property is vested in the Commandant by reason of the internment, nor has he by virtue of his office

¹ Journ. Off. September 4, 1939, p. 11091: "*Tous ressortissants ennemis internés en France métropolitaine, en Algérie, dans les colonies françaises ou dans un pays allié.*"

² Sec. 1 b V: "any person who has been detained under the Defence of Canada Regulations during the period of such detention."

³ P. C. 9797.

⁴ Statutory Rules 1941, No. 7.

any power of disposition. "He may permit the sale of any of his property by an internee and any arrangements necessary in connection therewith," r. 16 (1). The regulations would not limit or restrict the incidence of National Security (Enemy Property) Regulations⁵ in relation to interned enemy subjects.⁶ In New Zealand, interned persons are expressly included in the regulations regarding prisoners of war.⁷ Again, a Cuban decree⁸ provides that all assets of citizens of the countries at war with Cuba "who are arrested, interned, or who do not reside in the territory of the Republic" shall be vested in the Interventor for Property of Enemy Aliens.

In English law, "civil internment does not revoke the license to stay in the country and does not involve, by itself, the enemy character of the interned person."⁹

In *Unger v. Preston Corporation*,¹⁰ the plaintiff, who came to England from Germany in 1934 as a "refugee from Nazi oppression," was engaged by a local authority as a full time school medical officer before the outbreak of the war. On June 25, 1940, he was interned as an enemy alien

⁵ Statutory Rules 1942, No. 228.

⁶ Cf. Baalman, *War Legislation Affecting Property in Australia*, (1942) p. 62.

⁷ Prisoners of War Emergency Regulations 1940, Serial Number 1940/25, February 21, 1940, r. 2(ii); prisoner of war includes "any person of enemy nationality who is for the time being detained under the authority of the Alien Control Emergency Regulations 1939, or any other lawful authority as an executive measure, and not in execution of any judicial sentence."

⁸ No. 3343, December 21, 1941, Pan American Union, Congress and Conference Series No. 40 (1942), p. 26.

⁹ Webber, *Effect of War on Contracts* (London 1940) p. 27. As to the general question of internment of aliens in England, see *Schaffenus v. Goldberg* (1916) 1 K. B. 284; Kempner, *The Enemy Alien Problem in the Present War*, (1940) 34 Am. J. Int. L. 443; Cohn, *Legal Aspects of Internment*, (1941) 4 Modern L. Rev. 200; Note, *Civil Liberties in Great Britain and Canada During War*, (1942) 55 Harv. L. Rev. 1006, 1013, 1016; Koessler, *Enemy Alien Internment, with Special Reference to Great Britain and France*, (1942) 57 Pol. Sc. Qu. 98, and especially the Report of the British Library of Information, New York, March 20, 1942, reprinted as Exhibit 13 to Hearings on National Defense Migration (H. Res. 113), Part 31 (1942), p. 11 861.

¹⁰ (1942) 1 All E. R. 200 (Liverpool Autumn Assizes, November 11, 1941).

and was not released until March 7, 1941. In reply to a claim by the plaintiff for payment of his salary during the period of his internment, the defendants contended that, according to the doctrine of frustration,¹¹ his contract of employment was terminated automatically on the date of his internment. It was held that the contract was frustrated by the internment of the employee as an enemy alien where the internment caused more than a temporary interruption of the economic purpose of the contract.¹²

In *Matthiesen v. Glas*¹³ it was held that a creditor was not debarred from sequestrating a debtor's estate by reason of the fact that the creditor was an enemy national, for the time being interned in the Union of South Africa.

In American law, an interned individual of enemy nationality is not considered an "enemy" within the meaning of the Trading with the Enemy Act as long as the President of the United States by proclamation under sec. 2 (b) of this Act has not included such person in the definition of enemy.¹⁴ No such proclamation has as yet been issued during this war. This has been emphasized by the United States Supreme Court in *Ex parte Kumezo Kawato*,¹⁵ in an action by a Japanese fisherman to recover damages due to collision. Here the Government filed a supplemental brief stating that it did not consider that the subsequent internment altered "the position of the petitioner (for writ of mandamus) in respect to his privilege of access to the courts." The Court said: "Since the President has not under this [Trading with the Enemy] Act made any declaration as to enemy aliens, the Act does not bar peti-

¹¹ See Chapter XV, n. 55.

¹² On frustration of a service contract by detention of a British engineer, see *Knight v. Guilford Corporation*, (1942) 194 L. T. R. 30 (K. B., July 15, 1942).

¹³ (1940) South Africa L. Rep. 147 (Sup. Ct., Transvaal Provincial Division).

¹⁴ See *Tortoriello v. Seghorn*, 103 A. 393 (N. J. Eq. 1918); Hays, *Enemy Property in America*, (1923) p. 67.

¹⁵ 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942).

tioner from maintaining his suit.”¹⁶ The same point of view has been expressed in the opinion of the General Counsel of the Alien Property Custodian, August 6, 1942,¹⁷ where it is said: “The rules of the Geneva Convention which govern the property of prisoners of war, dealing with factors quite different from the property of interned persons, do not, in the opinion of the [Alien Property Custodian’s General] Counsel, affect the Custodian’s right to deal with property of internees, and are overridden, insofar as they conflict with policies empowering the Custodian to deal with the property of ‘nationals’ of foreign or enemy countries, by the Trading with the Enemy Act and Executive Order No. 9095,” and further: “The Trading with the Enemy Act contains no express reference to internees or their property, either before or after the amendment of 1941, nor do the various Executive Orders conferring authority upon the Custodian. . . . Since internees are persons not within designated enemy countries, the Custodian may bring such individuals within the definition of ‘national of a designated enemy country’ for the purpose of vesting classes of their property comprehended within the purview of subdivision (a), (c) and (f), only by determining that the internee is (a) “controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country,” or (b) “that the national interest of the United States requires that such person be treated as a national of a designated enemy country. . . . In short, the powers and duties of the Alien Property Custodian with respect to the property of interned individuals, do not differ from his

¹⁶ In *Sonnenfeld v. Redeventza S. A. Belge Pour le Raffinage de Petrole*, N. Y. L. J. November 22, 1941, p. 1608, the court did not determine the question “if plaintiff would have a right of action notwithstanding inability to perform by reason of his internment.”

¹⁷ C.C.H.W.L.S. ¶9752.

powers over the property of persons not interned." Thus, Vesting Order 475, regarding Property of Interned Enemy Aliens, December 10, 1942,¹⁸ determined "such persons, having been interned or detained within the United States pursuant to law, are nationals of designated enemy countries," and determined further "that the national interest of the United States requires that they be treated as nationals of a designated enemy country (Italy)."¹⁹

Though the Geneva Convention relating to the Treatment of Prisoners of War²⁰ does not, as is stated, affect interned persons and especially not their property, the United States Department of State declared²¹ that "enemy aliens whom it might be found necessary to intern would be treated at least as favorably as prisoners of war." The Government of this country declared that it would apply to "civilian enemy aliens as liberal a regime as was consistent with the safety of the United States."^{21a}

The Alien Enemy Act as amended,²² under which the Presidential Proclamations of December 7 and 8, 1941,²³ were issued and under which aliens have been arrested in this country, has been construed by courts with regard to the question whether an arrested person is an alien enemy within the meaning of the statute. This query has arisen in recent cases where aliens of Austrian, German, and Italian origin have been arrested.²⁴

In United States ex rel. Wakler d'Esquiva v. Uhl, Di-

¹⁸ 7 Fed. Reg. 11036 (1942).

¹⁹ As to Japanese in an alien detention camp, see Vesting Order 424, December 1, 1942, 7 Fed. Reg. 11036 (1942).

²⁰ July 27, 1929, Treaty Series 846, 47 Stat. 2021.

²¹ *Treatment of Civilian Enemy Aliens and Prisoners of War*, (1942) 6 Bulletin, Dep't of State 445.

^{21a} See Wilson, *Treatment of Civilian Alien Enemies*, (1943) 37 Am. J. Int. L. 30, 39.

²² 40 Stat. 531 (1918).

²³ 6 Fed. Reg. 6321, 6323, 6324 (1942).

²⁴ On Japanese, see *infra* n. 52 *seq.*

rector of Immigration and Naturalization of the United States in the New York District,²⁵ an alien born in Austria had left that country before March 13, 1938, the date of the *Anschluss*, to become a resident of France. He immigrated to this country in 1939. Though not residing in Austria at the time of the *Anschluss*, he was held to be a native of Germany, within the meaning of Proclamation No. 2527 of December 8, 1941.²⁶ In defining the term "native," the court said: "It is my belief that by 'native' Congress meant those persons who are not citizens of the United States, and who were born within what is now the territorial limits of a country at war with the United States, although they may not owe allegiance to that country." In *United States ex rel. Zdunic v. Uhl*,²⁷ a person born in the Austrian-Hungarian Province of Bosnia, after the First World War became a citizen of Yugoslavia, but left that country in 1922 for Austria. He was living and working in Austria, at the time of the *Anschluss*, and continued to live there. He became a member of the German Labor Front and was issued a German passport. In 1939 he left Austria for the United States. He was held a denizen of Germany, within the meaning of Proclamation No. 2527, December 8, 1941, and hence liable to detention, regardless whether Austria was part of Germany *de jure* or *de facto*. Said the Court: "He lived within a German controlled country, subject to its domination and such laws as it cared to make, and enjoyed certain privileges" (at p. 520).

In the *Schwartzkopf* case²⁸ an arrested alien asked for

²⁵ D. C. S. D. N. Y., July 15, 1942, C.C.H.W.L.S. ||9729.

²⁶ 6. Fed. Reg. 6323 (1941). As to the position of Austro-Hungarians in this country, see Chapter V, n. 41.

²⁷ 46 F. Supp. 688 (July 7, 1942), *aff'd* on reargument 47 F. Supp. 520 (August 11, 1942).

²⁸ N. Y. Times, May 13, 1942, not otherwise reported.

writ of habeas corpus, on the ground that born in Prague, later Czechoslovakia, he became a naturalized German in 1925, that he left Germany after Hitler's rise to power for Austria, and became an Austrian citizen in 1936. He immigrated to this country after 1938. He pleaded that he had lost his Germany citizenship by acquiring the citizenship of a foreign country (Austria). The District Court, Southern District, New York, dismissed the petition. The question in this case was a particular one, namely, whether former German subjects who are not "natives" of Germany can be treated as alien enemies, under the Presidential Proclamation No. 2526 of December 7, 1941, if their last citizenship was German.

In *United States ex rel. Buchs v. Uhl*,²⁹ petitioner was born in Paris, France, of parents born in Germany. He resided in France continuously until he went to Germany at the age of sixteen, and came to the United States in 1924. He stated his nationality as German when registering under the Alien Registration Act of 1940,³⁰ but in filing a declaration of intention to become a citizen of the United States in 1941, he stated his nationality as French. The court denied the petition for writ of habeas corpus on the ground that the alien had manifestly failed to sustain the burden of proof that he is not an alien enemy.³¹

On the other hand, in *United States ex rel. De Cicco v. Long*,³² an alien enemy held in custody as a subject of Italy was admitted to bail and to habeas corpus to inquire

²⁹ D. C. S. D. N. Y., August 28, 1942, C.C.H.W.L.S. ||9738.

³⁰ 54 Stat. 673.

³¹ During the last war, the naturalization of a citizen of Natal and therefore a British subject in Germany was held void as being prohibited; thus the son of that person was not considered an alien enemy, in *Ex parte Schumann*, (1940) Natal Provincial Division 251, reported in *Annual Digest and Reports of International Law Cases, Years 1938-1940* (Ed. by Lauterpacht, 1942), Case No. 115, p. 350.

³² 46 F. Supp. 170 (D. C. D. Conn., July 4, 1942).

into his citizenship. The petitioner, born in Italy in 1880, came to the United States in 1903, and was naturalized as an American citizen in 1909. He served in the Italian army in 1915, and was employed by the Italian Government in this country. He was taken in custody as a subject of Italy under the authority of the Presidential Proclamation No. 2527, of December 8, 1941,³³ as having submitted himself to Italian military law upon his return to Italy in 1915, and thus having expatriated himself. In reviewing former decisions³⁴ the court held that any person held in custody under the Alien Enemy Act³⁵ is entitled to a judicial determination of his claim of citizenship where that claim is raised in good faith, but decided, in the instant case, that petitioner is not a United States citizen.

The burden of proof in such habeas corpus proceedings rests upon the alien taken into custody. It is for him to show that there are no facts justifying the application of the Presidential Proclamations under the Alien Enemy Act, that is to say, that he is not an alien enemy. Said the Court in *United States ex rel Zdunic v. Uhl*: "The power vested in the President to direct the course to be observed under the Alien Enemy Act is not subject to review by the Federal Court nor is the Attorney General's order and determination that an alien be held in custody subject to review by the courts" (at p. 688).

These judicial decisions deal with the question whether a person taken into custody has the legal status of an alien enemy, within the meaning of the Enemy Alien Act and the Presidential Proclamations issued thereunder. These decisions confirm as well as those of the First World War³⁶

³³ 6 Fed. Reg. 6324 (1941).

³⁴ *U. S. v. Ju Toy*, 198 U. S. 253 (1905); *Ng Fung Ho v. White*, 259 U. S. 276 (1922).

³⁵ 40 Stat. 531 (1918).

³⁶ *Ex parte Graber*, 247 Fed. 8882 (1918); *Ex parte Franklin*, 253 Fed. 984

that the discretion of the Attorney General as to the necessity or desirability of the detention of an alien enemy is not reviewable by the courts.

Another question which is also a matter of purely administrative determination concerns the legal situation of alien enemies apprehended by the Federal Bureau of Investigation.³⁷ Alien Enemy Hearing Boards have been established in eighty-six judicial districts³⁸ in order to recommend in each instance whether an alien enemy be released unconditionally, paroled, or interned for the duration of the war.³⁹

Judicial construction has thus been confined to the particular question to be decided under the statute.

Similar questions, with judicial interpretation again confined to particular administrative war-time regulations, have arisen in English cases [under Reg. 18B of the Defence Regulations (General)⁴⁰] involving the internment of nationals dangerous to the war effort.⁴¹ These questions

(1918); *De Lacey v. United States*, 257 Fed. 625, L. R. A. 1918 E 1011; *Ex parte Risse, in re Stallforth*, 257 Fed. 102 (1919); *Ex parte Gilroy*, 257 Fed. 110 (1919).

³⁷ Bulletin Dep't of Justice, Appointment of Alien Enemy Hearing Boards, N. Y. L. J. January 16, 1942; Gordon, *Status of Enemy Nationals in the United States*, (1942) 2 Lawyers Guild Rev. 10, at p. 14. Of the 7,627 alien enemies whose cases were handled by hearing boards, 3,646 were interned for the duration, 2,993 paroled and 1,048 released. Interned were 1,974 Japanese, 1,448 Germans, 210 Italians and 14 Rumanians and Hungarians, Review of Attorney General Biddle, N. Y. Times, December 6, 1942, see further *ibid.* March 19, 1943.

³⁸ As to related proceedings in England and France, see the references *supra* n. 9, and the recent (Australian) National Security (Aliens Control) Regulations, 1942, Statutory Rules Nos. 405, 406, regarding advisory committees and alien tribunals, see (1942) 16 Australian L. J. 159.

³⁹ For communications with confined enemy aliens, Bulletin Dep't of Justice, N. Y. L. J. December 24, 1941, p. 2109.

⁴⁰ S. R. & O. 1939, No. 927, as amended.

⁴¹ *Liversidge v. Anderson*, (1942) 1 A. C. 206 (H. L.); *Greene v. Secretary of State for Home Affairs*, (1942) 1 A. C. 284 (H. L.); *Rex v. Secretary of State for Home Affairs; Ex parte Budd*, (1942) 2 K. B. 14 (C. A.); *Greene v. Anderson*, 194 L. T. 54 (C. A. 1942).

have been treated more generally by writers⁴² dealing with the English statute.⁴³

In this country, the special situations created by the evacuation of the Japanese who were forced to leave military zones on the Pacific Coast⁴⁴ called for protection of the evacuees. In order to safeguard the interests of such persons and to bring about equitable settlement between creditors and West Coast evacuees,"⁴⁵ the Federal Reserve Bank of San Francisco was authorized to serve as custodian of the property of evacuees and to block transactions involving their property.

Special Regulation No. 1,⁴⁶ under Exec. Order No. 8389, as amended, and sec. 5 (b) of the Trading with the Enemy Act, as amended, provides that the Federal Reserve Bank may declare the property of evacuee nationals "Special Blocked Property," and prohibit transactions unless

⁴² Carr, *Crisis Legislation in Britain*, (1940) 40 Col. L. Rev. 1309; Note, *A Regulated Liberty*, (1942) 42 Col. L. Rev. 339; Keeton, *Liversidge v. Anderson*, (1942) 5 Modern L. Rev. 162; Allen, *Last Words on Regulation 18B*, (1942) 58 L. Q. Rev. 462; Keith, *Legality of Detention under Defence Regulations*, (1942) 24 J. Comp. Leg. & Int. L. 137. Cf. Address by Chief Judge Lehmann, N. Y. L. J. January 25, 1943, p. 321.

⁴³ See also *Ex parte Lannoy*, (1942) 2 All E. R. 232; (1942) 58 T. L. R. 207; 86 Sol. J. 321; Notes, (1942) 58 L. Q. Rev. 299; Keith, *Refusal to Allow an Alien [a Belgian subject] to Land*, (1942) 24 J. Comp. Leg. & Int. L. 139. Cf. *Arbon v. Anderson*, *De Laessoe v. Anderson*, (1943) 1 All E. R. 154 (K. B., December 11, 1942).

On the question of the detention of an American citizen by military authorities in Hawaii, see *Ex parte Zimmermann*, 132 F. (2d) 442 (C. C. A., Ninth Circ., December 14, 1942).

On questions of internment of enemy aliens in Germany, see decree of September 5, 1939, *Reichsgesetzblatt I* 1667; in Italy, Art. 284 of the Law on War and Neutrality, July 8, 1938, *Gaz. Uff.*, September 15, 1938, p. 4294; in France, Koessler, *supra* n. 9, at p. 114.

⁴⁴ Exec. Order No. 9066, February 19, 1942, 7 Fed. Reg. 1407 (1942). See Note, *Alien Enemies and Japanese-American: A Problem of Wartime Controls*, (1942) 51 Yale L. J. 1316, 1324; Miyamoto, *Immigrants and Citizens of Japanese Origin*, (1942) 223 Annals. Am. Acad. Pol. Soc. Sc. 107; Storequist, *The Restricted Citizen*, *ibid.* 149, 152; Watson, *The Japanese Evacuation and Litigation Arising Therefrom*, (1942) 22 Oregon L. Rev. 46.

⁴⁵ Press Release, Fed. Res. Bank of San Francisco, March 18, 1942.

⁴⁶ Evacuee Property Department, Circular No. 1, March 18, 1942, confirmed by the Secretary of the Treasury, 7 Fed. Reg. 2184 (1942).

expressly authorized by license. "The term 'evacuee national' shall mean any Japanese, German, or Italian alien, or any person of Japanese ancestry, resident on or since December 7, 1941, in Military Area No. 1 or in specified zones in other military areas."⁴⁷

On the other hand, by General License No. 68 A, as amended, March 10, 1942,⁴⁸ Japanese evacuees who had resided continuously within the continental United States since June 17, 1940, as well as certain Japanese business enterprises were allowed to dispose of their property without restriction. This, as Lt. General De Witt stated,⁴⁹ was "to aid the evacuees in a voluntary liquidation of their property at reasonable prices and to protect them against individuals who seek to take advantage of their situation."

The regulations have turned to the loyalty test of enemy character, under which even resident American citizens are treated as nationals of a foreign country, insofar as evacuee-owned property is declared property owned by nationals of a foreign country. Thus, distinctions based on nationality vanished with the changes in ideological concepts which led to this war. But a far more important aspect of the loyalty test is to be found in the restrictions involving removal to relocation centers,⁵⁰ which were issued for the military areas of the West Coast.⁵¹ Legal questions arose out of the special treatment to which Amer-

⁴⁷ This Regulation was revoked March 16, 1943, 8 Fed. Reg. 4237 (1943).

⁴⁸ 7 Fed. Reg. 1854 (1942). See Public Circular No. 4A, January 16, 1942, 7 Fed. Reg. 383 (1942), Instructions for Preparation of Reports of Foreign-Owned Property by Certain Nationals of Japan.

⁴⁹ N. Y. Times, March 12, 1942.

⁵⁰ Under the direction of the War Relocation Authority, established in the Office for Emergency Management by Exec. Order No. 9102, March 18, 1942, 7 Fed. Reg. 2165 (1942).

⁵¹ Cf. Findings and Recommendations on Evacuation of Enemy Aliens and Others from Prohibited Military Zones, Fourth Interim Report of the Select Committee Investigating National Defense Migration, House Report No. 2124, 77th Cong., 2d Sess. (the so-called Tolan Committee Report), p. 164, and the Hearings (H. Res. 113), Part 31 (1942), p. 11870.

ican citizens of Japanese ancestry were subjected. Some of the persons affected by these war-time measures challenged their constitutionality. In the case of *In re Ventura*,⁵² an American-born woman of Japanese ancestry, the wife of a citizen of the Philippine Commonwealth, attacked the curfew provisions of Public Proclamation No. 3, March 24, 1942,⁵³ as unconstitutional. Rejecting her contention, the Court said: "The orders and commands of our President and the military forces, as well as the laws of Congress,⁵⁴ must, if we secure that victory that this country intends to win, be made and applied with realistic regard for the speed and hazards of lightning war."

Violation of the same curfew regulation and violation of Civilian Exclusion Order No. 57⁵⁵ by failure to report to the Civilian Control Station were charged in *United States v. Hirabayashi*.⁵⁶ The court held that the orders and regulations thereunder were constitutional and valid, as the war powers are ample to permit the making and enforcing of regulations necessary to protect strategic military areas essential for national defense. The court pointed out that "in time of war a technical right of an individual should not be permitted to endanger all of the constitu-

⁵² 44 F. Supp. 520 (D. C. Wash. April 15, 1942); Note, (1942) 42 Col. L. Rev. 1214.

⁵³ 7 Fed. R. 2543 (1942).

⁵⁴ Public Law No. 503, 77th Cong., 2d Sess., March 21, 1942, conferring *inter alia* upon Federal courts jurisdiction to try persons charged with violations of the orders and restrictions in question.

⁵⁵ May 10, 1942, providing for the exclusion of all persons of Japanese ancestry, alien and non-alien, from certain portions of Military Area No. 1 and for the reporting to designated stations. See the notes cited n. 44 and Fairman, *The Law of Martial Rule and the National Emergency*, (1942) 55 Harv. L. Rev. 1253; Radin, *Martial Law and the State of Siege*, (1942) 30 Calif. L. Rev. 634; Dell' Ergo, *Martial Law*, Exhibit 3 to the Hearings, *supra* n. 51, at p. 11924. See Civilian Restriction Orders Nos. 1-25, January 25, 1943, 8 Fed. Reg. 982 (1943).

⁵⁶ 46 F. Supp. 657 (D. C. W. D. Wash., N. D. 1942); Davisson, *Applicability of Curfew Regulations and Exclusion Orders to Persons of Japanese Ancestry*, (1942) 41 Michigan L. Rev. 522.

tional rights of the whole citizenry." The same point of view has been expressed in *Ex parte Kanai*,⁵⁷ where the defendant was charged with leaving Military Area No. 1 without permission and remaining in San Francisco after the date fixed for evacuation of all persons of Japanese extraction. Said the court: "No federal court should and this court will not set itself up as an authority to say how much area is properly included within Military Area No. 1. This court will not constitute itself as a board of strategy, and declare what is a necessary or proper military area." In *United States v. Yasui*,⁵⁸ the court held the curfew orders valid as applied to the petitioner on the ground that he was an alien enemy, having implicitly elected Japanese citizenship after attaining his majority. The Court said, moreover, in the event that military necessities result in a declaration of a state of martial law by proper authority, the power to issue regulations affecting all parties indiscriminately, aliens and citizens, could not be challenged. Some other cases on the same point have not yet been officially reported.

An American citizen of Japanese ancestry, in *United States v. Korematsu*,⁵⁹ was charged with not having presented himself for evacuation to an assembly center at the time prescribed therefor. In this case the American Civil Liberties Union failed in its challenge of the Federal Government's authority. In *United States v. Mitsuye Endo*,⁶⁰ the temporary detention in assembly areas and resettlement camps pending arrangements for orderly relocation outside of the restricted zones was challenged, as an unlawful de-

⁵⁷ 46 F. Supp. 286 (D. C. E. D. Wis., July 29, 1942). See Gordon, *supra* n. 37, at p. 16, n. 78.

⁵⁸ 48 F. Supp. 40 (D. C. Oregon, November 16, 1942).

⁵⁹ Before the District Court of Northern California, San Francisco, N. Y. Times, September 2, 1942; see Watson, *The Japanese Evacuation and Litigation Arising Therefrom*, (1942) 22 Oregon L. Rev. 46, at p. 58.

⁶⁰ *Ibid.* p. 58.

privation of liberty. Similar contentions were made in the cases of *Toki Wakayama* and *Ernest Wakayama*⁶¹ involving petitions for writs of habeas corpus on account of their detention.⁶²

The effect of evacuation measures on contracts was considered in *Brown, Trustee v. Oshiro*.⁶³ A resident of Japanese ancestry was compelled by the terms of the Civil Exclusion Order to vacate premises maintained by him as a hotel in Los Angeles. He was nevertheless held to pay past rents because the lease contained no exception covering the contingency, nor was the contract void on the ground of impossibility of performance.^{63a}

A related question, namely, the effect of an alien's expulsion on the performance of a contract, has been dealt with by French courts during this war. In *Maiano v. Simard*⁶⁴ an Italian contractor who had been residing in France for fifteen years had agreed on March 18, 1939, to demolish certain buildings, said demolition to be completed by October 15, 1939. The contractor was not able to finish this work in time because of his expulsion (*arrêté d'expulsion*) from France August 24, 1939. The court held that he had breached the contract and denied him any right of compensation because "his expulsion was not unforeseeable (*imprévisible*) when the contract was made. . . . The external circumstances at that time (March, 1939) apparently (*assurément*) revealed even to the least informed mind (*à l'esprit le moins averti*) the imminent pos-

⁶¹ Before the District Court of Los Angeles, *ibid.* p. 58.

⁶² As to the evacuation of Japanese from British Columbia, Canada, see Orders of the British Columbia Security Commission, reprinted in *Canadian War Orders and Regulations* 1942, vol. XI (December 21, 1942), p. 606.

⁶³ Calif. Super. Ct., Los Angeles County, July 30, 1942, C.C.H.W.L.S. ¶9732.

^{63a} For a contrary view, see *Chase Nat. Bank v. Onishi*, N. Y. L. J. February 19, 1943, p. 689.

⁶⁴ Cour d'appel Bordeaux, November 26, 1940, Recueil Gazette Palais 1941 I, 29.

sibility of the application of security measures against aliens." The decision does not explain how an alien after having lived fifteen years in France should have known more than a year before the outbreak of war with Italy that he was going to be expelled and thereby be prevented from completing the contract in the usual course of his business.⁶⁵

A new approach to the enemy concept due to extraordinary war conditions may be discerned in the Presidential Proclamation No. 2561, July 2, 1942,⁶⁶ in denying access to the courts of the United States not only to "subjects, citizens or residents of any nation at war with the United States" (the usual definition of alien enemy under the Alien Enemy Act of 1798, as amended⁶⁷), but also to persons "who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States." In the first case under this Proclamation, the so-called Saboteur case before the United States Supreme Court, *Ex parte Quirin*,⁶⁸ no question arose as to persons of any nationality other than German.⁶⁹ Eight German citizens who after living in this

⁶⁵ But see art. 1147 French Code civil which reads as follows: "Whenever an obligation has not been performed or there has been a delay in performing same, and if the debtor cannot prove that the non-performance results from circumstances for which he is not responsible, he is liable to pay damages and interest, if any, though he may not have been guilty of bad faith." As to the question of *force majeure* as inevitable accident caused by this war, see Cour de Cassation, Req., September 30, 1940, Recueil Gazette Palais 1940 II 217.

⁶⁶ 7 Fed. Reg. 5105 (1942).

⁶⁷ 40 Stat. 531 (1918).

⁶⁸ *Per curiam* opinion July 31, 1942, 63 S. Ct. 1, extended opinion by Chief Justice Stone filed October 29, 1942, 317 U. S. —, 63 S. Ct. 2, 87 L. Ed. 1.

⁶⁹ Counsel for petitioner raised the question as to the citizenship of Haupt, contending that he became an American citizen by virtue of the naturalization of his parents during his minority and that he had not lost his citizenship. The Government argued that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he had by his conduct renounced or abandoned his U. S. citizenship. See Schilling, *Saboteurs and the Jurisdiction of Military Commissions*, (1942) 41 Michigan L. Rev. 481, at p. 482 n. 2, 486 n. 20; Hyde, *Aspect of the Saboteur Cases*, (1943) 37

country had returned to Germany between 1933 and 1941, were landed from German submarines on the Long Island and on the Florida coast in June, 1942. They had attended a German sabotage school and wore parts of German Marine Infantry uniforms which they buried when landing, along with incendiary devices. Within two weeks all were apprehended in different parts of the country. The sole question presented to the Court was whether it was within the constitutional power of the Government to place enemies of the United States, who have invaded the country to destroy the nation under whose constitution they claim protection, upon trial before a military commission⁷⁰ for the offense of unlawful belligerency.⁷¹ As this question is outside of the scope of this book, reference may be made to articles dealing with the opinion of the Supreme Court.⁷² It may be mentioned, however, that the Court referred to the contention of the Government that the saboteurs were enemy aliens and that under the Proclamation of the President no court could grant a hearing to these persons. Chief Justice Stone said at p. 9: "But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of

Am. J. Int. L. 88; Corwin, *The War and the Constitution: President and Congress*, (1943) 37 Am. Pol. Sc. Rev. 18, 21.

⁷⁰ Presidential Order of July 2, 1942, 7 Fed. Reg. 5103 (1942).

⁷¹ See on the relation of the *Quirin* opinion to the famous case *Ex parte Milligan*, 4 Wall. (71 U. S.) 2 (1866), the opinion 63 S. Ct. at p. 19.

⁷² Battle, *Military Tribunals*, (1942) 29 Virginia L. Rev. 255, 267; Cramer, *Military Commission Trial of Eight Saboteurs*, (1942) 17 Wash. L. Rev. 247; Kraus, *Saboteurs and Military Justice*, (1942) 17 St. John's L. Rev. 29; Munson, *The Arguments in the Saboteurs Trial*, (1942) 91 U. of Pa. L. Rev. 239, 245; Tolman, *Review of the Decision of the Supreme Court in the Sabotage Case*, (1942) 28 Am. Bar Ass. J. 604, and Notes, (1942) 31 Georgetown L. J. 90, (1942) 37 Ill. L. Rev. 265, (1942) 29 Virginia L. Rev. 317, (1943) 56 Harv. L. Rev. 631.

the United States constitutionally enacted forbid their trial by military commission." Professor Cushman comments on this point as follows:⁷³ "The court will look at the question of the detention of anybody under circumstances so unusual or suspicious as to raise the question whether he may possibly be entitled to a civil trial. It is an important protection to civil liberty that the Court, in its discretion, is willing to take this initial look. It may decide to look no further or, as in this case, it may consider the prisoners' contention on its merits. It is important and gratifying that the court actually took the case."⁷⁴

Similarly, the former South African Olympic boxer Leibbrandt, who was brought by a U-boat to South Africa for sabotage purposes, was convicted of high treason and sentenced to death, by the Communal Court at Pretoria, Union of South Africa.^{74a}

On the other hand, nationals interned or held as prisoners in enemy countries⁷⁵ are not considered enemies within the meaning of the Trading with the Enemy Acts of the countries of which such persons are nationals. They are not deemed to reside in the enemy country of their own free will. Nevertheless, General License No. 32,⁷⁶

⁷³ Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case*, (1942) 28 Corn. L. Q. 54, at p. 63; *The Case of the Nazi Saboteurs*, (1942) 36 Am. Pol. Sc. Rev. 1082, at p. 1090.

⁷⁴ The opinion of the United States Supreme Court may have further importance. At p. 11, Chief Justice Stone stated: "It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to make its precise boundaries, or to enumerate or define by statute all the acts which that law condemns." As Sommerich, Correspondence, N. Y. L. J. December 11, 1942, p. 1854, remarks, the law of war includes that part of the law of nations which in addition to prescribing the conduct of war governs the status of enemy individuals. "The quoted language would seem to permit punishment of enemy individuals under the law of war for acts not defined by Congress in any statute or code."

^{74a} N. Y. Times, March 12, 1943.

⁷⁵ Cf. Flory, *Prisoners of War*, (1942) p. 27.

⁷⁶ October 23, 1941, 6 Fed. Reg. 5467 (1941).

which allows certain remittances to blocked nationals abroad, does not "authorize remittances to enemy prisoners of war in any foreign country."⁷⁷

In *Vandyke v. Adams*,⁷⁸ in an action for the rent of a flat, the English court refused to regard a British soldier, detained as a prisoner of war in Germany, as an enemy "in any sense of the word at all."⁷⁹

The recent Australian National Security Regulations⁸⁰ (Enemy Property) expressly exempt from the definition of enemy subjects "any prisoner of war," and a German decree of June 27, 1940,⁸¹ does not consider German nationals interned in enemy countries and having no nationality other than German, as "enemies."

⁷⁷ Public Interpretation No. 8, October 31, 1942, Fed. Res. Bank of New York, Circular 2535.

⁷⁸ (1942) 1 Ch. 155, (1942) 1 All E. R. 139, 58 T. L. R. 129, 116 L. T. R. 77, 86 Sol. J. 291 (Ch. D., January 21, 1942); Note, (1942) 92 L. J. 42.

⁷⁹ As to grants of representation where the persons primarily entitled thereto are on war service abroad or prisoners of war, see the Note of the Senior Registrar, Principal Probate Registry, November, 1942, 194 L. T. 182.

⁸⁰ Statutory Rules No. 268, June 19, 1942, r. 4.

⁸¹ (1940) 102 Deutsche Justiz 732, expressly exempting Jews from this regulation.

8. Enemy Character of Corporations.

THE VARIOUS Trading with the Enemy Acts of World War I regarded three different factors as decisive tests in classifying bodies of persons as enemies: (1) organization under the law of an enemy state, (2) residence in enemy territory, and (3) control by enemies. The Trading with the Enemy Acts issued during this war substantially simplify the qualification of corporations as enemies inasmuch as each of these elements by itself may establish the enemy character of the corporation. Thus, in all Trading with the Enemy Acts, companies organized under the laws of an enemy state, or having their principal place of business in enemy territory, whether corporate or unincorporate, are considered enemies within the meaning of the Acts.

The British Act, for instance, in sec. 2 (1) d defines as enemy "any body of persons constituted or incorporated, in, or under the laws of, a State at war with His Majesty." Accordingly, German bodies incorporated under the law of Germany are deemed of enemy character wherever they may carry on their business. "It is also immaterial that they are under the control of allied or neutral stockholders, however absolute this control may be, for the statute looks only to the place of incorporation."¹

Similarly, the French Act² regards as enemies, corporations "incorporated in conformity with the laws of an enemy state." The decree of the Dutch government-in-

¹ Rogers, *The Effect of War on Contracts* (1940), p. 103. See Foster, *La Theorie Anglaise du Droit International Prive* (1938), Rec. Cours. Ac. Dr. Int. II 399, 455.

² "Qui ont leur siege en territoire ennemi ou qui ont ete constituees conformement aux lois d'un Etat ennemi." Journ. Off. September 4, 1939, p. 11093.

exile of June 7, 1940,³ regards as enemies legal persons "established or whose business or enterprise is established in enemy territory," or "organized or existing according to or governed by the law of an enemy state."

Similar provisions are contained in the Order in Council of the Norwegian government-in-exile, of May 18, 1940,⁴ which provides that all ships registered in Norway or belonging to a port there and situated outside occupied Norway are deemed requisitioned by the government-in-exile (which assumes the right to use the ships) as far as "the ships are owned by (a) persons domiciled in the occupied area or carrying on business from an office there, (b) partnerships, corporations, joint stock companies or other companies registered in or having their board of directors in such area or carrying on business from an office there."⁵

The German Act, January 15, 1940,⁶ I, sec. 3 (1) 3, deems enemies all corporations "the original legal personality (*urspruengliche Rechtsfaehigkeit*) of which is based on the laws of an enemy state." Thus, the Act goes beyond the *siège social* theory which is adopted elsewhere in German law, as in the German Prize Code of August 28, 1939.⁷ The German Trading with the Enemy law classifies as enemies, for example, corporations registered under English law in China. It also regards dependent branches of enterprises located in enemy territory as enemies even if the main office is located within Germany or in a neutral

³ Staatsblad No. A6.

⁴ Norsk Lovtidend 1940 No. 2, p. 40.

⁵ This Order was reviewed in the *Lorentzen* case, see Chapter XXI, n. 49.

⁶ Reichsgesetzblatt I, p. 191, cf. Hefermehl, *Das feindliche Vermoegen*, (1940) 10 Deutsches Recht A p. 1217.

⁷ Reichsgesetzblatt I, 1585, sec. 8(2) determines the enemy character of goods belonging to a corporation by the latter's principal place of business; cf. Lenz, *Probleme des Prisengerichts*, (1941) 103 Deutsche Justiz 513, 515; Jessup, *Prize Rules*, (1942) 36 Am. J. Int. L. 454.

country. Accordingly, the London branch of a Swiss bank with main offices in Switzerland is considered an enemy; so, too, is a corporation having its office in a neutral country but constituted under enemy law, for instance, an international cartel which transferred its main office from Paris, France, to Switzerland during the war.⁸ The Italian Act of 1938⁹ regards corporations as enemies if they are of enemy nationality under the law of the enemy state; so, too, the Japanese Act¹⁰ deems enemies all corporations "belonging to enemy countries."

In American law, "generally speaking, a corporation as either foreign or domestic is determined by the place of its origin, without reference to the residence of its stockholders or incorporators, or the place where its business is transacted."¹¹ Nationality of a corporation was also adopted as a criterion in the Declaration on the Juridical Personality of Foreign Companies, proclaimed by the President of the United States on August 21, 1941,¹² which states: "Companies constituted in accordance with the laws of one of the Contracting States, and which have their seats in its territory, shall be able to exercise in the territories of the other Contracting States, notwithstanding that they do not have a permanent establishment, branch or agency in such territories, any commercial activity which is not contrary to the laws of such States and to enter all appearances in the courts as plaintiffs or defendants, provided they comply with the laws of the country in question."

Nationality of a corporation¹³ is also an important test

⁸ Moehring, *Die Behandlung feindlichen Vermoögens*, (1940) 7 *Zeitschrift der Akademie fuer Deutsches Recht* 125, 126.

⁹ Sec. 5: "Quando (le persone giuridiche) posseggano la nazionalita dello Stato nemico a termini delle leggi di questo."

¹⁰ Chapter I, n. 25.

¹¹ (1940) 20 *Corpus Juris Secundum* §1784, p. 10.

¹² Treaty Series No. 973; see Hudson, *International Legislation*, Vol. 7 (1942) No. 445, p. 355.

¹³ Cf. Domke, *Le Probleme de la Nationalite des Societies Avant et Apres la*

under the Trading with the Enemy law. Public Circular No. 18, March 30, 1942,¹⁴ with reference to General Ruling No. 11, defines as persons subject to the jurisdiction of the United States "any partnership, association, corporation or other organization which is organized under the laws of the United States." Thus, the Hawaiian Regulations, as amended,¹⁵ relating to Securities, determined these corporations as "corporations organized under the laws of, and having their principal place of business in the territory of Hawaii." In the same sense, General Ruling No. 10a,¹⁶ August 12, 1942, dealing with a moratorium on obligations of Philippine companies held in the United States and expressly referring to sec. 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended, defines the term "Philippine company" in sec. 4 (a) as any "organization organized under the laws of the Philippine Islands and which prior to January 1, 1942, derived its principal income from the Philippine Islands." But these definitions are somewhat superseded by General Ruling No. 11, March 18, 1942, as amended, which includes in the term "enemy national" any "organization to the extent that it is actually situated within enemy territory."

The same test of "carrying on business in enemy territory" as determining enemy character not only of individuals, but also of corporations, has been adopted by the Acts of the various countries. So, sec. 2 (i) e of the British Act, as amended, includes under the term "enemy": "as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business." As English writ-

Legislation et la Jurisprudence Francaise de Guerre 1939-1940, (1941) 8 *Nouvelle Revue de Droit International Prive*, Nos. 1-2.

¹⁴ 7 Fed. Reg. 2503 (1942).

¹⁵ 7 Fed. Reg. 5808, 6463, 6464, 6785 (1942).

¹⁶ 7 Fed. Reg. 6383 (1942).

ers point out¹⁷: "the amendment emphasises the fact that, although nationality is immaterial when one is considering whether or not an *individual* is an enemy, it is material (in so far a corporation can be said to derive its nationality from the State in which it is incorporated) when one is dealing with a body corporate." Though enemy-occupied territory is, generally, assimilated to enemy territory, the establishment or incorporation of a company under the law of an occupied country raises particular questions as to the enemy character of such companies. These questions were recently dealt with in the *Uden*, *Drewry* and *Lubrafol* cases, discussed *infra* Chapters IX, n. 33, XIV, n. 38, and n. 40a, 40c, 40e.

The determination of the enemy character of a corporation by virtue of its incorporation under enemy law or its carrying on business in enemy or enemy-occupied territory also prevails in other regulations which were issued under the Trading with the Enemy Act, as amended. The General Orders of the Alien Property Custodian include in the term designated foreign national "any business organization, organized under the laws of, or having its principal place of business within designated foreign countries."¹⁸

Furthermore, the U. S. Censorship Regulations, issued under sec. 3 (c) of the Trading with the Enemy Act by the Office of Censorship, January 30, 1943,¹⁹ in sec. 1801.2 (c) (3) include in the term enemy national "any organization to the extent that it is actually situated within enemy territory." The Regulations relating to the Transportation of Enemy Aliens on American Vessels and Aircraft, issued under sec. 3 (b) of the Trading with the Enemy Act by the

¹⁷ Krusin and Rogers, *Solicitor's Handbook of War Legislation*, Consolidated Supplement constituting Vol. II (London 1942), p. 356.

¹⁸ Sec. 2 General Order No. 2, sec. c(4) General Order No. 14, sec. 2(ii) General Order No. 15.

¹⁹ 8 Fed. Reg. 1644 (1943).

Secretary of State, March 5, 1943,²⁰ provide in sec. 22.1 (b) that the term enemy shall mean, *inter alia*, "any corporation incorporated within such territory [enemy and enemy-occupied] of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

²⁰ 8 Fed. Reg. 2820 (1943).

9. Enemy Controlled Corporations.

WITH the expansion of economic warfare, the problem of domestic and neutral corporations, enemy controlled as to their management and the nationality of their stockholders, has again become important.

The question of determining the enemy character of a domestic or neutral corporation by the test of control was widely discussed during the First World War.¹ It was introduced by way of a dictum in *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd.*² This case involved a company organized under the laws of England. The secretary, a naturalized British subject, who owned one of twenty-five thousand shares, assumed to bring an action on behalf of the company. Dismissing the action, the House of Lords admitted the control test of enemy character, "to pierce the corporate veil," where directors and stockholders were enemies within the meaning of the Trading with the Enemy Act, as residing or doing business in an enemy country.³

Though the control test was applied, in the *Daimler* case, only to "a company incorporated in the United Kingdom,"⁴ the Privy Council, in *The Hamborn*⁵ applied it later to a foreign (Dutch) company, in a situation where

¹ See Huberich, *Trading with the Enemy* (1918) p. 79; Norem, *Determination of Enemy Character of Corporations*, (1930) 24 Am. J. Int. L. 310, 319; Oppenheim, *International Law*, vol. II (6th ed. by Lauterpacht, 1940) §88a p. 220.

² (1916) 2 A. C. 307.

³ As to critics, see McNair, *The National Character and Status of Corporations*, British Yearbook of International Law 1923-1924, p. 44; Martin Wolff, *On the Nature of Legal Persons*, (1937) 53 L. Q. Rev. 494, at p. 513; Farnsworth, *The Residence and Domicile of Corporations* (1939) p. 130.

⁴ (1916) 2 A. C. 307, at p. 344.

⁵ (1919) 2 A. C. 993.

the issue was not one of trading with the enemy but of liability to condemnation in prize.⁶

The control test was later adopted by the Peace Treaties, as e. g. in the Versailles Treaty, Article 297 (b), which permitted the Allied and Associate Powers to retain and liquidate property belonging to German nationals "or companies controlled by them."⁷ But this rule did not involve a departure from the underlying theory of corporation law. In a case where the Standard Oil Company of New Jersey claimed the beneficial ownership in the tankers of the Deutsche Amerikanische Petroleum Gesellschaft at Hamburg, Germany, the shares of which were owned by the American company, the Arbitration Commission instituted by the United States and the Reparation Commission⁸ upheld "the jurisprudence which in all countries accord to the legal entity known as a company a personality and a patrimony entirely distinct from those of its shareholders."

However, the question is now settled in many countries by the Trading with the Enemy legislation of this war, the control test having been expressly adopted in the different Acts. The control doctrine has now become statutory law in Great Britain. Sec. 2(1) c of the Trading with the Enemy Act provides that the expression "enemy" means: "any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy."⁹ The Trading with the Enemy legislation

⁶ Cf. Parry, *The Trading with the Enemy Act and the Definition of an Enemy*, (1941) *Modern L. Rev.* 161, 167.

⁷ See Garner, *International Law and the World War*, vol. I (1920) §152 p. 223; de Solere, *Condition des Biens Ennemis*, (1929) 4 *Repertoire de Droit International* 473, 505; Borchard, *Introduction to Gathings, International Law and American Treatment of Alien Enemy Property* (1940) p. ix.

⁸ (1928) 22 *Am. J. Int. L.* 404, 411.

⁹ Regarding this "canonization" of the rule of the *Daimler* case, see *Annual*

of Canada¹⁰, Australia¹¹, and New Zealand¹² follows the same trend.

The control test has also been expressly adopted in the French Trading with the Enemy Act,¹³ which includes, sec. 2 (3), in the term "enemies," "corporations dependent in any way whatever (*de quelque manière que ce soit*) on one or several individuals or legal persons considered enemies under this Act."¹⁴ Similarly, the Egyptian Act, as amended,¹⁵ extends enemy qualification "to any association or corporation of Egyptian or foreign nationality which is run (*fonctionne*) under German control or involves (*com-*

Survey of English Law, 1939, p. 1, 383; Parry, *supra*, n. 6, at p. 165; Mitchell, *British Defense Measures and Some of Their External Implications*, (1940) Am. Foreign L. Ass., Proceedings No. 20, p. 10. For the application of the control test in Defence (Finance) Regulations, 1939, as amended, Reg. 5 c (Provision as to certain bodies corporate), see Howard, *The Defence (Finance) Regulations*, 1939 (1942) p. 60.

¹⁰ Sec. 1(b) iii: "any person [including bodies of persons, incorporate (wherever incorporated) and unincorporated, sec. 1(a)] acting as agent or otherwise on behalf of an enemy, or under the control of a person who is an enemy."

¹¹ National Security (Enemy Property) Regulations, June 19, 1942, Statutory Rules 1942 No. 268, provide, r. 19: "No alteration made after the commencement of this regulation to the memorandum of association or articles of association of a company incorporated under the law of any part of Australia in which more than twenty per centum of the number of shares are held by or for the benefit of enemy subjects have any effect unless and until the Controller consents thereto."

¹² R. 3(1): "If the Minister is satisfied that any person, firm, or company carrying on business in any place, whether in or out of New Zealand, is carrying on such business exclusively or to a substantial extent for the benefit or under the control (*italics ours*) of an alien enemy resident out of New Zealand or of an enemy trader, or is engaged in any business communications or undertaking injurious to the interests of His Majesty in respect of the present war, he may, by notice in the Gazette, declare such first-mentioned person, firm or company to be an enemy trader for the purpose of these regulations."

¹³ September 1, 1939, Journ. Off. September 4, 1939, p. 11087.

¹⁴ The statement in Trotter, *Law of Contract During and After War* (4th ed. London 1940) p. 200, that "French law is the same as American in this respect," i. e., not going "behind the corporate charter," is no longer justified. The statutory provision of sec. 2(1)c of the French Trading with the Enemy Act, 1939, establishes the control theory; moreover, the French decisions cited by Trotter were overruled by the leading French case *Societe Franco-Suisse de Conserves de Lenzbourg*, Cour de Cassation, Req., July 20, 1915, Dalloz Per. 1916 I 44; Sirey 1916, I 148, (1915) 42 Journ. Dr. Int. 1164.

¹⁵ Proclamation No. 8, September 19, 1939; (1939) 29 Gaz. Trib. Mixtes p. 361.

porte) important German interests." The Italian Act,¹⁶ sec. 5 (2), regards as enemies "legal persons when enemy subjects have any prevalent interests whatever in them," while the principal German Act of January 15, 1940,¹⁷ sec. 12, provides for the administration of "bodies under direct or indirect predominant (*massgeblich*) enemy control." The German Decree of May 30, 1940,¹⁸ declares enterprises "under predominant (*massgeblichem*) enemy influence" liable to administration, but such influence does not depend on the domicil of the individuals exercising it. Corporations under the control of two neutral nationals domiciled in Belgium were not considered under Belgian influence merely by reason of that domicile.¹⁹ The decrees of the German civil and military authorities in occupied countries follow the pattern of the German trading with the enemy legislation.²⁰

The German decree for the originally occupied zone of France²¹ expressly applied to enterprises having central and branch offices in that zone not only if they were under enemy (especially British) influence, but also if they were "directly or indirectly under decisive influence of Belgian, Dutch or Norwegian nationals." The decree of the Reich Commissioner in Norway²² which, in sec. 13, refers to direct or indirect decisive enemy influence, further extends the control test by providing that enterprises may be placed under administration "if it is to be supposed that the

¹⁶ "quando in esse (persone giuridiche) abbiano comunque interessi prevalenti sudditi nemici."

¹⁷ Reichsgesetzblatt 1940 I, 191.

¹⁸ Reichsgesetzblatt 1940 I, 821; General Ordinance of the Reich Minister of Justice, November 14, 1940; (1940) 102 Deutsche Justiz p. 1296.

¹⁹ Krieger and Hefermehl, *supra* Chap. I, n. 29, H 1 p. 3.

²⁰ Cited *supra* Chap. I, n. 26-31.

²¹ Sec. 10, September 23, 1940, Journ. Off. Gouv. Milit., October 5, 1940, No. 10, p. 97. As to provisory administrators (*administrateurs provisoires*) for English insurance corporations doing business in Paris, cf. Neue Zuercher Zeitung, October 10, 1940.

²² August 17, 1940, Forordningstidend for de besatte norske omrader No. 2, p. 3.

existing management does not afford a sufficient guarantee that the enterprise takes into account the interests to be protected by the Reich Commissioner for the occupied Norwegian territories."

The Decree of the Dutch Government-in-exile, June 7, 1940,²³ also adopted the control test by including, sec. 1 (5) (c) (3), in the term "enemy subjects," legal persons "in which interests of an enemy state or of enemy subjects are predominatingly involved."

In the United States, the Trading with the Enemy Act has not adopted the control theory. Unlike the above mentioned statutes of other countries, the Act itself contains no special provision regarding corporations under enemy control. On the contrary, the control theory has been expressly rejected by American courts. Said the United States Supreme Court in *Behn, Meyer & Co. v. Miller*:²⁴ "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co. v. Continental Tyre and Rubber Co.*, 2 A. C. (1916) 307, decided June 30, 1916. Section 7, subsection (c) was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests herein. Corporations are brought within the carefully framed definitions (sec. 2) of 'enemy' and 'ally of enemy' by the words—'Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the

²³ Staatsblad No. A 6.

²⁴ 266 U. S. 457, 45 S. Ct. 165, 69 L. Ed. 374 (1925).

United States, doing business within such territory.' And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies." Thus, the Supreme Court, in *Hamburg-American Line Terminal and Navigation Co. v. United States*,²⁵ held that under sec. 2 of the Trading with the Enemy Act, property in this country owned by a domestic corporation was non-enemy property, even though all of the stock of the corporation was owned by an enemy, the Hamburg-American Line, a German corporation in Hamburg, Germany. Speaking for the Court, Mr. Justice McReynolds said (at p. 140): "It (Congress) definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy."²⁶

From the same point of view, namely, that the status of the corporation is not fixed by the stockholders' nationality, the control test was rejected by New York courts in *Fritz Schulz, Jr., Co. v. Raimes & Co.*²⁷ There it was held that a New Jersey corporation owned entirely by German stockholders residing in Germany did not, at the outbreak of the war, cease to be a domestic corporation. In so doing, the New York courts followed the decision of the (English) Court of Appeals in the *Daimler* case²⁸ and rejected the *Daimler* decision of the House of Lords, which had reversed the Court of Appeals.

This doctrine, which refuses to "look behind the scenes," was recently confirmed by the Mixed Claims Com-

²⁵ 277 U. S. 138, 48 S. Ct. 470, 72 L. Ed. 822 (1928).

²⁶ But see *Amtorg Trading Corp. v. United States*, 71 F. (2d) 524 (C. C. P. A. 1934); the "I'm alone" case, Hackworth, *Digest of International Law*, vol. II (1941) p. 703, 750.

²⁷ 100 Misc. 697, 166 N. Y. S. 567 (1917).

²⁸ (1915) 1 K. B. 893.

mission, United States and Germany, in *United States on behalf of Lehigh Valley Railroad, Agency of Canadian Car and Foundry Co., Ltd. v. Germany*.²⁹ The Umpire concurred *expressis verbis* in the views set forth by the American Commissioner in his supplemental opinion (at p. 321) that "it is a settled rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character." However, in this case the issue was not whether the company in question was an enemy, but rather whether an American company controlled by Canadians could be a claimant as an American national.³⁰

During this war the control theory has been rejected in this country with regard to the Trading with the Enemy Act. In *Toa Kigyo Corporation v. Offenberger*,³¹ a domestic corporation—the stockholders of which were non-resident Japanese nationals and the manager a resident Japanese national—was not regarded as an enemy, the court expressly stating that "the case is not within the prohibition against the prosecution of causes by non-resident aliens."³²

The problem arises in reverse where it is claimed that control by non-enemy stockholders should divest a corpo-

²⁹ October 31, 1939, *Opinions and Decisions*, p. 324. See Woolsey, *Litigation of the Sabotage Claims Against Germany*, (1941) 35 Am. J. Int. L. 282, 299; Martin (Acting Agent of the United States), *Final Report* (1941) p. 84, and, as to the litigation relating to the awards of the Mixed Claim Commission, *Z. & F. Assets Realization Corporation and American-Hawaiian Steamship Co. v. Hull, Secretary of State*, 311 U. S. 470, 61 S. Ct. 351; (1941) 35 Am. J. Int. L. 394; Note (1941) 27 Virginia L. Rev. 394.

³⁰ For a similar rule as to corporations organized in the Philippine Islands or in China, the Department of State expressed the opinion that for purposes of Consular jurisdiction, all American corporations are recognized as American citizens "irrespective of the nationality of the stockholders." Hackworth, *Digest of International Law*, Volume II (1941) p. 567.

³¹ N. Y. L. J. February 14, 1942, p. 687.

³² A stay of action to make adequate preparation for trial was granted.

ration of its otherwise established enemy character. Rejection of such a claim would seem to follow from rejection of the control test in any form.

Recently, this question was dealt with in *H. P. Drewry, S. A. R. L. v. Onassis*.³³ There, the plaintiff was a French corporation with its registered office and principal place of business in Paris, France, and incorporated under the laws of France. The individual who owned most of the plaintiff's corporate stock was, and is, a British subject, who had fled to England. The court held that this circumstance "does not affect the plaintiff's status to the extent of concealing the enemy alien status." It reasoned that to "permit the nationality and residence of stockholders to dictate the decision in cases of this character would mean that American owned corporations incorporated and having their residence in enemy territory would be exempt from the operation of the law. Such a result could make a travesty of the Trading with the Enemy Act in many instances. It is the nationality and residence of the corporation that controls, not that of its stockholders. The corporation is the legal entity that counts." Furthermore, the fact that plaintiff's assets were all removed from France before the Germans arrived in Paris, did not aid the plaintiff. Said the court: "Even if we assume that the plaintiff's sympathies are with the United Nations—and that assumption is seemingly justified—the legal status of the plaintiff remains unaltered. The Trading with the Enemy Act makes no distinction between an enemy in law and an enemy in spirit. Sympathies of the persons affected cannot sway the result. Whoever comes within the sweep of the definition is an enemy."³⁴

³³ N. Y. L. J. November 17, 1942, p. 1496. Cf. the English case of the same parties, Chap. XIV, n. 38.

³⁴ On reargument the original decision was adhered to, N. Y. L. J. December

Thus, the court has again taken the view that the controlling test in deciding the status of a corporation as an enemy, within the meaning of sec. 2 of the Trading with the Enemy Act, as amended, is the nationality and residence of a corporation and not that of its stockholders.

As to the freezing regulations, General Ruling No. 11, March 18, 1942, as amended, expressly adheres to the separability doctrine of corporations by classifying as "enemy national" an organization "to the extent it is actually situated within enemy territory." The phraseology omits any reference to the control test which has been applied in the early freezing regulations. According to sec. 5E (ii) of Exec. Order No. 8389, as amended, an enterprise is regarded as a "national of a foreign country" and its assets are blocked, if it "was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof." Thus, a domestic corporation is deemed to be under the control of a "national of a foreign country" when a substantial portion of its capital is represented by funds which belong to blocked nationals.³⁵

In accord with this more realistic approach, which corresponds to the needs that war-time regulations are designed to meet, Professor Jessup, at the Meeting of the American Society of International Law, April 25, 1942, pointed out:³⁶ "Why should we in international law still talk of the diplomatic protection of a corporation accord-

19, 1942, p. 1975. This status as enemy corporation did not prevent the plaintiff from maintaining the action, see *infra* Chapter XV.

³⁵ See Note, *Foreign Funds Control Through Presidential Freezing Orders*, (1941) 41 Col. L. Rev. 1039, 1045.

³⁶ *International Law in the Post-War World*, (1942) 36 Am. J. Int. L. Proceedings 46, 49.

ing to its nationality or even its majority stock ownership after Berle and Means³⁷ and even the *Daimler* case have shown us the primary importance of management and control? Why do we not face and regulate facts instead of hiding them, as lawyers love to do, in legal formulae?"

It may be doubted if the statement of a learned writer³⁸ commenting on the freezing regulations is still justified, when it is said that "a corporation all of whose securities were owned by an enemy (or national) would be subject to freezing but not to seizure of its property," and "the (Trading with the Enemy) Act is therefore more restricted than is the freezing power."³⁹ On the other hand, it must be borne in mind that Public Circular No. 18, March 30, 1942,⁴⁰ sec. 3c, extends the term "person subject to the jurisdiction of the United States" to include any organization "which is owned or controlled by, directly or indirectly, one or more persons subject to the jurisdiction of the United States as herein defined."

This trend toward the application of the control doctrine to the determination of the enemy character of corporations is also manifest in the Final Act of the Inter-American Conference on Systems of Economic and Financial Control, July 10, 1942.⁴¹ Its Recommendation VII on "Control of Business Enterprises" provides that alienation of property of owners inimical to the security of the Western Hemisphere may be made only to "nationals of the respective country (American Republic) or to juridical persons formed by them." Thus the Costa Rica Decree

³⁷ *The Modern Corporation and Private Property* (1932).

³⁸ Davis, *Federal Freezing Orders—A Transition Period*, N. Y. L. J. September 30, 1941, p. 820.

³⁹ Davis, *Trading with the Enemy*, N. Y. L. J. December 19, 1941, p. 2048.

⁴⁰ 7 Fed. Reg. 2503 (1942); cf. Transportation Regulations, March 3, 1943, 8 Fed. Reg. 2819 (1943).

⁴¹ Proceedings, Pan American Union, Congress and Conference Series No. 39, p. 137, 155.

No. 52⁴² terminating all commerce with Axis nationals, had already placed under special governmental control all stock companies in which nationals of Japan, Germany and Italy owned more than 25 per cent of the stock.

In any event, the criteria of control need to be sufficiently determined. In the different provisions of the Trading with the Enemy Acts there is no enumeration of the requirements of control. Only in the Canadian Consolidated Regulations respecting Trading with the Enemy (1939), sec. 8 (1), and the New Zealand Trading with the Enemy Regulations (1939), r. 6 (4) (b), does the fact that "one-third or more of the issued share capital or of the directorate of a company" has been held by enemy aliens, provide the legal basis to consider a corporation an enemy, within the meaning of these Regulations. We refer further to the recent Australian Regulations,⁴³ pursuant to which no alterations of articles of associations of companies are allowed where more than 25 per cent of the shares are held by or for the benefit of enemy subjects.

Other indications are furnished by regulations issued under different Trading with the Enemy Acts and also by cases decided in Australia, France, and Germany during this war, concerning the enemy character of corporations. In *Re G. Hardt & Co. Pty. Ltd.*,⁴⁴ the company, incorporated as a proprietary company limited by shares, bought wool in the Australian market to fulfill orders from abroad. It imported to Australia motor cars from Auto Union, a manufacturer in Germany, and other goods under the German Aski scheme.⁴⁵ This device is but one of many

⁴² December 26, 1941, Gaceta Oficial December 27, 1941.

⁴³ Quoted *supra* n. 11; cf. Baalman, *War Legislation Affecting Property in Australia* (1942) p. 107.

⁴⁴ (1940) 13 Australian L. J. 425 (High Court of Australia, December 16, 1939).

⁴⁵ Cf. Domke, *Quelques Questions de la Pratique du Droit Prive Monetaire*, (1939) 4 *Etudes Pratiques de Droit Commercial* 298, at p. 304; Weiden,

used by Germany to favor transactions in reichsmarks. The purchase price is credited to the account of the (Australian) exporter with a German bank to be used for the purchase of German goods, either by the exporter himself or by another foreign trader to whom he may assign that account. "The arrangements surrounding the various agencies were varied and of a considerably complicated nature" (at p. 425). The director and some employees of the company who were German nationals were interned at the outbreak of war. The shares of the company were held by or on behalf of six persons, five of whom were German nationals, while the nationality of the sixth was in doubt, he being either a German or an Argentine national. Four of them appeared to have resided in Germany since the outbreak of the war, one in Argentina, one in Batavia, Dutch East Indies. A chartered accountant, auditor of the company, was appointed comptroller by the court⁴⁶ with powers set forth in detail in the report of the case (at p. 426), on the ground that the company carried on business wholly or mainly on behalf of enemy subjects.

The French cases are significant, too, because the control test of the French Act differs from the doctrine recently confirmed by the Corporation Statute,⁴⁷ namely, the *siège social* or the *centre d'exploitation* doctrine. The statutory adoption of the control doctrine by the Trading with the Enemy Act was followed by three decisions of the Tribunal Civil de la Seine in which the court, in deciding whether or not a corporation was controlled by

Foreign Exchange Restrictions, (1939) 16 N. Y. U. L. Q. Rev. 559, at p. 564; Nussbaum, *Money in the Law* (1939) p. 478.

⁴⁶ On application made by the Minister of Trade and Customs under sec. 13(1)c of the Trading with the Enemy Act 1939-1940.

⁴⁷ This Act of November 16, 1940 (Journ. Off. November 26, 1940, p. 5828, *rectificatif* November 27, 1940, p. 5848) sec. 5(6), applies to corporations which have their administrative center in France but carry on business in other countries.

enemies, did not regard the enemy nationality of the manager or shareholders as decisive, but applied to such persons only the tests of enemy character as set up by the Act. Thus the enemy character of a corporation was denied in *S. A. Les Parfums Tosca*,⁴⁸ because the controlling German national was residing in the Netherlands, then neutral, and was not on the blacklist. The same result was reached in the *Société Le Zénith* case,⁴⁹ where the corporation was controlled by German refugees in France who had not been interned, and in *Spielman, Herman et Spielman, Ernst*⁵⁰ where Austrian refugees who were no longer connected with their former Viennese firm resided in the United States and Canada. On the other hand, in *Société Soma-tex*,⁵¹ enemy character was attributed to a corporation, two of whose three managers were German nationals who had left France at the outbreak of the war, the control there being clearly in the hands of enemies. In this case a company with a capital of 50,000 francs, which in its capacity as agent for various foreign machine manufacturers owed 1,000,000 francs to a German creditor, payment of which had not been asked for, was declared to be under enemy control—thus indicating that stock ownership is not the sole decisive test of enemy control. Even if the control exercised by enemy persons is not so predominant as to render the company itself an enemy, the shares—or in the case of a partnership the right, title, and interest as co-partner in and to the partnership—owned by an enemy are considered enemy property. Thus in the *Zénith* case, where the court did not uphold the sequestration of the assets of a limited liability company, it maintained the

⁴⁸ November 16, 1939, Dalloz Hebd. 1940, 11; Recueil Gazette du Palais 1939, II 360.

⁴⁹ January 3, 1940, Dalloz Hebd. 1940, 35; Rec. Gazette Pal. 1940 I, 78.

⁵⁰ March 7, 1940, Rec. Gaz. Pal. 1940 I, 370.

⁵¹ November 3, 1939, Dalloz Hebd. 1940, 22; Rec. Gaz. Pal. 1939 II 338.

seizure of the interest of a co-partner whose status as a refugee in France had not been administratively clarified. French courts during this war had to settle a question similar to that dealt with by the Mixed Claims Commission,⁵² that is, whether corporations constituted in France according to French law, carrying on business there and being controlled by foreigners other than enemies, are to be considered "nationals" to whom certain benefits of municipal law such as relief for tenants should be denied. The French courts⁵³ refused to extend such extraordinary benefits even to corporations the shareholders of which were citizens of nations protected by most-favored-nation clauses of international treaties.

The application of the control doctrine under the French Trading with the Enemy legislation was changed, however, due to the occupation by Germany of Poland and later of other countries. Under sec. 2 (c) of the Act of September 1, 1939,⁵⁴ French corporations under the influence of persons or companies in these occupied territories would have had to be considered enemies, since control was vested in persons in what was then enemy territory, namely, territory which was assimilated to enemy territory. However, since communication between these territories and France was disrupted because of the war, such control in fact could no longer be exercised. Recognizing this fact, French law⁵⁵ no longer regarded corporations under Polish, Czechoslovak, and Danish control as under control of persons in enemy-occupied territory and hence as enemies, since these French corporations no longer

⁵² *Supra* n. 29.

⁵³ For citation of cases see Domke, *Problems of International Law in French Jurisprudence 1939-1941*, (1942) 36 Am. J. Int. L. 24, at p. 31, n. 26-29.

⁵⁴ Journ. Off. September 4, 1939, p. 11091.

⁵⁵ Decrees of May 2, 1940 (Journ. Off. May 3, 1940, p. 3230) and June 1, 1940 (Journ. Off. June 3, 1940, p. 4183).

depended upon any effective control from abroad. Thus the scope of the control theory in French law has been restricted substantially. The application of the control doctrine has been dealt with in greater detail by authors commenting upon the German trading with the enemy legislation.⁵⁶ In German law, a substantial influence constituting control is deemed to exist in cases of 50 per cent ownership of shares or voting power. But such control is manifested not only by legal ownership, but also by long-term loans, contracts of sale, and other factual situations in which a material influence can be exercised on the management of the corporation. Even indirect enemy influence is deemed decisive, e. g., if the shares of a domestic corporation are owned by a neutral corporation the shares of which are in turn owned by persons or corporations considered enemies within the meaning of sec. 3 of the German Act of January 15, 1940. The complicated credit relationships underlying present international commercial transactions are also taken in account in the American freezing regulations and in the practical application of the British Act where, as it has been pointed out,⁵⁷ "*de facto* control is enough for this purpose. The agents or persons need not be properly authorized persons. It is sufficient if they actually control the affairs of the company."

On the other hand, German law does not attribute enemy character to a corporation under enemy control.⁵⁸ The enemy-controlled domestic corporation itself is not considered an enemy since it "belongs to the economic sphere of the Reich and a major part of its profits remains

⁵⁶ Hefermehl, *Die Behandlung feindlichen Vermoegens*, (1940) 102 Deutsche Justiz 165, 169.

⁵⁷ Blum and Rosenbaum, *The Law Relating to Trading with the Enemy* (London 1940) p. 11, n. 28.

⁵⁸ Court of Appeal (Oberlandesgericht) Koeln, April 16, 1940; (1940) 102 Deutsche Justiz 519, ann. by Hefermehl.

in the Germany economy."⁵⁹ Rather, a domestic enterprise (*Inlandsunternehmen*)⁶⁰ under dominant enemy influence is placed under the special administration of the Reich Commissioner for the Administration of Enemy Property. The administrator of such enterprise, as the only legal representative, was denied the right to entrust the management to the former manager or other persons as legal representatives of the corporation.⁶¹ The provision of the German Decree of May 30, 1940,⁶² has been extended to "protect" domestic corporations under Norwegian, Belgian, Luxemburg, and Dutch influence though the nationals of these occupied countries are not considered enemies within the meaning of the German trading with the enemy legislation.

Another special provision in German law applies to enemy-controlled corporations which have neither central nor branch offices inside Germany. They are considered "enemies," regardless of where they are established, whether in neutral countries or elsewhere. These corporations are placed under curatorship for absent persons, according to the Decree of October 11, 1939,⁶³ while domestic corporations under enemy control are placed under the aforementioned special administration of the Reich Commissioner.⁶⁴ It may be mentioned that the control doctrine

⁵⁹ Daniel, *Stellung und Behandlung feindlicher Versicherungsunternehmen während des Krieges*, (1940) 23 *Hanseatische Rechts und Gerichtszeitung* B 115, 123.

⁶⁰ Cf. Federal Supreme Court of the Reich (Reichsgericht), July 10, 1934, *Juristische Wochenschrift* 1934 p. 2969 No. 1.

⁶¹ Landgericht (District Court) Berlin, October 26, 1940; (1941) 11 *Deutsches Recht* A p. 211 No. 18, ann. by Groschupp, *aff'd* Court of Appeals (Kammergericht), January 16, 1941, *ibid.* p. 871 No. 25

⁶² General Regulations of the Reichs Minister of Justice, June 20, 1940, (1940) 102 *Deutsche Justiz* 728; September 17, 1940, *ibid.* p. 1060.

⁶³ *Reichsgesetzblatt* 1939 I p. 2026, with executive decrees of January 22 and May 30, 1940, *ibid.* 1940 I, p. 232, 821, transl. (1940) 3 *Comp. L. Ser.* 385.

⁶⁴ Cf. *Mayer v. Garvan*, 270 Fed. 229 (D. C. D. Mass. 1921), *modified* 278 Fed. 27 (C. C. A. 1st, 1922), *rev'd* on other grounds, 271 U. S. 272, 46 S. Ct. 538, 70 L. Ed. 743 (1926), where a German court was held without authority

has been applied especially with regard to American interests. By sec. 1 of the Decree of June 28, 1941,⁶⁶ regarding the Freezing of American Property in the German Reich, the assets of domestic corporations are blocked "which, to an extent of 25 per cent or more, are directly or indirectly controlled by individuals or corporations who are either United States citizens or whose permanent domicil or usual residence is within the United States."

As to the status of enemy controlled corporations under prize law with reference to vessels and goods of such corporations, no decisions have as yet become known during the present struggle.⁶⁶

The question whether a corporation is deemed to be under enemy influence is left to the courts in French law,⁶⁷ while in German law the enemy character of corporations, whether enemy-controlled domestic or domiciled abroad, is conclusively determined by the Reich Minister of Justice,⁶⁸ and in the occupied territories by the civil or military occupying authorities.⁶⁹

Administrative rather than judicial determination is

to appoint a *curator absentis* for an American citizen residing at Boston, a partner of a dissolved German-American partnership.

In this war, the German Act of January 15, 1940, sec. 4, subjects the enemy-interest (in a partnership) as such to the requirement of reporting and to prohibition of any transaction. Similarly, a curator may be appointed for the sole purpose of representing such interest of the absent enemy owner.

⁶⁵ Transl. C.C.H.W.L.S.F.S. ||67703. Cf. Circular Regulation (*Runderlass*) of the Foreign Exchange Control Agency No. 54/41 Devisenstelle—19/41 Reichsstelle.

⁶⁶ See Norem, *supra* n. 1, at p. 330; Hackworth, *Digest of International Law*, vol. II (1941) §208 p. 724; Colombos, *Treatise on the Law of Prize* (2nd ed., London 1940) p. 69; Kunz, *British Prize Cases, 1939-1940*, (1942) 36 Am. J. Int. L. 204, 216.

⁶⁷ For cases see *supra* n. 48-51.

⁶⁸ Sec. 12(2) of the Decree of January 15, 1940, Reichsgesetzblatt I, p. 191; cf. Hefermehl, *Das feindliche Vermoegen*, (1940) 10 Deutsches Recht p. 1217, 1220.

⁶⁹ Cf. the decrees Chap. I, n. 26-31, concerning Poland sec. 21, Norway sec. 13, Belgium and Luxemburg (July 2, 1940) sec. 6(2), Holland sec. 13, France secs. 3, 10.

now prevailing, too, in the United States. Exec. Order No. 8389, as amended, provides in sec. 5E that the Secretary of the Treasury shall have full power to determine that any person (including corporations) is or shall be deemed to be a "national of a foreign country," and Exec. Order No. 9095, as amended, provides in sec. 10(a) that the determination by the Alien Property Custodian as to property of a designated enemy country or national thereof shall be "final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred (upon the President of the United States) by sec. 5(b) of the Trading with the Enemy Act, as amended."

The control of stock of domestic corporations deemed to be enemies within the meaning of the Act, because of their being controlled by enemies, may be vested by the Alien Property Custodian in himself. Although he may not be bound by State laws which substantially impair the performance of his functions,⁷⁰ he was advised by the Opinion of his Chief Counsel, September 21, 1942, to comply, in the management of such corporations, with State laws requiring State residence of one or more directors or shareholders.⁷¹

It is obvious that authority in the administration of the Trading with the Enemy Act, in foreign funds control by the Treasury and in the administration of enemy property by the Alien Property Custodian, must be unhampered so

⁷⁰ As to the conflict between the New York Personal Property Law, sec. 174, and the Trading with the Enemy Act, in relation to the issuance to the Alien Property Custodian of new certificates of stock for those lost or destroyed without the necessity of his complying with the provisions of the State law, it was said in *Miller v. Kaliwerke Aschersleben A. G.*, 283 Fed. 746 (C. C. A. 2d, 1922): "Unless for some reason these acts of Congress are unconstitutional they override the law of the State of New York in so far as the two are in conflict."

⁷¹ C.C.H.W.L.S. ||9753.

that the executive branch of the Government may make full use of the weapons of economic warfare which have been entrusted to it. As has been pointed out in another connection:⁷² "Realism requires such construction as permits the most efficient co-operation with the Federal agencies directly charged with the duty of carrying on the war."

⁷² *International Association of Machinists v. E. C. Stearns & Co.*, 178 Misc. 661, 664, 33 N. Y. S. (2d) 156, 159 (S. Ct. Onondaga County, July 2, 1942). Cf. *Matter of Armand Schmoll v. The Federal Reserve Bank of New York*, 286 N. Y. 503, 37 N. E. (2d) 225 (October 16, 1941); Note, *Supreme Court Evaluation of Administrative Determination of Law 1932-1942*, (1942) 56 Harvard L. Rev. 100; *infra* Chapter XVII.

10. Blacklisted Individuals and Corporations.

RESIDENCE, carrying on business in enemy territory, and control by enemies are not the only tests by which the enemy character of persons and corporations may be determined. The various Trading with the Enemy Acts provide that persons and corporations residing or carrying on business in any country, and being deemed to serve the interests of the enemy, may be classified as enemies, within the meaning of the respective Acts. The determination of such persons and corporations by executive authorities makes it possible to take into account the ever changing character of economic warfare.

The British Act, sec. 2 (2) provides that "the Board of Trade may by order direct that any person specified in the order shall, for the purposes of this Act, be deemed to be, while so specified, an enemy." This authority is exercised through Trading with the Enemy (Specified Persons) Orders.¹ Though theoretically the Board of Trade is competent to list the name of any person or corporation in any place, for any reason,² the Schedules (Statutory List) contain exclusively names of residents of neutral countries. The rule is laid down in sec. 2 of the (Amendment) Orders revoking all previous Orders, which provides: "Each

¹ For a complete list see Howard, *The Defence (Finance) Regulations*, 1939 (London 1942), Appendix 10, p. 97. A new Consolidation Order—The Trading with the Enemy (Specified Persons) (Amendment) (No. 3) Order, February 20, 1943, S. R. & O. 1943, No. 216, varied by (Amendment) (No. 4) Order, March 3, 1943, S. R. & O. 1943, No. 285.

² See Parry, *Trading with the Enemy and the Definition of an Enemy*, (1941)

³ Modern L. Rev. 178; Trotter, *Law of Contract During and After War* (4th ed. 1940, London) p. 37.

of the persons specified in the Schedule hereto [the (Amendment) Orders] shall for the purposes of the Trading with the Enemy Act, 1939, be deemed to be an enemy within the meaning of that Act during such period as this Order shall in relation to such person remain in force."

Similar provisions are contained in the Canadian Consolidated Regulations Respecting Trading with the Enemy (1939). Included in the term "enemy" by sec. 1 (b) (ii) is "a person wherever resident or carrying on business who is an enemy or treated as an enemy and with whom trading is, for the time being, prohibited by these Regulations or by statute or proclamation by His Majesty or by the common law," and by sec. 1 (b) (iv), "any person who is declared by the Governor in Council to be an enemy." The last (fourth) Consolidation of Lists of Specified Persons contains 10,642 names of companies and individuals; of these only five are listed under *United States*.³

The Australian "Trading with the Enemy Act, 1939, Specified Persons Lists" are revised by Declarations of the Minister of State for Trade and Customs.⁴ In New Zealand, the Enemy Trading Regulations, 1939, r. 3 (i) (a) use the concept of "enemy trader" to effect a sweeping elimination of business favoring the Axis.⁵

The French Act,⁶ sec. 3, authorized the Minister of Foreign Affairs to establish a list of individuals and bodies resident in neutral countries who are deemed to be under enemy influence and therefore to be treated as enemies (*Liste officielle d'ennemis*).⁷ The fact that persons of

³ Cf. Revision No. 38, March 26, 1943, Canada Gazette, p. 1433.

⁴ See No. 12, December 15, 1941, Commonwealth Gazette No. 280, December 31, 1941.

⁵ Declaration by the Minister of Industries and Commerce, October 29, 1939, New Zealand Gazette, December 7, 1939, No. 143, p. 3459.

⁶ Journ. Off. September 4, 1939, p. 11093.

⁷ *Liste Officielle des Maisons Considérées Comme Ennemis ou Comme Prenant Vis-à-vis de l'Ennemi le Rôle de Personnes Interposées et Résidants dans les Pays Neutres.*

enemy nationality may reside or carry on business in neutral countries is not in itself sufficient to warrant their classification as enemies. It is further necessary that they be "blacklisted." Thus, in *S. A. Parfums Tosca*,⁸ the Tribunal Civil de la Seine held that the German managing director and holder of a substantial part of the shares (2,000 of 2,500) of a French corporation could not be considered as enemy since he was residing in the Netherlands, then neutral, and had not been put on the French blacklist.

Legislation of governments-in-exile includes the Dutch decree of June 7, 1940,⁹ sec. 1 (5) d, which classifies as enemies "persons who are declared by Us [the Government] to be enemy subjects"; and the Belgian decree-law of April 10, 1941,¹⁰ sec. 5, provides similarly that "persons appearing on the special list published in the *Moniteur Belge* by the Minister of Economic Affairs are assimilated to enemy subjects."

In Germany no official blacklists have been issued in this war.¹¹ Resort to blacklists has been found unnecessary because foreign commerce has been regulated for many years by a strict system of exchange control requiring a license for any transaction with any foreign country. As stated in the Rules for the Control of Foreign Exchange (*Richtlinien fuer die Devisenbewirtschaftung*), sec. 6 (1):¹² "The object of the Foreign Exchange Law and the rules for its administration is to prevent the unregulated outflow of foreign exchange from the German domain and to render present and future exchange the subject of de-

⁸ *S. A. Les Parfums Tosca*, Trib. civ. Seine, November 16, 1939, *Dalloz Hebdomadaire* 1940, 11; *Recueil Gazette du Palais*, 1939, II 360.

⁹ *Staatsblad* No. A 6.

¹⁰ *Moniteur Belge* 1941, p. 90.

¹¹ Cf. Hefermehl, *Die Behandlung feindlichen Vermoegens*, (1940) 102 *Deutsche Justiz* 165, at p. 166.

¹² See *infra* Chapter XX, n. 2.

liberate regulation." The Italian Act,¹³ however, provides for the establishment of a blacklist (*lista nera*) of suspect individuals (*persone sospette*).

As regards the United States, the extension of economic warfare, especially after the invasion of Western European territories, led to the freezing regulations under sec. 3 of the Trading with the Enemy Act. Moreover, the efficient use of weapons of economic warfare required further measures to supervise enemy trade in neutral countries. Since the President has not yet made use of his authority under sec. 2 (b) of the Trading with the Enemy Act to issue a list of individuals and corporations who are to be considered as enemies, within the meaning of the Act, regardless of their residence,¹⁴ it may be asked whether the Proclaimed List of Certain Blocked Nationals,¹⁵ may be regarded as the "enemy list" within the meaning of the Act.¹⁶ However, the question seems to be moot.¹⁷ For General Ruling No. 11, as amended, sec. 2 (a) IV expressly declares as enemy nationals, "any person whose name ap-

¹³ Sec. 325 of the Royal Decree of July 8, 1938, *Gazzetta Ufficiale Supp. Ord.*, September 15, 1938, p. 4294.

¹⁴ The discussion on this point has now been settled by U. S. Supreme Court in *Ex parte Kumezo Kawato*, 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942).

¹⁵ Under Presidential Proclamation No. 2497, July 17, 1941; 6 Fed. Reg. 3555 (1941); (1942) 36 Am. J. Int. L. Supp. 214, *infra* Appx. J. Various revisions and supplements thereto are superseded by Revision IV, November 12, 1942, 7 Fed. Reg. 9510 (1942) and Cumulative Supplements Nos. 1, 2, *ibid.* 9671, 10761, Nos. 3-5, 8 Fed. Reg. 832, 2006, 3137 (1943).

¹⁶ Stiefel, *Insurance and Trading with the Enemy*, (1942) 146 *Weekly Underwriter* 58, 59. As to the unofficial "gray" list of importers and foreign traders in Latin-American nations and other parts of the world who have become suspect of favoring Axis objectives, see *N. Y. Times*, April 5, 1942, *Business Sect.* p. 3.

¹⁷ Cf. Woolsey, *War between the United States and the Axis Powers*, (1942) 36 Am. J. Int. L. 77, 81; *Statement of the Delegation of the United States at the Inter-American Conference on Systems of Economic and Financial Control*, Proceedings, Pan American Union, Congress and Conference Series No. 40 (1942) p. 42; *Administration of the Wartime Financial and Property Controls of the United States Government* (Treasury Department, December, 1942) p. 17.

pears on The Proclaimed List of Certain Blocked Nationals and any other person acting therefor.”¹⁸

Since by the First War Powers Act the freezing regulations are expressly integrated with the Trading with the Enemy Act, and the meaning of “enemy national” in General Ruling No. 11 has been adopted by the U. S. Censorship Regulations,¹⁹ the important field of trading and communication is covered by these terms of General Ruling No. 11. The Press Release of the Treasury Department, March 18, 1942,²⁰ clarifies the situation by pointing out that “a person in the United States may freely trade or communicate with any one in Latin America unless such person is on the published ‘blacklist’ or is known to be an agent or a representative of such person or for one of the Axis governments or their satellites. Thus a person may deal with the Buenos Aires branch of an Italian firm so long as such branch is not placed on the blacklist or is not known to be acting as a cloak for a Proclaimed List national or for the Axis. Of course, a person may not trade or communicate with such Latin American branch if in fact he intends to use this as a device for actually communicating with the head office of the firm in Italy.”

Exec. Order No. 9095, as amended, entrusts the Alien Property Custodian with the final and conclusive determination whether such (blacklisted) persons and corporations are to be treated as “nationals of a designated country.” According to sec. 10 (a), persons not within designated enemy countries, especially persons in neutral countries, “shall not be deemed to be nationals of a designated

¹⁸ Foreign traders were recently reminded again, by the Department of Commerce, of the necessity for checking the political status of agents, consignees and customers. Exporters may obtain a list of selected firms “as suitable replacements for undesirable contacts,” N. Y. Times, December 8, 1942.

¹⁹ January 30, 1943, 8 Fed. Reg. 1644 (1943).

²⁰ Fed. Res. Bank of New York, Circular No. 2399.

country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country, or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest for the United States requires that such person be treated as a national of a designated enemy country." Furthermore, General Order No. 2 of the Alien Property Custodian, June 15, 1942,²¹ and No. 14, December 1, 1942; No. 15, January 6, 1943,²² include in the term "designated foreign national": "any person included in The Proclaimed List of Certain Blocked Nationals."^{22a}

As has been seen *supra* p. 12, the "enemy" concept of the Trading with the Enemy Act has been modified by the substitution of the new concept "enemy national," General Ruling No. 11, as amended, sec. 2 (a) IV, including in this latter term the blacklisted persons and corporations. This change, as stated in the Press Release of the Treasury Department, March 18, 1942, permitted "an effective adaptation of these restrictions (against trade and communications under war-time conditions) to the pattern of the present war." Thus, the blacklisting system in effect supplements the application of the control test and of the doctrine of "acting for the benefit of an enemy." These criteria, purporting especially to destroy all enemy trade in neutral countries detrimental to the United Nations, are appropriate to counteract the measures of economic war as waged by the Axis powers. Professor Quincy Wright

²¹ 7 Fed. Reg. 4634 (1942).

²² 7 Fed. Reg. 10546 (1942); (1943) 25 J. Pat. Off. Soc. 137.

^{22a} Cf. sec. 22.4, Transportation Regulations, March 5, 1943, 8 Fed. Reg. 2819 (1943).

rightly says:²³ "Totalitarian economy has thus destroyed not only the rule of law, protecting international commerce, but also the rule of law protecting frontiers, and has reduced international relations to a jungle condition."

Moreover, the preservation of the foreign commerce and domestic economies of the American Republics, which has always been considered part of the "Good Neighbor" policy, made necessary some adjustment of Anglo-American theories of wartime commercial law. Not only have general and special licenses under the freezing regulations facilitated business in Latin America, but the American Republics have been declared a generally licensed trade area,²⁴ so that normal trade may continue, except with blacklisted firms. Along the lines of the same policy, Public Interpretation No. 2²⁵ deals with the question whether a trade transaction with a concern in such a generally licensed trade area²⁶ is excluded from General License No. 53 solely because the concern is a branch or subsidiary of a concern organized under the law of an enemy or enemy-occupied country outside of this area or because "a substantial portion of the stock is held by a person domiciled or resident outside the generally licensed trade area." Contrary to the control doctrine as applied generally under the freezing regulations, such a trade transaction is not excluded from General License No. 53, as amended.

²³ *International Law and the Totalitarian States*, (1941) 35 Am. Pol. Sci. Rev. 738, 741.

²⁴ This term is defined in sec. 3(a) of General License No. 53, as amended by Public Circular No. 19, September 22, 1942, 7 Fed. Reg. 7518 (1942), as including: (i) the American Republics; (ii) the British Commonwealth of Nations; (iii) the Union of Soviet Socialist Republics; (iv) the Netherlands West Indies; (v) the Belgian Congo and Ruanda-Urundi; (vi) Greenland; (vii) Syria and Lebanon; and (viii) French Equatorial Africa, New Caledonia, Tahiti and the French Establishments in India.

²⁵ Fed. Res. Bank of New York, Circular No. 2368.

²⁶ The term does not include "any territory which is controlled or occupied by the military, naval or police forces or other authority of Japan, Germany, or Italy, or allies thereof," *supra* n. 24.

The adoption of United States blacklists by such countries as Bolivia,²⁷ Costa Rica,²⁸ Guatemala,²⁹ Haiti,³⁰ and Nicaragua³¹ further diminished the fear that American firms would become "subject to heavy contractual liability in foreign courts,"³² a fear which proved unfounded.^{32a} This process of rendering trading with the enemy laws more uniform³³ will be promoted by the Recommendations of the Final Act of the Inter-American Conference on Systems of Economic and Financial Control,³⁴ especially the Third Recommendation on "Transactions Among the American Republics," which provided that transactions may be prevented "which would benefit the aggressor nations, the actions dominated by them, or persons whose activities are inimical to the security of the American Continent."

Adoption of this new concept of "loyalty" as the decisive test is also to be found in the Fifth Recommendation (Standards for the Application of Financial and Economic Controls Within the American Republics) which as one of its objectives determines "to eliminate from the economic life of the respective country all undesirable influence and activity of those persons, real or juridical, residing

²⁷ December 12, 1941, Proceedings, *supra* n. 17, at p. 15.

²⁸ October 10, 1941, *ibid.* p. 24.

²⁹ Presidential Decree No. 2702, February 21, 1942, *Diario de Centro America*, February 24, 1942; No. 2791, June 17, 1942, *ibid.* June 17, 1942; No. 2841, July 17, 1942, *ibid.* July 24, 1942.

³⁰ December 29, 1941, Proceedings, *supra* n. 17, at p. 32 A.

³¹ Presidential Decree No. 70, December 16, 1941, *La Gaceta*, December 18, 1941.

³² Davis, *Federal Freezing Orders—A Transition Period*, (1941) 106 N. Y. L. J. 804 (September 29, 1941). Cf. Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, (1942) 56 Harvard L. Rev. 30, at p. 62, n. 136.

^{32a} Cf. Publ. Interpretation No. 10, February 25, 1943, Fed. Res. Bank of New York, Circular 2591.

³³ E. g. Mexico, Publication of List of Firms and Persons Included under the Provisions of the Law on Enemy Property and Business, June 11 and 23, 1942, *Diario Oficial*, June 13, July 18, 1942; Cuba, Resolution No. 26, August 18, 1942, *Gaceta Oficial*, August 21, 1942, p. 15136.

³⁴ Proceedings, *supra* n. 17, at p. 148, 152, 155.

or situated within the American Republics, who are known to be, or to have been, engaging in activities inimical to the security of the Western Hemisphere." The Seventh Recommendation regarding Control of Business Enterprises has a far-reaching objective. It aims at a policy under which "in accordance with the constitutional procedure of each country, the business, properties and rights of any real or juridical person, whatever their nationality, shall be the object of forced transfer or total liquidation . . . or of blocking, occupation or intervention."

Such a policy "goes far beyond the restrictions imposed by trading prohibitions, freezing regulations or blacklists. It is designed to put any person or corporation meeting the vague disqualifications of the recommendation out of business."³⁵ Adapted to the factual needs of the present, it is precisely this policy that requires of the executive branch of the government the exercise of powers necessary to counteract the measures of economic warfare long since prepared by the Axis powers.

³⁵ Note, *New Administrative Definitions of "Enemy" to Supersede the Trading with the Enemy Act*, (1942) 51 Yale L. J. 1388, 1398.

11. Acting "For the Benefit of the Enemy."

THE NARROW concept of the "enemy" character of individuals and corporations as defined in the Trading with the Enemy Acts of the different countries has to some extent been counterbalanced by the system of control and blacklisting, both for individuals and corporations. There is still another device that is apt to close the door to transactions which may aid the enemy, namely, the prohibition of acting on behalf of or for the benefit of an enemy. This prohibition is contained in various Trading with the Enemy Acts, and specifically the United States Act, sec. 3 (a), forbids any trade "either directly or indirectly, with, to, or from or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy."

The same point of view, namely, the prohibition of any act that may aid the enemy, found expression in the Restatement of the Law of Contracts,¹ as follows: "§594. Bargain aiding an enemy. A bargain, performance of which will have the effect of aiding an enemy of the United States, or of diminishing the power of the United States to carry on effectively a war in which it is engaged, or may engage, is illegal; §595. Bargain with an alien enemy. A bargain with an alien enemy during the existence of war is illegal unless the enemy alien resides in the United States, or in a neutral country, and the subject matter of the bargain is not such as to afford aid to the enemy, or to diminish the power of the United States to carry on the war effectively."

¹ American Law Institute (1932).

Similar devices have been used in the regulations issued during this war by the Treasury Department as well as by the Alien Property Custodian. Exec. Order No. 8389, as amended, sec. 5 III, includes within the term national "any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country."²

Furthermore, Public Circular No. 18, March 30, 1942,³ provides, sec. 2, that "any person within the Western Hemisphere who is subject to the jurisdiction of the United States shall not engage in any financial, business, trade or other commercial transaction which is directly or indirectly with, by, on behalf of, or for the benefit of an enemy national, except as specifically authorized by the Secretary of the Treasury," including in the term "person subject to the jurisdiction of the United States," in sec. 3 (d), "any agent, subsidiary, affiliate, or other person owned or controlled, directly or indirectly, by any persons subject to the jurisdiction of the United States." This provision "was primarily intended to forbid any indirect payments or transfer of goods to the enemy, and, similarly, a payment to a South American firm for repayment to Germany would probably be forbidden by the American blacklist."⁴ Thus, the Department of State on December 21, 1942, reiterated a warning to any person or firm who serves as a "cloak" for another person or firm on the Government's blacklist believed to be acting in the interest of Axis powers.⁵

² See Notes, *Foreign Funds Control Through Presidential Freezing Orders*, (1941) 41 Col. L. Rev. 1041, (1942) 42 Col. L. Rev. 105; Davis, *Trading with the Enemy*, N. Y. L. J. December 19, 1941, p. 2048.

³ 7 Fed. Reg. 2503 (1942); cf. Pub. Circ. 18A, April 13, 1943, F. Res. Bk. Circ. 2607.

⁴ Note, *New Administrative Definitions of "Enemy" to Supersede the Trading with the Enemy Act*, (1942) 51 Yale L. J. 1388, 1395.

⁵ N. Y. Times, December 22, 1942.

These provisions in the field of freezing regulations are referred to in Exec. Order No. 9095, as amended, which establishes the Office of Alien Property Custodian, and provides in sec. 10 (a) that the term "national" shall have the same meaning prescribed in sec. 5 of Exec. Order No. 8389, as amended. Even a remote interest which secures the benefits of legitimate trade to an enemy may be decisive, as is shown by the suspension of trading "until further notice" on the New York Stock Exchange in the securities⁶ of Axis governments, political subdivisions and companies.

Recent events have brought out another significant application of the prohibition against acting "for the benefit of an enemy." German Nazi sympathizers in this country, now interned, are known to have invested in German marks, *Rueckwanderer Marks*, purchased at a discount with a view to their subsequent use at full value in Germany. Such purchases, amounting to no less than \$20,000,000, as revealed by a recent report,⁷ favor the position of the enemy and are prohibited under the Trading with the Enemy Act.

In defining "agents of foreign principals,"⁸ another term in the field of war-time regulations against enemy influence, a Press Release of the Department of Justice, June 25, 1942,⁹ stated that these provisions also apply "among others, to many lawyers, and business men through-

⁶ N. Y. Times, December 12, 1941, and January 2, 1942. Similarly, the recent settlement of Mexico's foreign debt excluded Mexican bonds held in continental Europe in order to prevent funds from going to Axis-controlled countries. President Camacho's message to the Chamber of Deputies put the value of such bonds at \$50,000,000 to \$60,000,000, N. Y. Times, December 13, 1942.

⁷ Office of U. S. Attorney, S. D. N. Y., Report of Work during First War Year, N. Y. L. J. December 16, 1942, p. 1923.

⁸ Public Law No. 532, 77th Cong. 2d Sess., April 29, 1942, requiring the registration of certain persons employed by agencies to disseminate propaganda in the United States.

⁹ C.C.H.W.L.S. ||8561. Cf. *U. S. v. Musa*, U. S. Dist. Ct., S. D. N. Y., September 23, 1942, *ibid.* ||9741; *Viereck v. U. S.*, U. S. S. Ct., March 1, 1943, 11 U. S. L. W. sec. 4, p. 4233.

out the country who have as clients, or who are the trade representatives of, foreign concerns."

On the other hand, interests of "enemies" involved in lawsuits by resident claimants do not prevent the adjudication of claims, as will be shown, Chapter XV.

Several provisions similar to those of this country are contained in the British Trading with the Enemy Act. Sec. 1 (3) provides that "any reference in this section to any enemy shall be construed as including a reference to a person acting on behalf of an enemy"; sec. 1 (2) (a) further provides that a person is deemed to have traded with an enemy "if he has any commercial, financial or other intercourse or dealing with, or for the benefit of, an enemy"; and finally sec. 1 (3A), as added by the Defence (Trading with the Enemy) Regulations, 1940, deals with "restriction orders" or winding up orders" as to any business "being carried on in the United Kingdom by, or on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies."¹⁰

The same concept of "acting for the benefit of an enemy" is to be found in the Canadian Consolidated Regulations respecting Trading with the Enemy (1939), sec. 1 (b) (iii), which defines under the term enemy any person "acting as agent or otherwise on behalf of an enemy, or under the control of a person who is an enemy," whereas the New Zealand Emergency Regulations (1939), r. 3 (i) b include in the term enemy subject: "any corporation, whether incorporated in any enemy country or not, which the Attorney-General, by notice published in the Gazette, declares to be in his opinion managed or controlled, directly or indirectly, by or under the influence of, or carried

¹⁰ On an application of this provision in the *Banca Commerciale Italiana* case, see Chap. XII, n. 5.

on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country."

Similarly, the Trading with the Enemy Act of the Belgian Government-in-exile¹¹ provides in sec. 2 that "a Belgian individual . . . is also prohibited from carrying out one of the transactions contemplated by this article with any person regardless of his nationality or of his residence if he knew or should have known that such transaction is directly or indirectly giving aid and comfort to the enemy."

This question of "acting for the benefit of an enemy" has given rise to some interesting cases in England, during this war.

In *In re I. G. Farbenindustrie Aktiengesellschaft's Agreement*,¹² the Bayer Products, Ltd., asked the Court to order¹³ that certain patents registered for many years in the name of the German corporation be vested in the applicant, a British subject, alleging that the German corporation, the registered proprietor, was only a trustee for the British company as beneficial owner of the patents. The court held that the vesting order would not be an assignment on behalf of an enemy within the meaning of the Trading with the Enemy Act, sec. 4 (1), for even if it could properly be described as an assignment of a chose in action, it would be an assignment on the application of somebody not an enemy, claiming a beneficial interest.¹⁴ The exist-

¹¹ April 10, 1941, *Moniteur Belge* 1941, p. 90.

¹² (1941) Ch. 147; (1940) 4 All E. R. 486; 57 T. L. R. 148; 110 L. J. Ch. 167; 165 T. L. R. 290 (Ch. Div. November 22, 1940).

¹³ According to sec. 51 of the Trustee Act, 1925, which provides *inter alia* that where a trustee entitled to a thing in action is out of the jurisdiction, the Court may make an order vesting the right to sue for or recover the thing in action in any such person as the Court may appoint.

¹⁴ As to a license to exercise rights under an enemy-owned patent (suspension of use of a British company's trade mark), see *Rex v. Comptroller General of Patents; Ex parte Bayer Products, Ltd.*, (1941) 2 K. B. 306, 111 L. J. K. B.

ence of a state of war did not prevent the court from investigating an alleged beneficial title, even to patents which have long been on the register in the name of an enemy. Said the court, at p. 154: "the object of keeping the Courts in being and discharging their usual functions during war-time is to determine the rights of litigants who come and seek to have their rights determined."

On the other hand, there is no benefit to an enemy where a contract was made before he became an enemy. In *Ex S. S. Glenearn*,¹⁵ a British corporation had sold rubber to be delivered from its estate in Johore, British-Malaya, to a German corporation in Hamburg. On or about August 23, 1939, the cargo was stopped in London because of the international situation. The British seller agreed with the German buyer on the delivery of other goods, which were then in transit. The goods were seized as prize on October 9, 1939, and the British corporation claimed as its property part of the cargo of which the Crown sought condemnation as prize. The court held the transfer of sold goods still in transit before the outbreak of war valid, even if made in contemplation of war and in spite of the delivery to buyer's agent after the war had started, since the term enemy implies that the trading occurred after the outbreak of war.¹⁶

The question of acting for the benefit of an "enemy" also came up in cases concerning guarantees. In *Kohnstamm (R. & A.) Ltd. v. Ludwig Krumm (London)*

117, 165 L. T. R. 278 (C. A. July 1, 1941), discussed *infra* Chapter XVIII, n. 11.

¹⁵ (1941) P. 51, 57 T. L. R. 339; (1941) Lloyds Rep. on Prizes 63 (Adm. Div. February 26, 1941. Cf. the critical note by McNair (1942) 53 L. Q. Rev. 19, who refers to the facts of this case as "unusually complicated," and *The Glenearn* (No. 2), 58 T. L. R. 97 (Adm. Div. December 4, 1941). See further *France Fenwick Tyre and Wear Co., Ltd. v. H. M. Procurator-General*, (1942) 2 All E. R. 453 (Privy Council, August 5, 1942).

¹⁶ Cf. *Verano v. De Angelis Coal Co.*, 41 F. Supp. 954 (D. C. M. D. Pa. November 18, 1941), 44 F. Supp. 726 (D. C. M. D. Pa. April 7, 1942).

Ltd.,¹⁷ the defendant, an English corporation, nearly all the shares of which were owned by a German firm, Ludwig Krumm A. G., had guaranteed to the plaintiff the payment for goods supplied by the plaintiff to the German firm. The German buyer did not pay for certain goods which had been delivered before the outbreak of the war; the defendant refused to pay, arguing that this would constitute an unlawful acting for the benefit of an enemy. The court held, however, that the recovery of the purchase price from the defendant would not discharge any obligation of the German buyer who, as principal debtor, would remain liable to the defendant. Furthermore, the plaintiff, having completely performed all obligations on his part, would be permitted to receive payment even from the German corporation under sec. 1 (2) (ii) of the Act, as later amended, providing that "a person shall not be deemed to have traded with the enemy by reason only that he has received payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving the payment had already been performed when the payment was received, and had been performed at a time when the person from whom the payment was received was not an enemy."

As to this provision, English writers¹⁸ point out: "In its original form the proviso prohibited the receipt of money unless the recipient had performed all his obligations under the contract before the commencement of the war. The rapid conquests of the enemy rendered many persons enemies during the course of 1940 with whom trade had previously been encouraged, and it was necessary, therefore, to alter the crucial date to suit these altered

¹⁷ (1940) 2 K. B. 359, (1940) 3 All E. R. 84, 56 T. L. R. 843, 110 L. J. K. B. 217, 163 L. T. R. 299 (K. B. May 21, 1940).

¹⁸ Krusin and Rogers, *Solicitor's Handbook of War Legislation*, Consolidated Supplement constituting vol. 2 (London 1942) p. 353.

circumstances. As a result of the amendment payment may be accepted from some one who is now an enemy provided that the person receiving that payment had discharged all his obligations at a time when the payer had not yet acquired an enemy status."¹⁹ The court further set forth that "discharge" means a complete discharge of the obligation and not a mere transfer of the debtor's obligation to pay from the creditor to the guarantor; therefore, the defendant was held liable to pay the enemy's debt guaranteed by him to the British creditor.²⁰

It was correctly pointed out²¹ that this rule might also be applied in cases where neutral corporations had guaranteed payment due by enemy firms. However, this decision has since been departed from in *Stockholms Enskilda Bank Aktiebolaget v. Schering, Ltd.*²² By agreement made in 1936, plaintiff, a Swedish bank, placed at the disposal of a German corporation, Schering-Kahlbaum A. G. in Berlin, blocked reichsmarks which the German corporation promised to repay in installments in sterling subject to a discount. If default occurred, the German corporation was to lose the benefit of the discount. An English subsidiary of the debtor, the defendant in this case, and an Indian subsidiary (Schering-Kahlbaum Indie, Ltd.) became sureties for the repayment of the debt by the German corporation and also jointly and severally agreed to be

¹⁹ Similarly the French Act, sec. 15(9) allows "the receipt (*perception*) of amounts due as payment out of transactions which were performed before the opening of the hostilities."

²⁰ See the criticism of the decision in (1940) 189 L. T. R. 329, Digest of English Law 1939, p. 398.

²¹ C.C.H.W.L.S. ||66080. Cf., generally, Domke, *Les Garanties de Tiers dans les Emprunts Internationaux*, (1936) 34 Rev. Sc. Legisl. Financ. 598, 611; Nussbaum, *Money in the Law* (1939) p. 502; Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, (1942) 56 Harvard L. Rev. 30, at p. 63, n. 140.

²² (1941) 1 K. B. 424, (1941) 1 All E. R. 257, 57 T. L. R. 289, 110 L. J. K. B. 229, 165 T. L. R. 19, 69 Lloyd's L. L. Rep. 49 (C. A., January 29, 1941); Notes (1941) 52 L. Q. Rev. 162; (1942) 59 South African L. J. I 31.

liable as principals to pay the amount of the debt by installments on having a proportionate part of the debt against the German corporation assigned to them against payment of each installment. In an action to recover the installment due October, 1939, the English subsidiary of the German debtor pleaded that its payment to the Swedish bank would violate the Trading with the Enemy Act as it would result in the English corporation having financial dealings for the benefit of an enemy, sec. 1 (2) (a), making a payment on behalf of an enemy, sec. 1 (2) (a) (ii), and discharging an obligation of an enemy, sec. 1 (2) (a) (iii). The Court of Appeals held that the words "for the benefit of an enemy" were to be applied in their broadest sense; no limited construction should be given them as they are comprehensive enough to include any transaction of which it can be truly said that it is in favor of the enemy. Payment of the installment would preserve for the German corporation, an enemy, the benefit of the discount, which would be lost if no payment were made, and would relieve it of its obligation to the English subsidiary *pro tanto*. The court further pointed out that the benefit for the German corporation accrued to it automatically upon payment of the installment and that "there was no possible means of stopping it by an order vesting the installment in the Custodian of Enemy Property."

The prohibitions against "acting on behalf of an enemy" must be applied in cases where the person favored is technically an enemy because of his residence in enemy or enemy-occupied territory even though the only purpose of the transaction may be to facilitate the immigration of such person as a refugee into the United States.

Such a situation was dealt with in *Weiner v. Central Fund for German Jewry*.²³ The plaintiff, a British subject,

²³ (1941) 2 All E. R. (K. B., February 18, 1941).

deposited a sum of money with the defendant for the purpose of helping two Viennese to come to England temporarily as refugees, with a view to their subsequent immigration into this country. Before any steps could be taken, the outbreak of the war rendered this purpose unattainable. The plaintiff commenced an action for the recovery of the deposit, but admitted that he had no right to the sum deposited and was willing to have it handed over to the Custodian of Enemy Property. Defendant contended that this action was brought on behalf of enemies—persons residing in Austria, enemy territory—and, therefore, could not be entertained in English courts. But the court held that the plaintiff could have his rights determined by the court. On the other hand, "any sum recovered must be paid to the Custodian of Enemy Property for the purpose of ensuring that it did not pass into the hands of an enemy alien."

The question has been dealt with in this country too. In *Hansen v. Emigrant Industrial Savings Bank*,²⁴ the executor claimed the amount of a bank account standing in the name of the deceased, in trust for an enemy alien now in Germany, the tentative beneficiary. The court held that the will which the deceased executed subsequent to the creation of the bank account revoked the trust and that consequently the funds belonged to the estate and no longer to the prospective immigrant.

In *Dobschiner v. Levy*,²⁵ similar facts were recently considered in a case where alien enemies were not directly involved. Plaintiff, of German birth, wanted to bring his relatives from Germany to America. He decided to move these relatives first to Luxemburg. In order to guarantee

²⁴ N. Y. L. J. March 27, 1942, p. 1305, September 9, 1942, p. 539. Cf. *Strauss v. Schweizerische Kreditanstalt*, 45 F. Supp. 449 (D. C. S. D. N. Y. June 20, 1942).

²⁵ 39 N. Y. S. (2d) 277 (December 21, 1942, rehearing January 15, 1943).

the Luxemburg government against the hazard of the immigrants becoming public charges, he deposited with the New York banking account of the Luxemburg banking house of the defendant an amount, such deposit being a prerequisite to the defendant for giving the required assurance to the Luxemburg government. As the relatives never went to Luxemburg, the depositor was released from all obligations toward the government. Plaintiff asked for the return of this money, at New York, where both parties are now residing. The court held the relationship created was that of debtor and creditor, and "equity will require the return of these moneys to the plaintiff."

The question of "acting for the benefit of the enemy" arose out of the organized sale of exit-permits from occupied countries by German authorities. In order to stop this traffic by preventing further participation in the illegal practice, drastic measures were adopted by the British Government after consultation with the United States and Dutch Governments. These measures were explained by the Earl of Selborne, Minister of Economic Warfare, in the House of Lords, November 24, 1942:²⁶ "First, they will immediately place upon the statutory list (blacklist), and thereby proclaim as enemies, any persons in neutral countries or in any other country to which the list applies who act as brokers or agents in this traffic; second, persons in such countries or territories who pay money to the enemy or his agents in pursuance of this traffic are performing a service to the enemy and will render themselves liable to all legitimate penalties and counter-measures as it may be within the power of the United Nations to take, and third, any person in the United Kingdom who makes payments to or for the benefit of the enemy, in these or other circumstances, is liable to prosecution under the

²⁶ N. Y. Herald Tribune, November 25, 1942.

Trading with the Enemy Act." On the same day, the United States Department of State issued a formal warning that any person participating in the purchase of exit-permits for relatives or friends in German-occupied territories would be regarded as a person trading with the enemy "and thereby be publicly designated as an enemy."²⁷

Finally, reference must be made to a provision of the British Trading with the Enemy legislation, namely, the obligation to pay any amount due to or on behalf of an enemy to the Custodian for Enemy Property. The Trading with the Enemy (Custodian) Order 1939,²⁸ sec. 1 (5), provides that any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, shall be paid to the Custodian. The Trading with the Enemy Investment Order, 1940,²⁹ further provides that moneys received by the Custodian may be invested in the purchase of British Government securities. The provision compelling the payment to the Custodian has also been adopted by other Trading with the Enemy laws in the British Commonwealth, e. g., in the Canadian Consolidated Regulations Respecting Trading with the Enemy (1939), sec. 29, in the Australian Trading with the Enemy Act 1939-1940, sec. 14, and in the National Emergency Regulations No. 8 (3) of the Union of South Africa.³⁰

In this country, the Alien Property Custodian only recently issued General Order No. 20, of February 9, 1943,³¹ which prohibits any payment, transfer or distribution of property in the process of administration by a person under judicial supervision or involved in any court or admin-

²⁷ (1942) 7 Bulletin Dep't of State 962.

²⁸ S. R. & O. 1939, No. 1198; Order No. 3, March 26, 1942, S. R. & O. 1942, No. 542.

²⁹ S. R. & O. 1940 No. 1113.

³⁰ Cf. Shilling, (1942) 59 South African L. J. I 32.

³¹ 8 Fed. Reg. 1780 (1943).

istrative action or proceeding, to or for the benefit of any person in any place under the control of a designated enemy country.³² This provision, unlike that of the British Trading with the Enemy legislation which orders payment to the Custodian, merely prohibits any payment to or for the benefit of "designated nationals" (sec. 3) unless the Custodian either has consented thereto, or has filed a statement that he does not desire to represent such person, or has appeared in the proceedings on behalf of such person and has been given ninety days prior notice of the proposed payment, transfer or distribution. But in all cases where the Alien Property Custodian did not exercise any authority as to such property, and did not make any determination, the proposed distribution of property must conform to the freezing regulations, that is, it must be licensed by the Secretary of the Treasury, pursuant to Exec. Order No. 8389, as amended.³³

The existing control of foreign-owned property by the freezing regulations is the real reason why there is in this country no compulsory payment to the Custodian unless demanded by him through a Vesting Order or otherwise.

³² Cf. Bulletin, Alien Property Custodian, N. Y. L. J. February 25, 1943, p. 749.

³³ Sec. 503.20(b), General Order No. 20.

12. Loss of Enemy Character.

ONE of the questions less frequently discussed in the First World War was that of the loss of the enemy character of individuals and corporations. "Decisions [during the First World War] regarding loss of enemy character concern only neutrals of whom it is suggested that they have reasonable time after war begins within which to elect to leave the enemy country."¹ So, the United States Supreme Court, in *Swiss Nat. Ins. Co. v. Miller*,² held that a neutral corporation does not lose its enemy character even if it ceases to do business in enemy territory by selling its establishment there.

This problem is now of far greater importance because numerous refugees from the countries now occupied or controlled by Axis powers are scattered over the world while their enterprises and property had to be left in those countries. Furthermore, special legislative measures of some governments-in-exile, facilitating the transfer of the principal place of business of corporations from a territory now occupied by the enemy to other parts of the country, involve questions not yet discussed in former controversies.³

The mere abandonment of residence or commercial domicile in enemy or enemy-occupied territory is generally not sufficient for a person or corporation no longer to be deemed an enemy. In *N. V. Gebr. van Uden's Scheepvaart en Agentuur Maatschappij v. V/O Soufracht*,⁴ the court ex-

¹ Rogers, *The Effect of War on Contracts* (1940), p. 106.

² 267 U. S. 42, 45 S. Ct. 213, 69 L. Ed. 504 (1925).

³ See Chap. XIII.

⁴ (1942) 1 K. B. 222, (1941) 3 All E. R. 419, 58 T. L. R. 60 (C. A. November 5, 1941), *rev'd* (but not with regard to the quotation), (1943) 1 All E. R. 76 (H. L., December 3, 1942).

pressed a similar view: "A trader in Germany is an enemy for all purposes. Even if he leaves Germany and goes to a neutral country, he would still be regarded as (an enemy) *ex lege* in Great Britain for the duration of the war, if he were of enemy nationality, and for as long as he had any business interest in Germany, or intended to retain his domicil there, if he were a subject of a neutral power." As to the abandonment of control by an enemy, the British Act, sec. 2 (1) c, provides that any body of persons shall be deemed an enemy "if and so long the body is controlled" by an enemy.

The relevant date for determining the enemy or non-enemy character of a creditor has been dealt with in *Re Banca Commerciale Italiana*.⁵ The British Act as amended, sec. 3A (1), provides that, where any business is being carried on by or on behalf of enemy subjects, the Board of Trade may *inter alia* make a winding-up order. With regard to the Italian Bank which was carrying on business in England on June 10, 1940, when war broke out with Italy, it was held that the relevant date for ascertaining whether creditors were of enemy or non-enemy status, was that of the winding-up order, and not that of distribution.⁶ Thus, Japanese creditors such as the Yokohama Specie Bank, were considered non-enemies, since the order to wind up the Italian Bank was made before outbreak of war with Japan.

On the other hand, the British Trading with the Enemy (Custodian) (No. 3) Order,⁷ exempts from the status of

⁵ (1942) 2 All E. R. 208, 58 T. L. R. 325, 194 L. T. R. 11 (Ch. Div., June 30, 1942).

⁶ In so holding, the decision in *In Re Deutsche Bank* (1921), 2 Ch. 30, was followed. See, in this country, Vesting Order 910, February 15, 1943, 8 Fed. Reg. 2455 (1943).

⁷ March 26, 1942, S. R. & O. 1942 No. 542. See (1942) 193 L. T. R. 155 and Defence (Finance) Regulations, 1939, reg. 2 A, as amended October 14, 1942, S. R. & O. 1942 No. 2096.

"enemy," for the purpose of payment of money by banks, individuals and corporations who are enemies only because residing or carrying on business in certain territories in occupation of the Japanese, or who are enemies only because they are controlled by persons resident in any such area. Such persons and corporations cease to be enemies only in regard to bank accounts; no other property is released even if owned by persons who subsequently left the occupied territory.

Evidence will be required that, by abandonment of residence in enemy territory or otherwise, enemy influence or any relation to the enemy has wholly ceased. The burden of proving his non-enemy character rests upon the person or corporation alleging such character, as provided expressly in the Canadian Consolidated Regulations Respecting Trading with the Enemy (1939) sec. 58: "The onus of proof in every instance shall rest upon the person who asserts that he or any property claimed or held by him is not within the provisions of these Regulations."

So, too, the New Zealand Enemy Trading Emergency Regulations (1939), provide, R. 10(2): "In any [legal] proceedings for a breach of these regulations an allegation in an information that any person, firm, or company is an enemy trader or an alien enemy shall, until the contrary is proved, be sufficient evidence that such person, firm, or company is an enemy trader or (as the case may be) an alien enemy within the meaning of these regulations."

The onus of proof of non-enemy character is on the person or corporation alleging such character, for "otherwise a British subject is justified in trading with a German, wherever found, unless it can be proved that the German is resident or carrying on business in Germany, a position which, in view of the very various and dubious purposes for

which a German may be at present found outside Germany, seems a very dangerous one."⁸

The decisions rendered during this war by the United States Federal Courts on the enemy character of persons taken into custody are limited to habeas corpus proceedings, i. e., to the question whether such persons are alien enemies within the meaning of the Presidential Proclamations issued under the Alien Enemy Act.⁹ The burden of proof that the detention is not valid is on the alien. But these decisions have no bearing on the question of the enemy character of individuals which may arise out of the application of the Trading with the Enemy Act.

Concerning the loss of enemy character of stateless refugees, their treatment as enemies within the meaning of the different Trading with the Enemy Acts has been dealt with in Chapter VI.

The trend toward administrative determinations in the application of trading with the enemy law permits adaptation to changing business conditions. Thus, persons and corporations may be freed from the blacklist restrictions upon trading with them by a simple deletion of their names in the next regular issue of the blacklist.¹⁰

Changes in military conditions in regard to territories occupied by the enemy and subsequently liberated are reflected in British trading with the enemy law, witness the situation in Syria and Lebanon. These territories, formerly under French mandate, were declared enemy territory during the German infiltration from May 27, 1941. They were subsequently declared non-enemy on August 19, 1941, and since September 5, 1941, have been incor-

⁸ *Tingley v. Mueller*, (1917) 2 Ch. 144, 175.

⁹ See Chapter VII, p. 106.

¹⁰ Cf. *Von Zedtwitz v. Sutherland*, 26 F. (2d) 525, 58 App. D. C. 153 (1928); *Societe Suisse Pour Valeurs de Metaux v. Murphy*, 306 U. S. 631, 59 S. Ct. 463, 83 L. Ed. 1033 (1939).

porated in the Sterling area.¹¹ But no portion of Italian East Africa has yet been declared non-enemy territory, although an Order of the Board of Trade¹² authorized trading with any body of persons "carrying on business in the territories formerly known as Italian East Africa."

On the other hand, sec. 8 of the decree of the military authorities in occupied Belgium and France, October 24, 1940,¹³ provided that absent Belgians who fled the German invasion were to be considered enemies even though they might later establish temporary residence or domicile in a neutral country, and the decree of the Governor General (in Poland) of September 17, 1940,¹⁴ provided for the sequestration of the property of all citizens of the former Polish State "who had fled or are not temporarily absent."

¹¹ S. R. & O. 1941 Nos. 731, 1156, 1423. See Howard, *The Defence (Finance) Regulations*, 1939, (1942) p. 99, and the incorporation of Madagascar in this area as of December 24, 1942, S. R. & O. 1942, No. 2626.

¹² Trading with the Enemy (East Africa) Order, 1941, July 29, 1941, S. R. & O. 1941 No. 1116.

¹³ Journ. Off. Gouv. Milit. 19 ed. No. 2, p. 263.

¹⁴ Sec. 2 of the Decree concerning the Treatment of the Property of Citizens of the Former Polish State, Reichsgesetzblatt I 1270, transl. in *The Black Book of Poland* (1942) 549.

13. Transfer of Business Places of Corporations.

THE Governments (now in exile) of the Netherlands, Belgium, and Luxemburg, have taken legislative steps to facilitate the transfer of the principal place of business of corporations established or carrying on business in territories now occupied by the enemy from such territory. The purpose of this legislation clearly is to exempt such corporations from the trading with the enemy legislation of their own government and that of the governments of allied countries.

Thus, before the invasion of the Netherlands by German troops (May 10, 1940) the Dutch government enacted a statute,¹ April 26, 1940, authorizing corporations organized and existing under Dutch law to transfer their principal place of business from any one of the four component territories of the Kingdom of the Netherlands to any other, the four territories being the Realm in Europe, The Netherlands Indies, Surinam, and Curacao.² Sec. 2 of this statute provides that "commencing with the period in which the place of establishment of a corporation has been transferred to another territory, the corporation will be governed by the laws of that territory." By a further decree of June 7, 1940,³ sec. 39 (1), any power of persons

¹ Statute regarding the Transfer of the Principal Place of Business (*Zetelverplaatsing*) of Corporations Domiciled in the Netherlands to Other Territories in the Kingdom of the Netherlands, *Staatsblad* No. 200, as amended March 4, 1942, *Staatsblad* No. C 16. No translation has been published in this country. However, a translation has been made available by the Netherlands Chamber of Commerce, New York, Report No. 16, May 22, 1940.

² By Decree of May 7, 1940, the statute was made effective as of May 8, 1940.

³ Decree containing measures to prevent legal relations in wartime from damaging the interests of the Kingdom of the Netherlands, *Staatsblad* No. A 6,

"present in enemy territory" to represent a legal person is "as a matter of law suspended" and such persons are "incompetent to act for or on behalf of the legal person." As to the loss of enemy character, the decree of the Dutch government-in-exile of May 24, 1940,⁴ by which property of individuals and companies resident in the occupied territories is vested in the State of the Netherlands, contains a legal fiction as to the domicile of corporations outside the occupied territory. Sec. 2 (2) (a) provides that corporations "which in accordance with the provisions of the Statute of April 26, 1940, have transferred their seat to another territory of the Kingdom, shall be deemed to be domiciled on May 15, 1940, outside of the territory of the Kingdom occupied by the enemy."

Though this provision is established merely "for the application of this section 2," it may be assumed that such corporation which legally transferred its principal place of business to unoccupied territory, thereby lost its "enemy" character within the meaning of the Trading with the Enemy Acts of other countries.⁵ That the transfer was made in compliance with all Dutch provisions must be certified by the Dutch authorities-in-exile.⁶ In *Gruenebaum v. N. V. "Oxyde" Maatschappij voor Ertsen en Metalen*,⁷ the decree of May 24, 1940, was applied in favor of the Dutch Government, since the "proper and effective transfer of the seat of the defendant corporation" was not

transl. in C.C.H.W.L.S.F.S. ||65680, as amended March 4, 1942, Staatsblad No. C 16.

⁴ Decree relating to Certain Property of Individuals and Companies Resident in the Kingdom of the Netherlands, Nederlandsche Staatscourant May 30, 1940, A 1940 No. 151, Staatsblad No. A 1, transl. Fed. Res. Bank of New York, Circular No. 2091, July 2, 1940; C.C.H.W.L.S.F.S. ||67150. Cf. *infra* Chapter XXI.

⁵ See Chapter XII.

⁶ Decrees of June 6, 1940, and May 9, 1941, Staatsblad No. A 4, B 42.

⁷ N. Y. L. J. August 27, 1941, p. 439, *aff'd* N. Y. L. J. October 17, 1942, p. 1062.

proved and was thus considered to have remained in the occupied territory. This transfer of Dutch corporations from European occupied territory has been incidentally recognized by the New York Supreme Court, in *Koninklijke Lederfabriek "Oisterwijk N. V." v. Chase National Bank*,⁸ and *Amstelbank N. V. v. Guaranty Trust Company of New York*.⁹ These decisions did not recognize the counter-measures enacted by the German occupying authority. A decree of the Reich Commissioner for the occupied Netherlands territories of August 28, 1940,¹⁰ repealed the Dutch statute which had been promulgated before the invasion, and provided that all transfers of the principal place of business of corporations may be declared wholly or partly null and void.

Legislation, similar to that of the Netherlands regarding the transfer of the principal place of business of corporations, was enacted, before the invasion, by the Belgian and Luxemburg Governments. The Belgian Decree-Laws of February 2, June 2, and October 31, 1940,¹¹ are now repealed and replaced by the Decree-Law of February 19, 1942,¹² relating to the Administration in War-Time of Commercial Companies or Entities Having a Commercial Form of Organization. These regulations provide for "(1) the provisional suspension of all interference with property situated in unoccupied territory by representatives of

⁸ 177 Misc. 186, 30 N. Y. S. (2d) 518 (September 26, 1941) *aff'd*, 263 App. Div. 815, 32 N. Y. S. (2d) 131 (December 20, 1941) *leave to appeal denied* 263 App. Div. 857 (January 16, 1942).

⁹ 177 Misc. 548, 30 N. Y. S. (2d) 194 (November 28, 1941).

¹⁰ Sec. 1(3) of the Decree Regarding Special Economic Measures, August 28, 1940, *verordeningenblad voor het bezette Nederlandsche gebied*, Stuk 23 p. 360. On the conflict of authority which will necessitate (at a future date) some international judiciary, see Grant and Masterson, *The Work of the Section of International and Comparative Law of the American Bar Association*, 1941-1942, (1942) 36 Am. J. Int. L. 664, 665.

¹¹ Transl. Fed. Res. Bank of New York Circular No. 2172; C.C.H.W.L.S.F.S. ||67578; see the *Lubrafol* cases, cited *infra* Chapter XIV, n. 40 c, e.

¹² *Moniteur Belge* 1942, p. 174, transl. C.C.H.W.L.S.F.S. ||67740.

the corporation remaining in invaded territory, (2) the extension and prolongation of the provisional powers of management of the representatives residing in unoccupied territory with regard to such property."¹³

Corresponding legislation was enacted earlier by the Governor General of Belgian Congo¹⁴ where practically all corporations with important British and American interests are controlled by representatives resident outside the occupied territory. Similar decrees were enacted by the Government of Luxemburg by the decree-laws of February 26, 1940, and February 5, 1941.¹⁵

On the other hand, the German military authorities in occupied Belgium did not confine themselves to a repeal of the legislation enacted by the Belgian Government, as they did with the respective legislation of the Dutch Government, but declared¹⁶ "Belgian companies which had transferred their seat temporarily to a place in enemy country" to be enemies; a further decree¹⁷ provided that corporations which transferred their principal place of business pursuant to the above-mentioned Belgian law, may by resolution of the board reestablish their domicile inside the occupied Belgian territory.

Similarly, the German military authorities in occupied France did not recognize any transfer of the *siège social* of corporations from the occupied to the then non-occupied zone of Continental France. The Delegate General of the

¹³ Report to the Council of Ministers of the Belgian Government-in-exile, *ibid.*

¹⁴ Now superseded by the Decree-Law concerning the Government and the Administration of the Colony of Congo-Belge and of the Territory under Mandate of Ruanda-Urundi, April 29, 1942, *Moniteur Belge* 1942, p. 222.

¹⁵ Memorial No. 1, February 15, 1941, p. 3, transl. Fed. Res. Bank of New York Circular No. 2211, May 12, 1941; cf. Memorial 1942 Nos. 1-3.

¹⁶ Sec. 2 of the Decree of August 23, 1940, *Journ. Off. Gouv. Milit.*, 13 ed. No. 2, p. 182.

¹⁷ Issued by the Ministry of Justice and the Ministry of Finance in Brussels (under German control), December 4, 1940, transl. C.C.H.W.L.S.F.S. ||67630.

French Government in the occupied territory of France expressly stated¹⁸ that the property of such enterprises would be regarded as located in the occupied zone of France.¹⁹

Unlike the legislation of the governments-in-exile of the Netherlands, Norway, Belgium, and Luxemburg which are recognized as the legal representatives of their respective countries,²⁰ the French National Committee at London, which leads the movement of Fighting France (formerly Free France)²¹ did not promulgate legislative measures to protect French interests in European occupied territory. It confined its legislation to the administration of Free French territories under the supervision of Free French forces. A decree of July 15, 1941,²² provides a special regime for the agencies, branches or offices of corporations located in territories under the authority of the Defense Counsel of the French Empire (*Conseil de Défense de l'Empire Français*) as far as their administration is in countries with which communications have become

¹⁸ Circular of October 27, 1940, published in *Le Statut des Juifs en France, en Allemagne et en Italie* (Lyon 1941) 107.

¹⁹ Within the meaning of the Second Ordinance of the German Military Authorities regarding Measures against the Jews, October 18, 1940, Journ. Off. Gouv. Milit. October 20, 1940.

²⁰ Cf. Drucker, *The Legislation of the Allied Powers in the United Kingdom*, Czechoslovak Yearbook of International Law (London 1942) 44, 58; Lachs, *Allied Governments in Exile*, (1942) 92 L. J. 275; Oppenheimer, *Governments and Authorities in Exile*, (1942) 36 Am. J. Int. L. 568, 572. Jumeau, *Le Refuge du Gouvernement National à l'Étranger*, (1941) [reviewed by this writer (1942) 36 Am. J. Int. L. 346] does not deal with the legislative activity of governments-in-exile during this war.

²¹ See the definitions on the agreement (July 13, 1942) with the British Government, *Fighting France*: "A Union of French nationals, wherever they may be, and of the French territories who join together in order to collaborate with the United Nations in the war against the common enemies"; *French National Committee*: "The directing organ of Fighting France, it organizes the participation in the war of the French nationals and territories who join in collaboration with the United Nations in the war against the common enemies," (1942) 2 Inter-Allied Review 187.

²² Decret Sur le Fonctionnement des Sociétés en Territoire Ralliés, Journ. Off. de la France Libre 1941 No. 8, p. 30.

"legally or actually impossible (*légalement ou matériellement impossible*).” A further decree of August 10, 1941,²³ provides for judicial orders to coordinate, under a general management, agencies of corporations which are located in territories under the control of Fighting France and which have their main office (*siège social*) in territory "subjected to the control of the enemy." On the other hand, a decree of the late Admiral Darlan as High Commissioner for French North and West Africa, prohibited any transactions or communications with the (French) territory occupied by the enemy.²⁴

Finally, it may be mentioned that the Swiss Federal Council issued a similar decree, October 30, 1939,²⁵ by which a Swiss corporation may remove, in case of war, its place of administration to any place in which the Government of Switzerland may have its seat. "The result of the Decree was probably that should Switzerland be occupied by enemy forces and should the Swiss Government in consequence remove its seat abroad, the corporations in question would not automatically become 'enemy subjects' in the meaning of the [British Trading with the Enemy] Act."²⁶ The result would have been the same under Trading with the Enemy Acts of other countries which treat enemy-occupied territory as enemy territory.

Thus, it was said in *N. V. Amstelbank v. Guaranty*

²³ Decret Sur la Coordination des Agences, Succursales ou Comptoirs, Situes en Territoires Rallies, d'une Meme Societe Ayant Son Siege Social en Territoire Soumis a l'Emprise de l'Ennemi, *ibid.* No. 9, p. 35.

²⁴ N. Y. Times, December 26, 1942.

²⁵ Decrees Concerning the Transfer of the Registered Place of Legal Persons and Commercial Companies in War-time (*Arrete Concernant le Transfer du Siege des Personnes Morales et des Societes Commerciales en Temps de Guerre*) October 30, 1939, Recueil des Lois Federales, November 1, 1939, No. 45; (1940) 42 Bull. Inst. Jur. Int. 79.

²⁶ Oppenheim, *International Law*, vol. 2 (6th ed. by Lauterpacht, 1940) §88a at p. 221, n. 4.

Trust Company of New York:^{26a} "the Government of the United States has refused to recognize the German military control of Holland. Any decrees by this unrecognized occupying power would not have the force and effect of mandates of a lawful sovereign, *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, 2 N. E. (2d) 758, 761. Any German decrees promulgated in the Netherlands should be given no force or effect whatever in the determination of questions involving property in this State."

It may thus be seen that the transfer of corporations from enemy-occupied territory is important as a counter-measure against economic warfare waged by the occupying powers. On the other hand, the occupying authorities repealed not only the legislation enacted by the different governments now in exile, but further tried to enforce measures of their own in utilizing the foreign assets of residents of the occupied territory. These measures, as the appointment of commissars for business enterprises in occupied countries, have not been recognized by courts of other countries.

Commissars who were designated for formerly Jewish enterprises in Germany²⁷ and for territories annexed or controlled by Germany (Austria,²⁸ the Protectorate of Bohemia and Moravia²⁹) were not recognized by the courts of different countries³⁰ even before the outbreak of the war.

^{26a} 177 Misc. 548, 30 N. Y. S. (2d) 194, 199 (November 28, 1941). Cf. the *Oesterwijk* case, *supra* n. 8.

²⁷ Decree concerning the Use of the Jewish Property, December 3, 1939, Reichsgesetzblatt I p. 1709.

²⁸ Statute concerning the Appointment of Commissary Administrators and Commissary Supervisors, April 13, 1938, Gesetzblatt fuer das Land Oesterreich St. 26, No. 80; (1938) 39 Bull. Inst. Jur. Int. 128.

²⁹ Decree of the Protector of the German Reich in Bohemia and Moravia concerning the Jewish Property, June 21, 1939, Verordnungsblatt p. 45.

³⁰ E. g. United Kingdom: *Boehm v. Czerny*, Ch. Div. July 25, 1940, *The (London) Times*, July 26, 1940, p. 6 col. 2; see McNair, *Municipal Effects of Belligerent Occupation*, (1941) 52 L. Q. Rev. 33, at p. 48 n. 42;

These commissars tried to secure foreign assets belonging to the business which they were administering. Similar measures, taken during this war in occupied countries,³¹ especially on behalf of enterprises where the owner or manager had fled abroad, were in no way recognized by New York courts.³²

In New York, special legislative measures aim at the preventing of assets located in this state from being looted by the occupying authorities in Axis controlled countries.³³ The New York Banking Law was amended, by c. 791 of the Laws of 1941,³⁴ and provides that banking institutions need not give any effect to adverse claims from occupied territories or to cancellation of authority, unless authorized to do so by order of an American court.

A further remedy was made available, in case of adverse claims, under sec. 51-A of the Civil Practice Act,³⁵

Holland: *Anninger, New York, v. de Mouchy*, Rotterdam, Arr. Rechtbank Rotterdam, October 11, 1939, *Nederlandsche Jurisprudentie* 1940 No. 168, p. 268;

Belgium: *Hamburger v. Hoogsteel*, Trib. Comm. Bruxelles, June 29, 1939; (1939) 25 *Rev. trimestrielle Inst. Belge Droit Compare* p. 133;

France: *Jellinek v. Levy*, Trib. Comm. de la Seine (Paris), January 18, 1940; *Recueil Gazette du Palais* 1940 I, 188;

Switzerland: *Bankhaus M. Thorsch Soehne v. Dr. Thorsch*, Obergericht Zuerich, March 1, 1939; (1940) 39 *Blaetter fuer Zuercherische Rechtsprechung* No. 95 p. 193; (1940) 42 *Bull. Inst. Jur. Int.* p. 87.

³¹ E. g. Decree of the Military Authorities concerning the Regulation of the Management of all Enterprises in the Occupied Territories in the Netherlands, Belgium, Luxemburg and France, May 20, 1940, *Journ. Off. Gouv. Milit.*, July 4, 1940, p. 15.

³² Cf. *Anninger v. Hohenberg*, 172 Misc. 1046, 18 N. Y. S. (2d) 499 (December 7 and 21, 1939); *Osborne v. Banco Aleman-Antioqueno and Bohemian Union Bank*, 176 Misc. 664, 29 N. Y. S. (2d) 236 (May 20, 1941); *Price v. Gestia*, N. Y. L. J. December 10, 1941, p. 1900; *N. V. Nederlandsch Handelskantoor v. Brown*, N. Y. L. J. March 9, 1942, p. 1024.

³³ See N. Y. Legis. Serv. 1941, p. 167.

³⁴ §134(5)(7), §138(1), §171(5)(7), §204-A, New York Banking Law. See Note, *Adverse Claims Emanating from Invaded Countries*, (1942) 42 *Col. L. Rev.* 172; McDonald, *New Amendments of the Banking Law*, (1942) 14 *N. Y. State Bar Ass. Bull.* 86, 88.

³⁵ Added by c. 805 of the New York Laws of 1939.

which allows an interpleader with a stay of proceedings for one year when two persons are both claimants to money and one cannot be served with process in the State of New York. Cases which arose under this section were concerned only with claims presented by business administrators instituted in occupied European territories. These claims, as emanating from authorities not deemed authorized to dispose of property abroad, were considered as having no reasonable basis, but being only simulated demands, thus excluding the statutory stay of proceedings.³⁶

³⁶ See Hollander, *supra* Chap. I, n. 18, at p. 114; Prashker, *Supplements to Cases and Materials on New York Pleading and Practice, Part II* (1942) p. 300.

14. Occupied Territory.

TERRITORIES occupied or controlled by the enemy are assimilated by Trading with the Enemy Acts of the different countries to "enemy territories." In view of the extensive occupation of territories by Axis powers this question has now assumed greater importance than in World War I, particularly because of the present intensification of economic warfare.

The British Act, sec. 15 (1), defines as "enemy territory": "any area which is under the Sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty." By the Defence (Trading with the Enemy) Regulations 1940,¹ a provision (subs. 1A to sec. 15 (1) of the Act) was added under which "The Board of Trade may by order direct that the provisions of this Act shall apply in relation to any area specified in the order as they apply in relation to enemy territory, and the said provision shall apply accordingly." Thus, the Trading with the Enemy Act was applied by Orders of the Board of Trade, issued under s. 15 (1A) of the Act,² to France—including the unoccupied zone, Corsica, Algeria, the French Zone of Morocco, Tunisia—as early as July 10, 1940, to Rumania, February 15, 1941, and finally to Finland, August 2, 1941.

The British declaration that all continental France was enemy territory³ had far reaching consequences, especially

¹ S. R. & O. 1940 No. 1214.

² S. R. & O. 1940 No. 1219; 1941 No. 189, 1117; 1942 No. 2096.

³ Similarly the Dutch Government-in-exile declared the whole of France enemy territory ("door den vijand bezet gebied"). Cf. the Decrees of March 27, May 29 and December 18, 1941, Staatsblad No. B 30, 47, C 9.

for British subjects, former residents of France, who had accounts in branches of British banks in France, the property of such branches now being dealt with as "enemy property." A debate in the House of Lords, as early as July 17, 1940,⁴ showed the fact that British property held by British banks in France was thus blocked. Other parts of the French Empire, namely, the territories controlled by the Fighting French forces, are not only non-enemy territory, but are included in the Sterling Area (French Equatorial Africa, New Caledonia, Tahiti, and as of December 24, 1942, Madagascar). Still other parts are non-enemy territories, "but any dealings with such territories have to be carefully considered for the possibility of the enemy deriving some benefit therefrom."⁵ These include Indo-China, Martinique and French Guiana.

The Canadian Consolidated Regulations respecting Trading with the Enemy (1939) which follow the pattern of the British Act, contain a further provision, sec. 1 (b),⁶ by which residence in "enemy territory or proscribed territory" qualifies a person or corporation as enemy, proscribed territory being defined, sec. 1 (e), as "any area in respect of which the Governor in Council by reason of real or apprehended hostilities or otherwise, may order the protective custody of property of persons residing in that area and the regulating of trade with such persons." Rumania is a case in point.⁷

Similar provisions are contained in the Australian National Security (Enemy Property) Regulations,^{7a} which provide, r. 4: "enemy territory has the same meaning as in

⁴ 116 Parl. Deb. (5th ser. 1939-40) 967. See C.C.H.W.L.S.F.S. ||67710, 70458.

⁵ Howard, *The Defence (Finance) Regulations*, 1939, (1942) p. 99.

⁶ Added on account of the invasion of European countries, May 11, 1940, P. C. 1935, (1940) 2 Proclamations and Orders in Council p. 85.

⁷ October 18, 1940, P. C. 5764.

^{7a} June 19, 1942, Stat. Rules No. 268.

the Proclamation made by the Governor General under section 3 of the Trading with the Enemy Act 1939-1940 on the twenty-fourth Day of July 1940, or within the meaning of any Proclamation varying, or in substitution for, that Proclamation." The New Zealand Emergency Regulations 1939 also provide in r. 1 (2) that "enemy country means the territories of Germany, and includes also any territory for the time being in the occupation of the military forces of Germany."

The French Act⁸ provides in sec. 4 that territories occupied by the enemy are, for the application of the Act, regarded as "being part of the continental (*métropolitain*) and colonial territory of the enemy" and hence enemy territory. Sec. 4 (2) of this Act further provides that by special decrees particular regulations may be issued for applying the Act to specific territories (*à certains de ces territoires*).⁹ As Germany occupied additional European territories in 1940, various French decrees¹⁰ provided for the protection (*sauvegarde*) of property owned by persons in enemy-occupied territory, especially of the Netherlands, Luxemburg, and Norway.

All measures of sequestration against Germans and Italians were repealed later, after the Armistice Conventions of June 22, 24, 1940.¹¹ But there has not yet been any final solution of the questions created by the French trading with the enemy legislation, in view of the fact that the state of war between France and Germany and Italy has not yet been terminated. German authors¹² be-

⁸ Journ. Off. September 4, 1939, p. 11093.

⁹ Journ. Off. September 4, 1939, p. 11093; September 14, 1939, p. 11405; October 13, 1939, p. 12288.

¹⁰ Decrees of April 24, 25, May 15, 25, 1940; Journ. Off. April 28, 1940, p. 3094, 3097, May 21, 26, 1940, p. 3776, 3933.

¹¹ See Chap. II n. 34-38.

¹² Kegel and Rupp and Zweigert, *Die Einwirkung des Krieges auf Verträge* (Berlin 1941) p. 289.

lieve that as yet a final solution cannot be made since the Peace Treaty probably will deal with these problems and "the French legislator, therefore, does not consider himself competent" (!) .

The Egyptian Act, which generally follows the French Regulations, provides¹³ that the term "territory of the German Reich" is "deemed to include also the territories under German military occupation or control."

Unlike the Italian Act,¹⁴ which also assimilates enemy-occupied territory to enemy territory, the German Act does not make any provision for territories occupied by enemies. On the other hand, it is interesting to note that in German law German-occupied territories such as Norway, the Netherlands, and Belgium are not considered enemy countries, in spite of the fact that Germany is at war with these nations. The German Act, therefore, does not apply to these territories. Rather, special decrees similar to the German Act were promulgated for each occupied country by the Reich Commissioner or military authorities, such decrees being directed not against the "enemies" of the occupied nation but against those of the occupying power.

The Decree of the Dutch government-in-exile of June 7, 1940,¹⁵ also regards as enemy territory "any territory under enemy jurisdiction and territory occupied by the enemy." However, for the determination of legal persons established in enemy territory as "enemy subjects," the decree exempts, in sec. 5 (c) (1), the "territory of the Kingdom occupied by the enemy," the term "Kingdom" as used in this decree referring to the Realm in Europe, The Netherlands Indies, Surinam, and Curacao.

¹³ As amended by sec. 10 bis (2), Proclamation No. 11, September 28, 1939, (1939) 29 Gaz. Trib. Mixtes p. 359.

¹⁴ "Territorio nemico o in quello occupato dalle forze armate nemiche."

¹⁵ Sec. 1(3), Staatsblad No. A 6.

Similarly, the recent decree-laws of the Belgian government-in-exile of February 19, 1942, and of March 19, 1942,¹⁶ expressly provide in sec. 1: "Countries controlled by the enemy are assimilated to countries occupied by the enemy; they will be listed by a decree of the Ministers United in Council," secs. 1 (4) b and 1 (1) b respectively declaring occupied territory: "any Belgian or foreign territory occupied by enemy forces or those specifically designated by the Minister of Economic Affairs."

The invaded countries have also been assimilated to enemy-countries for the purpose of freezing such assets in American Republics, namely, Argentina, Brazil, Colombia, Costa Rica, Paraguay, and Uruguay.¹⁷ Again the question of enemy-occupied territory arose in this country on account of the Japanese occupation of the Philippine Islands. On January 14, 1942, General Ruling No. 10¹⁸ was issued imposing a strict control over Philippine securities and impounding all Philippine paper currency within the United States. "These measures, taken at the request of the Philippine Government, are designed to thwart any attempt by the Axis to dispose of looted Philippine assets in the United States. Simultaneously the Philippine Government took action to prevent looted assets from being liquidated in markets outside the United States. It was pointed out that not only does this interfere with the Axis war effort but in addition it may contribute materially to minimizing Axis looting in the Philippines by removing the incentive for such action."¹⁹

Another instance of the financial consequences of the Japanese occupation was the moratorium on obligations

¹⁶ Chap I n. 39; Chap. XIII n. 12.

¹⁷ Pan American Union, Congress and Conference Series No. 40 (1942).

¹⁸ 7 Fed. Reg. 305 (1942).

¹⁹ Press Release of the Treasury Department, Fed. Res. Bank of New York, Circular No. 2361.

of Philippine companies held in the United States.²⁰ Further, the Chase National Bank, as trustee of the bonds of the Manila Electric Railroad and Light Corporation, asked the New York Supreme Court for a modification of the amortization clause of the indenture.²¹ Again, since the Associated Gas and Electric Corporation cannot dispose of certain of its units located in the Philippine Islands (Manila Electric Co., Escudero Service Co.), the Securities and Exchange Commission, in an order of December 30, 1942,²² declared it would grant an extension of the divestment order until the Japanese move out.

In the United States, sec. 2 (a) of the Trading with the Enemy Act, defining enemy territory as "that occupied by the military and naval forces of any nation with which the United States is at war," has now been superseded by General Ruling No. 11, which declares such territory to include, besides the territories of the belligerents, "the territory controlled or occupied by the military, naval or police forces or other authority of Germany, Italy or Japan." As shown in Chapter II, this definition replaces former definitions of the freezing regulations which provided for the automatic freezing of the funds of any country overrun by the enemy.²³

This definition of enemy territory also affects the application of the Trading with the Enemy Act in fields other than that of foreign funds control.²⁴ Sec. 4 (c) of General Order No. 6 of the Alien Property Custodian²⁵

²⁰ General Ruling No. 10-A, August 12, 1942, 7 Fed. Reg. 6383 (1942).

²¹ N. Y. L. J. February 20, 1943, p. 706.

²² N. Y. Herald Tribune, December 31, 1942.

²³ Public Circulars No. 10, December 26, 1941, 6 Fed. Reg. 6792 (1941); No. 11, January 5, 1942, 7 Fed. Reg. 147 (1942).

²⁴ On the application of sec. 269 N. Y. Surrogate's Act, as amended by c. 343 of the Laws of 1939, to Axis-controlled territories, see Davis, *Practice Statutes and Freezing Orders*, (1941) 105 N. Y. L. J. p. 1208, 1226, 1244; Hollander, *supra* Chap. I n. 18, at p. 123.

²⁵ August 3, 1942, 7 Fed. Reg. 6199 (1942).

expressly provides that enemy-occupied territory shall mean "any place under the control of any designated enemy country or any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication," and General Orders No. 14, December 1, 1942, and No. 15, January 6, 1943,²⁶ enumerate these countries.

Without going into the question whether and how far definitions of "occupied territory" in state laws are superseded by federal regulations, it may be said that state and federal definitions of "occupied territory" are substantially similar. So, the New York Banking Law, as amended,²⁷ provides that no effect need be given in the State of New York to a claim emanating from an occupied territory, defined this territory as "territory occupied by a dominant authority asserting governmental, military or police power of any kind in such territory, but not recognized by the United States as the *de jure* Government of such territory."²⁸

In the United States, Exec. Order No. 8446²⁹ extended the term "foreign (blocked) country" to all of France, including the French territory then unoccupied under the Armistice Conventions of June 22 and 24, 1940, but General Ruling No. 11, March 18, 1942, sec. 2 (ii) expressly confined the term "enemy territory" to "that portion of France within continental Europe occupied by Germany and Italy." Thus, unlike its status under the British regulations, the then unoccupied zone (Vichy-France) was not treated as "enemy territory." Though all French funds were (and still are) frozen, only persons in the originally

²⁶ December 1, 1942, 7 Fed. Reg. 10546 (1942); (1943) 25 J. Pat. Off. Soc. 137.

²⁷ Sec. 204-A, par. 2(b), as amended by c. 791 of the Laws of 1941.

²⁸ Chap. XII, n. 34-36.

²⁹ 5 Fed. Reg. 2279 (1940).

occupied zone of France were "enemy nationals" by reason of their residence. Further, such persons were blocked nationals if they were domiciled in the originally occupied territory at any time since the effective date of the Order while only individuals within enemy territory are enemy nationals or nationals of a designated enemy country, within the meaning of the General Orders No. 5, 6, and 14³⁰ of the Alien Property Custodian. Therefore, many business associations in the then unoccupied zone of France were blocked nationals but not "enemy nationals."³¹

It was not until the amendment of November 8, 1942, to General Ruling No. 11,³² that all of France within continental Europe was declared enemy territory. Though this declaration is only concerned with the freezing regulations, the newly occupied zone of continental France has also been treated as enemy territory by U. S. Censorship Regulations, January 30, 1943,³³ including into this term "the territory occupied or controlled by any nation with which the United States is or may hereafter be at war."

In a similar way the late Admiral Darlan as High Commissioner for North and West Africa, declared³⁴ continental France to be "enemy territory."

The questions which are briefly mentioned here³⁵ did not lose their importance by the factual annulment of the

³⁰ 7 Fed. Reg. 6199, 10546 (1942).

³¹ Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws* (1942) 56 Harvard L. Rev. 30, at p. 34, n. 18.

³² 7 Fed. Reg. 9119 (1942).

³³ Sec. 1801.2(b), 8 Fed. Reg. 1644 (1943).

³⁴ "All territories occupied by the enemy are considered as being part of enemy territory. Commerce and relations with the enemy are defined as all shipments, all receipt of shipments, all transport, all transmission, all imports or exports, all attempts at shipping, at receiving shipments, at transporting, transferring, sending or receiving of any written message, note or other communication of any nature, or of any object, whether of personal or monetary value, either directly or indirectly, to or from an enemy national or enemy territory after November 11, 1942," N. Y. Times, December 26, 1942.

³⁵ For further details see Chapter II, n. 34; VI, n. 66.

Armistice Convention through the occupation of the hitherto unoccupied zone of Vichy-France by German and Italian troops in November, 1942. As this violation of the Armistice has not been recognized, not even by the Vichy Government—though friendly toward the Axis powers³⁶—the consequences in international law, public and private, will manifest themselves later when the questions arising out of the recent events in France will finally be settled.

A further question to be considered with reference to occupied territories is whether, in situations not covered by Trading with the Enemy statutes, residence or doing business in occupied territory is sufficient to establish enemy character at common law. This question was recently answered in the negative in *N. V. Gebr. van Uden's Scheepvaart en Agentuur Maatschappij v. V/O Soufracht*.³⁷ Here Russians chartered the *S. S. Waalhaven* from her owner, a Dutch shipping company carrying on business at Rotterdam. The charter-party, dated August 11, 1939, provided for the arbitration of disputes in London. Before any steps had been taken to arbitrate a dispute which had arisen in the meantime, the Netherlands were occupied by German troops. The Russian charterers refused to cooperate in the appointment of the Umpire, arguing that the Dutch company was an enemy and, therefore, excluded from any legal proceedings in England. Although the Dutch company must be considered an enemy within the meaning of the British Trading with the Enemy Act (as carrying on business in enemy occupied territory), the

³⁶ See Statement of U. S. Policy toward the Vichy Government, November 9, 1942, (1942) 7 Bull. Dep't of State 903.

³⁷ (1942) 1 K. B. 222, (1941) 3 All E. R. 419, 58 T. L. R. 60, 111 L. J. K. B. 152, 166 L. T. R. 69, 86 Sol. J. 69, 71 Lloyd's L. L. Rep. 61 (C. A., November 5, 1941); Notes (1942) 55 Harvard L. Rev. 1224; (1942) 58 L. Q. Rev. 203; (1942) 86 Sol. J. 213. See McNair, *Municipal Effects of Belligerent Occupation*, (1941) 52 L. Q. Rev. 33, 44.

question to be decided here was whether a person trading in enemy occupied territory was also an enemy at common law. The court said (at p. 425) that "the Trading with the Enemy Act, 1939, does not purport to impose or define enemy status otherwise than for the purposes of the Act, which are (so far as relevant) the prohibition of dealings with persons who, for the purposes of the Act, are to be regarded as enemies. It achieves its object by prohibiting such dealings and not by any general extension of the class of enemies at common law. A person, therefore, who is not an enemy at common law is not by the Act made an enemy. All that the Act does is to prohibit certain dealings with a person of the defined class and to make certain provisions affecting his property. Except for the purposes of those prohibitions and those provisions, his status is unaffected." Said Lord Goddard, at p. 431: "the mere trading or residing in occupied territory is not enough to impose enemy character," as long as there is no question of actual assistance to the enemy conqueror. The activities of a trader in enemy-occupied territory are *prima facie* not undertaken for the benefit of the enemy. "Everyone who is living in enemy-occupied territory and has not adhered to the enemy in some way or another is primarily concerned with the continuity of life in that territory."

Similarly, it was stated by Lord Greene, M. R. (at p. 423): "To say that the mere act of trading must necessarily stamp him [trader in enemy-occupied territory] with enemy character appears to me to disregard the realities of the situation"; and by Du Parcq, L. J. (at p. 433): "The mere fact that a person is continuing to trade within territory occupied by the enemy [does not] impress that person with the character of an alien enemy at common law."

The *Uden* case shows that at English common law enemy-occupied territory is treated differently from enemy territory. At common law only those in enemy-occupied territory are considered enemies whose activity purports to benefit the enemy, whereas the British Trading with the Enemy Act regards all residents of enemy-occupied territory as enemies. A similar question was recently dealt with in *H. P. Drewry Société à Responsabilité Limitée v. Onassis*.³⁸ In this case a dispute under a charter-party between the claimant, as charterer, and the respondent, as owner of the vessel, was submitted to arbitration, the claim being brought by the charterer, a French corporation carrying on business in Paris, for damages for alleged breach of the charter-party. One point involved was whether the claimant was an alien enemy and as such barred from any proceeding in the United Kingdom. The arbitrator came to the conclusion that the claimant, a wholly French company, though belonging to an Englishman now residing in England, was an alien enemy at common law, and, at the same time, an enemy company within the definition of an "enemy" of the (British) Trading with the Enemy Act. The court was unwilling to consider the question of the qualification of the claimant company as an alien enemy at common law and limited the decision to the question under the Trading with the Enemy Act. It held that letters by the Trading with the Enemy Branch (Treasury and Board of Trade)³⁹ to the solicitors of the claimant amounted to a license authorizing the French company to institute proceedings in the United Kingdom.⁴⁰

³⁸ 71 Lloyd's L. L. Rep. 179 (C. A., December 18, 1941). Cf. the New York case of the same parties, Chap. IX, n. 33.

³⁹ Now called: Trading with the Enemy Department (Treasury and Board of Trade).

⁴⁰ On the contrary, in the *Uden* case, *supra* n. 37, at p. 426, a letter from the Custodian of Enemy Property authorizing to proceed was not deemed to be a license within the proviso to sec. 1(2) of the Act.

The following *dicta* of Du Parcq, L. J., at p. 181, may become important since leave to appeal to the House of Lords was refused: "Great confusion is introduced in these cases if one talks of a licence under the Act, which is not what the Act speaks of, and does not reserve the term 'licence' for what is required to be an alien enemy at common law. The Act and the subsequent regulations amending the Act are dealing with persons some of whom are not enemies at common law at all. What the Act does is to say that, so far as those persons are concerned—enemies, as I may put it, by definition—anyone who trades with them as a general rule will be committing a criminal offence; but if he gets authority to trade with them, he is not committing a criminal offence at all, because he is then not to be deemed to have traded with an enemy at all. Supposing A. B. is by definition an alien enemy, if you get authority to trade with him, you are not trading with an enemy. If you get no authority to trade with him, and without that authority do trade with him, you are trading with an enemy. There is nothing in the Act which says that the alien enemy is to be punished; but the person who is dealt with is the British subject who deals with the alien enemy."

But quite recently, on December 3, 1942, the House of Lords unanimously reversed^{40a} the *Uden* decision, establishing that the common law test of enemy character of individuals and corporations in a territory not only temporarily occupied by the enemy is none other than that under the statutory provision of the British Trading with the Enemy Act. It concluded that this test at common law was objective, "turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled; it

^{40a} (1943) 1 All E. R. 76; 59 T. L. R. 101; 74 Lloyd's L. L. Rep. 59.

is not a question of nationality or of patriotic sentiment." Said Lord Wright, in his concurring opinion:^{40b} "It is true that the Netherlands Government has been established in and recognized by Great Britain and is the government to which, in theory, all Netherlands subjects owe obedience. But in Holland itself that obedience cannot be enforced nor can that government protect its subjects resident there. Allegiance is generally dependent on reciprocal protection by the state. The Netherlands Government can give no such protection to its subjects in Holland. They are under the dominion and control of the Germans, who exploit them, plunder them, and tyrannise over them for the benefit of the German Reich. It is clear that the Germans do not intend to relinquish their possession unless forced to do so. However high may be the patriotic fervour of that loyal and valiant race and their devotion to the allied cause, the Dutch, so far as they are in Holland, must until the day of deliverance submit to the German yoke, and also accept the comparatively minor affliction of being described for limited purposes and occasions as being in law enemies *vis-à-vis* Great Britain. Such is the effect of the common law of England. They cannot sue or appear as actors in the English courts, they cannot trade with England, their property in England is subject to the Trading with the Enemy Act and regulations. They are shut off from intercourse with Britain. The reason is that, while the occupation lasts, they are on the wrong side of the line of hostile demarcation, the line of war which shuts off those on that side of the line from communication and intercourse and commercial dealing with those on our side, in substantially the same way as if they were originally enemies as nationals of, or resident in, the enemy state."

But this recent decision of the House of Lords was

^{40b} At p. 89.

meanwhile distinguished in *Owners of M. S. Lubrafol v. S. S. Pamia*.^{40c} There the Belgian Gulf Oil Company, owners of the motorship *Lubrafol*, had brought action against the owners of the Italian vessel *Pamia*. The Italian defendant applied for a stay of proceedings on the ground that the Belgian company with place of business in Antwerp is to be considered an enemy, the occupied Belgian territory being declared enemy territory on May 31, 1940. But the Belgian company had transferred its seat to Pittsburgh, Pa., on June 20, 1940, in accordance with the Belgian decrees,^{40d} and the powers of directors residing elsewhere than in the United States were suspended. The vessel was operated from the United States^{40e} and flew the flag of Panama. As the owners of the vessel had disassociated themselves from any activity in enemy-occupied territory, the court did not hold the Belgian company to be an enemy, thus distinguishing the case from the *Waalhaven* case of the Dutch corporation, carrying on business in Rotterdam, occupied Holland.

Legal problems arising out of the military occupation of foreign countries have assumed especial importance in Great Britain during this war, in view of her manifold commercial relations, particularly with Belgium and the Netherlands. The following cases deal with the prohibition of the performance of legal acts in enemy-occupied territories even between parties who themselves are not "enemies" of Great Britain.

In *In re May's Will Trust*,⁴¹ the question arose whether the testator's widow, who had been living in Belgium since the German occupation of that country, would be in-

^{40c} (1943) 1 All E. R. 269.

^{40d} Chapter XIII, n. 11.

^{40e} See *Government of the Kingdom of Belgium v. The Lubrafol*, 43 F. Supp. 403 (D. C. E. D. Texas, May 17, 1941).

⁴¹ (1941) 1 Ch. 109, 57 T. L. R. 22, (Ch. D., September 4, 1940).

capable of acting as trustee. Even though trusteeship as such is not covered by the Trading with the Enemy Act, the incapacity plays a role in view of the penalties against any intercourse with a person considered enemy while residing in enemy-occupied country. The Court could not find, on the evidence submitted, that the trustee in question was "incapable of acting" under the Trustee Act, 1925, sec. 36 (i), following the authorities wherein incapacity was confined to cases of mental or bodily infirmity. It was ready, however, to appoint a new trustee under sec. 41 (i) of that Act, which runs as follows: "The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees."

The question of being considered an enemy because of residing in enemy territory was recently dealt with in *In re Gourju's Will Trust; Starling v. Custodian of Enemy Property*.⁴² A naturalized British subject of French origin died in England in 1936. He had directed his trustees to hold the income of his residuary estate upon the statutory protective trusts for the benefit of his widow as long as she would live. As the widow resided in Nice, France, from 1936 on, she became an enemy within the meaning of the Trading with the Enemy Act, by virtue of the declaration of the whole of France (even the then unoccupied zone) as enemy territory, as of July 10, 1940.⁴³ The court held that an event had happened whereby the widow was deprived of the right to receive the income under her husband's will. The court hoped that "the welter of legislation which peace would bring" would take into considera-

⁴² (1943) 1 Ch. 24, 194 L. T. 177 (Ch. D., November 16, 1942).

⁴³ Cf. *In re Viscount Furness, deceased*, (1943) 195 L. T. 2 (K. B., December 21, 1942).

tion such hard cases as this in which the widow had suffered an undeserved forfeiture of her income.

The question of occupied countries also arose in *Gess, Gess v. Royal Exchange Assurance*,⁴⁴ where a Polish national domiciled in England died there intestate, leaving certain specified debts in Poland. In view of the German occupation it was impossible to advertise for creditors in Poland. The court authorized the administrators to pay to the Custodian of Enemy Property a sum sufficient to cover the known liabilities in order to be able to distribute the estate without advertising for claims in Poland. In *Cornelius v. Banque Franco-Serbe*,⁴⁵ the English plaintiff received (about May 10, 1940) a check, drawn by the defendant, a French bank in Belgrade, Yugoslavia, on the Amsterdamsche Bank at Amsterdam. At the time for presentment of the check, the Netherlands was occupied. Plaintiff claimed from the London branch of the defendant French bank the sterling equivalent of the amount in guilders due on the check. English as well as Dutch law⁴⁶ dispenses with the requirement of presentment for payment if this act cannot be effected "after the exercise of reasonable diligence." The plaintiff, however, contended that inasmuch as the Netherlands was occupied by the enemy and therefore became enemy territory, presentment, even if physically possible, would be as illegal as the collection of the proceeds of the check in Amsterdam, Holland. The court held that "there is nothing which makes it illegal or undesirable or improper in any way for the defendant bank to pay the money [in London]. The ille-

⁴⁴ (1941) W. N. 184 (Ch. D., July 7, 1941). See Bodkin, *Administration of Aliens' Estates in Wartime*, (1942) 92 L. J. 230; *Execution of Aliens' Trusts in Wartime*, *ibid.* 325.

⁴⁵ (1942) 1 K. B. 29, (1941) 2 All E. R. 728, 57 T. L. R. 610 (K. B., June 25, 1941). Cf. Mann, *Bills of Exchange and the Conflict of Laws*, (1942) 5 Modern L. Rev. 251.

⁴⁶ Sec. 46(2) of the Bills of Exchange Act, 1882.

gality of the presentment does not preclude the holder from suing the drawer on the cheque forthwith . . . the only illegality which had arisen being the relation to the machinery by which payment was to be effected."

It may be mentioned that sec. 13 of the Decree of the Dutch Government-in-exile, April 26, 1940,⁴⁷ reads as follows: "The obligations, resulting from agreements between the corporation and their parties, which can or must be discharged in the original place of establishment of the corporation, can or must be discharged in the new place of establishment, in observance of good faith."

A related question was recently considered by the House of Lords in *Bank Polski v. K. J. Mulder & Co.*⁴⁸ Bills of exchange payable in Dutch guilders in Amsterdam were accepted by the defendant in London. The bills were not presented for payment in Amsterdam, but the acceptors were called upon to pay them in London. The defendant was held liable to pay in London since the bills did not expressly state that they were to be paid in Amsterdam "only and not elsewhere"⁴⁹ and therefore, under sec. 52 of the Bills of Exchange Act, 1882, the presentment for payment was not a condition precedent to the liability of the acceptor.⁵⁰

Again, in *Hindley and Co., Ltd. v. General Fibre Company, Ltd.*,⁵¹ the decision aimed at making performance possible even though acts required to be done in enemy

⁴⁷ *Supra* Chap. XIII n. 1.

⁴⁸ 58 T. L. R. 178, 193 L. T. R. 105 (H. L., February 27, 1942); Note (1942) 58 L. Q. Rev. 296.

⁴⁹ Sec. 19(2) of the Bills of Exchange Act, 1882, provides: "An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere."

⁵⁰ As to the influence of the invasion of Denmark (April 8, 1940) on the relations between an English bank and their customers in Denmark, see *J. H. Rayner & Co., Ltd. and the Oilseeds Trading Company, Ltd. v. Hambros Bank, Ltd.*, 86 Sol. J. 302, 73 Lloyd's L. L. Rep. 32 (K. B., April 23, 1942), *aff'd* (1943) 1 K. B. 37, 74 Lloyd's L. L. Rep. 10 (C. A., October 23, 1942).

⁵¹ 56 T. L. R. 904 (K. B., June 28, 1941).

territory would be illegal if done there. In this case, the court held that buyers by declaring Bremen the port of delivery had not lost the power to change such port, because the declaration of Bremen, in enemy territory, was a nullity. The buyers were entitled to withdraw the declaration, the contract not coming to an end thereby, and to declare another port of delivery—such as Antwerp or Rotterdam in then unoccupied territory—thus rendering performance of the contract legal.

In *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour, Ltd.*,⁵² English manufacturers in Leeds in July, 1939, contracted to sell machinery on C.O.D. terms to a firm carrying on business in Poland, the port of delivery being Gdynia, Poland. One thousand pounds of the purchase price was paid in advance. Before the date fixed for delivery, Gdynia was occupied by German troops on September 23, 1939, so that delivery within that enemy-occupied territory became unlawful. A clause of the contract provided that "should the despatch be hindered or delayed . . . by any cause whatsoever beyond our reasonable control, including . . . war . . . a reasonable extension of time shall be granted." In an action in which the buyers claimed damages for breach of contract and for return of the sum paid in advance the House of Lords (affirming the decision of lower courts⁵³ on this point) held that the outbreak of war rendered the performance of the contract impossible and frustrated the commercial object of the contract, the clause mentioned above providing only for

⁵² (1943) A. C. 32, (1942) 2 All E. R. 122, 58 T. L. R. 308, 194 L. T. 5, 73 Lloyd's L. L. Rep. 45 (H. L., June 15, 1942).

⁵³ (1942) 1 K. B. 12, (1941) 1 All E. R. 464, 2 All E. R. 300, 110 L. J. K. B. 666 (K. B., March 7, 1941; C. A., May 15, 1941). See Notes (1941) 19 Can. B. Rev. 613, (1941) 15 Australian L. J. 187, (1941) 53 Juridical Rev. 272; McElroy, *Impossibility of Performance* (ed. by Williams, 1941) 150. Cf. *Forestral Land, Timber & Railways Co. Ltd. v. Richards*, (1941) 3 All E. R. 62 (H. L., July 30, 1941).

cases of limited interruption. The House of Lords further held that the contract which provided for delivery in an enemy-occupied territory was terminated by supervening illegality. But the House of Lords also held, reversing the decisions of the lower courts here, that the plaintiffs were entitled to recover the amount paid in advance. The rule that on frustration the loss must lie where it falls would not apply in respect of money paid on a consideration which wholly failed, thus expressly overruling the famous coronation case of *Chandler v. Webster*.⁵⁴ This new development of the doctrine of frustration⁵⁵ may have some influence on cases where the military occupation of territories prevents performance, such as *Luis de Ridder, Limitada, v. André & Cie*.⁵⁶ There, a contract for delivery of grain from Argentine sellers to Swiss buyers expressly provided that "notice of appropriation" was to be given to the buyer's agent in Antwerp, Belgium, which subsequently was occupied by German troops. The ship having been intercepted, her cargo was requisitioned by the British Government. As the contracts were c.i.f., the buyer's liability to pay remained. The buyers refused to accept the notice at their place of business at Lausanne, Switzerland, maintaining that it should have been given to their agent at Antwerp. The Court of Appeals, reversing an award in favor of the sellers, held that, by virtue of a clause in the contract prohibiting any change in its terms without

⁵⁴ (1904) K. B. 493; see Notes (1942) 92 L. J. 300, 310; (1942) 61 Law Notes 140; (1942) 56 Harv. L. Rev. 307; (1942) 58 L. Q. Rev. 442.

⁵⁵ Cf. Patterson, *Constructive Conditions in Contracts*, (1942) 42 Col. L. Rev. 903, 943, 949 ("disturbed balance" theory), and as to frustration of performance of a contract due to war-time conditions, *Matter of Kramer & Uchitelle, Inc. v. Eddington Fabrics Corp'n.*, 288 N. Y. 467 (July 29, 1942), *Neuberg v. Avery F. Payne Co.*, N. Y. L. J. September 14, 1942, p. 473, *Schreier v. Siegel*, 178 Misc. 711, rev'd 265 App. Div. 36 (First Dep't, October 30, 1942); Note, *Frustration of Performance of Contracts of Sale by the Government and the Effect upon Arbitration Clauses*, N. Y. L. J. December 21, 1942, p. 1986.

⁵⁶ 85 Sol. J. 367 (Ch. Div., February 11, 1941).

written consent, the contract had been cancelled with the occupation of Antwerp (before the sending of the notice of appropriation to the buyers themselves at Lausanne, Switzerland), since it was impossible from that moment for the sellers to perform.

In none of the English cases were the parties involved enemy subjects; in all of them contractual acts were to be performed in enemy-occupied territory. Such performance would have violated the prohibitions of the British Trading with the Enemy Act. The courts seem to have applied the provisions of this Act as a matter of public policy,⁵⁷ even when English law was not the proper law of contract or the parties were not English nationals or corporations carrying on business in England.

A special question concerning the effects abroad of acts performed in enemy-occupied and hence enemy country arose in *Aldrige v. Franco-Wyoming Securities Corporation*.⁵⁸ Voting proxies were executed by shareholders of a Delaware corporation, citizens and residents of occupied France. The proxies were mailed from unoccupied France and were received by the president of the corporation before December 11, 1941, the outbreak of war between the United States and Germany. The Court of Chancery of Delaware held that the Trading with the Enemy Act, sec. 2 and 3, did not specifically determine whether the proxies were invalidated upon the outbreak of the war. The court stated (at p. 545) that "the question is not free from doubt, but that its determination may have such serious consequences that it should better be passed upon at final hearing when there will be afforded

⁵⁷ Cf., generally, Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, (1940) 29 Yale L. J. 1026, at p. 1031; Domke, *Money in the Law*, (1942) 24 Journ. Comp. Legisl. 51, at p. 56; Freutel, *supra* n. 31, at p. 43.

⁵⁸ 26 Atlantic Reporter (2d) 544 (Court of Chancery of Delaware, May 27, 1942).

an opportunity for careful and deliberate consideration of the statute and pertinent authorities."⁵⁹

The occupation of European countries by Axis powers has had many repercussions in this country, inasmuch as assets of individuals, corporations, and banking institutions in the occupied territories are located in this country and "blocked" by the freezing regulations. It was held by the New York Court of Appeals in *Commission for Polish Relief v. Banca Nationala a Rumaniei*,⁶⁰ affirming the decisions below,⁶¹ that these regulations do not prevent resident creditors from attaching such assets. The court thus followed a suggestion of the United States of America as *amicus curiae*:⁶² "The Treasury regards the courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the equivalent of a voluntary payment order without the creation of transfer of any vested interest, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets."

Since we are dealing here only with trading with the enemy law, we confine ourselves to a citation of cases in which a withdrawal of money from banking accounts in foreign countries, especially territories occupied by Germany, become impossible, legally and physically.⁶³ Resi-

⁵⁹ As to the disclosure of beneficial interests in shares held by nominees, see Note (1942) 86 Sol. J. 370.

⁶⁰ 288 N. Y. 332, 43 N. E. (2d) 345 (July 29, 1942); N. Y. L. J. October 6, 1942, p. 912 (stay for trial). Cf. Notes (1942) 11 Geo. Wash. L. Rev. 116, (1942) 91 U. of Pa. L. Rev. 260, (1942) 37 Ill. L. R. 270.

⁶¹ 176 Misc. 1070, 29 N. Y. S. (2d) 186 (July 15, 1941), *aff'd* 262 App. Div. 543, 30 N. Y. S. (2d) 690 (Second Dep't, November 3, 1941).

⁶² Brief of United States of America as *amicus curiae*, p. 14. As mentioned *ibid.* p. 40, n. 8, the attachment action, in the instant case, was fully authorized by the Treasury Department, but this fact has not been brought to the attention of the lower courts.

⁶³ Cf. New York Banking Law, as amended by c. 510 of the Laws of 1942,

dent creditors not only attached funds belonging to a bank in an occupied country now in deposit with a New York bank, but also asked for delivery of securities held for their account in the name of the foreign bank with banking institutions in New York.⁶⁴ These questions will be discussed in Chapter XVII, with special reference to the requirement of licenses under the freezing regulations.

relating to "the liability of foreign banking corporations doing business in this state, for performance of contracts and replacements of deposits performable or repayable at foreign branches of such corporations." To these foreign branch banks in New York the amendment to the Federal Reserve Act (Public Law No. 31, 77th Cong., 1st Sess., April 7, 1941) is not applicable. This statute applies only to banks with insured deposits and gives exclusive jurisdiction to federal courts when property of recognized foreign governments or central banks (and not of nationals) is involved. The statute providing for certification of persons who are entitled to dispose of the assets by the Secretary of State, releases the bank from responsibility and thus prevents the occupying authorities in European countries from looting assets abroad.

⁶⁴ Belgium: *Owczarow v. Banque de Credit Commercial*, S. A., N. Y. L. J. June 1, 1942, p. 2323; *Rainer v. Banque de Commerce*, S. A., N. Y. L. J. June 7, 1942, p. 2413; *Rubensohn v. Guaranty Trust Company of New York*, N. Y. L. J. May 6, 1942, p. 1920.

Czechoslovakia: *Werfel v. Zivnostenska Banka*, 38 N. E. (2d) 382, 287 N. Y. 91 (November 27, 1941), see Memorandum for the United States as *amicus curiae*, p. 2.

France: *Bollack v. Societe Generale*, 177 Misc. 136, 30 N. Y. S. (2d) 83 (September 4, 1941), *rev'd* 263 App. Div. 601, 33 N. Y. S. 986 (First Dep't, March 27, 1942), *leave to appeal denied* 264 App. Div. 767, 35 N. Y. S. (2d) 717 (May 22, 1942), N. Y. L. J. June 5, 1942, p. 2394 (stay for trial). *Dunajewski v. Societe Nationale des Chemins de Fer Francais*, 35 N. Y. S. (2d) 102 (April 10, 1942); *Philipp v. Chase National Bank of the City of New York*, N. Y. L. J. April 1, 1942, p. 1358. Cf. *Feuchtwanger v. Central Hanover Bank & Trust Company*, 27 N. Y. S. (2d) 518 (May 12, 1941), *aff'd* without opinion, 263 App. Div. 711, 31 N. Y. S. (2d) 671 (First Dep't, November 21, 1941), *aff'd* 288 N. Y. 342, 43 N. E. (2d) 434 (July 29, 1942). Germany: *Loeb v. Bank of Manhattan Co.*, 18 N. Y. S. (2d) 497 (June 29, 1939).

Holland: *Van der Veen v. Amsterdamsche Bank*, 178 Misc. 668, 35 N. Y. S. (2d) 945 (June 22, 1942), *aff'd* without opinion 262 App. Div. 989 (First Dep't, October 3, 1942).

Luxemburg: *Neumark v. New York Trust Co.*, N. Y. L. J. January 29, 1943, p. 397.

Rumania: *Commission for Polish Relief v. Banca Nationala a Rumaniei*, *supra* n. 60, 61.

Switzerland: *International Investment Co. S. A. v. Swiss Bank Corporation*, N. Y. L. J. August 15, 1942, p. 355.

15. Suits by Enemies.

THE QUESTION most fully discussed under trading with the enemy law during this war has been whether suits by and against enemies may be instituted or prosecuted during wartime. The issue is obviously of great practical importance, but a solution is comparatively difficult to find because the Trading with the Enemy Acts of various countries do not contain sufficient provisions concerning the capacity of enemies to be sue or to be sued. Often common law rules must be examined to reach a decision. Court opinions and numerous articles and notes in legal periodicals, especially of this country,¹ have now clarified this question, which in the first months after the entrance of the United States into this war seemed rather confused.

The confusion centered on the question whether resident aliens of enemy nationality are permitted to institute and prosecute suits in the courts of this country. Such persons were refused the right to sue for the following two reasons: First, the opinion of the United States Supreme Court in *Ex parte Don Ascanio Colonna*² was temporarily misinterpreted. In this case the Royal Italian Ambassador claimed the benefit of Italy's sovereign immunity from suit; the application was denied in view of the statutory provision of sec. 2 (b) of the Trading with the Enemy Act which includes an enemy government in the term "enemy." This opinion, which denies to an enemy within the meaning of the Trading with the Enemy Act the right to prose-

¹ Articles by Atkinson, Battle, Friedenberg, Gordon, Mayer, Noll, Palstine, Sterck and Schuck, Tellier, Woodward, anonymous articles and numerous notes, cited *infra* in the Bibliography.

² 62 S. Ct. 373, 86 L. Ed. Adv. Op. 357 (January 5, 1942).

cute actions, has no bearing on the question whether resident aliens of enemy nationality are entitled to resort to the courts during wartime.

In *Kaufman v. Eisenberg*,³ the New York Supreme Court, misinterpreting the *Colonna* case, granted the defendants a stay of proceedings until the end of the war under sec. 2 (b) of the Trading with the Enemy Act in an action for injuries due to an automobile accident, because the resident plaintiff was "an alien enemy, being a national of Germany," and thus precluded from prosecuting. But the court, subsequently reconsidering *sua sponte* its ruling, vacated the stay and in a scholarly opinion⁴ said: "However, upon further consideration it appears that the mentioned cases⁵ were dealing with the status of a non-resident alien enemy while the plaintiff in the instant case is a resident alien enemy and a different rule is therefore applicable." In *Ex parte Kumezo Kawato*,⁶ a native born Japanese alien enemy who had resided in this country for the past thirty-seven years sued the owners of the vessel *Rally* for damages for injuries and wages due to him for services rendered as a fisherman. In this case the United States Supreme Court said that the *Colonna* opinion "has no bearing on the rights of resident enemy aliens."

Adding to the confusion as to rights of resident alien enemies was the failure of the courts to see that no proclamation has been issued during this war, under sec. 2 (c) of the Trading with the Enemy Act. This provision authorizes the President to include alien enemies "wherever resident or wherever doing business" within the term enemy,

³ N. Y. L. J. January 7, 1942, p. 74.

⁴ 177 Misc. 939, 32 N. Y. S. (2d) 450 (January 19, 1942).

⁵ The *Colonna* case and the case cited therein, *Rothbarth v. Herzfeld*, 179 App. Div. 865, 167 N. Y. S. 199 (1917), aff'd 223 N. Y. 578, 119 N. E. 1075 (1918).

⁶ 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942); Notes (1942) 28 Wash. U. L. Q. 39, (1943) 41 Mich. L. Rev. 754.

"if he shall find the safety of the United States or the successful prosecution of the war shall so require." In *Bernheimer v. Vurpillot*⁷ the right to sue was denied to refugees from Germany, residents of Pennsylvania, who were injured in an automobile accident. Their suit for damages was struck from the trial list on the ground that the war between the United States and Germany suspended the right of an alien of enemy nationality to bring civil action in United States courts. The court held that the Presidential Proclamation No. 2526 of December 8, 1941,⁸ which declared all German subjects alien enemies, did not include a clause similar to that in the Proclamation of President Wilson of April 6, 1917,⁹ which provided that all enemy aliens conducting themselves in accordance with the law "shall be undisturbed in the peaceful pursuit of their lives." The court construed the omission as "the deliberate intent on the part of our Government at this time to impose greater restrictions upon subjects of enemy countries resident here than were imposed in 1917." But neither the Proclamation issued in the First World War nor that of December 8, 1941, contained any express provisions by which resident alien enemies were denied the right to sue in federal and state courts.

Yet the court in this case, mistakenly relying on the fact that a provision similar to that of the Wilson Proclamation was not included in the 1941 Proclamation, ordered a stay of proceedings for the duration of the war or until such time as Congress or a Presidential Proclamation should accord aliens of enemy nationality the privilege of action in the courts of this country.¹⁰

⁷ 42 F. Supp. 830 (D. C. E. D. Pa., January 14, 1942); Note (1942) 55 Harv. L. Rev. 1057.

⁸ 6 Fed. Reg. 6321 (1941).

⁹ 40 Stat. 1650 (1917). Cf. Hunter, *Alien Rights in the United States in War-Time*, (1918) 17 Mich. L. Rev. 33.

¹⁰ But see *infra* n. 15.

A misunderstanding of the common law rule that resident alien enemies are allowed to sue may also be found in an obiter dictum in *Verano v. De Angelis Coal Co.*,¹¹ in an action by a resident Italian to recover damages for an occupational disease. The court said that if a state of war had been declared between the United States and Italy at the time of the decision, namely on November 18, 1941, the defendant's motion to stay would have been granted¹² In order to avoid further misunderstanding, the Department of Justice on January 31, 1942, issued a statement¹³ which aimed at clarifying the right of resident aliens of enemy nationality to sue in the courts of this country. In this statement it was pointed out that the President may, by Proclamation under secs. 2 (c) and 7 (b) of the Trading with the Enemy Act include within the term "enemy," alien enemies "even though such individuals or class of individuals may be resident in the United States if the President shall find that the safety of the United States or the successful prosecution of the war so requires." But no such proclamation has as yet been issued. The Presidential Proclamations under the Alien Enemy Act of 1789, as amended,¹⁴ were not in any way an exercise of the power vested in the President by sec. 2 (c) of the Trading with the Enemy Act. Consequently, the Department of Justice stated: "No native, citizen, or subject of any nation with which the United States is at war and who is resident in the United States is precluded by federal statute or regulations from suing in federal or state courts."

The fact that no proclamation under the Trading with

¹¹ 41 F. Supp. 954 (D. C. M. D. Pa., November 18, 1941).

¹² But later the same court held that resident alien enemies are not barred from prosecuting, 44 F. Supp. 726 (April 7, 1942).

¹³ Bulletin Dep't of Justice, N. Y. L. J. February 5, 1942, p. 545, fully reprinted in *Szanti v. Teryazos*, 45 F. Supp. 618, and in *Caparell v. Goodbody*, 29 A. (2d) 563.

¹⁴ 40 Stat. 531 (1918).

the Enemy Act has as yet been issued, and therefore resident alien enemies have not been declared enemies, within the meaning of Trading with the Enemy Act, is decisive for the admission of resident alien enemies to sue in the courts of this country during wartime. Said the United States Supreme Court in the *Kawato* case: "Not only has the President not seen fit to use the authority possessed by him under the Trading with the Enemy Act to exclude resident aliens from the courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner [an interned Japanese, resident in California] from our courts, and this stand is emphasized by the government's appearance in behalf of petitioner in this case."

This line of reasoning, based on the absence of a Presidential Proclamation, has now been followed by decisions of federal and state courts. Thus, the *Bernheimer v. Vurpillot* decision was reversed¹⁵ precisely upon the ground that permission to an alien enemy to reside in this country carries with it permission to sue in its courts, since there was no Proclamation or Order to the contrary. This rule, followed in *Uberti v. Maiatico*,¹⁶ *Anastasio v. Anastasio*,¹⁷ and *Stern v. Ruzicka*,¹⁸ has been emphatically adopted by the United States Supreme Court in the *Kawato* case: "The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them. Were this not true,

¹⁵ 130 F. (2d) 396 (C. C. A. 3d, August 3, 1942).

¹⁶ 44 F. Supp. 724 (D. C. C. Col. March 11, 1942).

¹⁷ *Ibid* 725 (D. C. C. Col. March 11, 1942).

¹⁸ *Ibid*. 726. See *Gambera v. Bergoty*, 132 F. (2d) 414 (C. C. A. 2d, December 10, 1942).

contractual promises made to them by individuals, as well as promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens to enforce rights growing out of legal occupations."

The question of the right of resident enemy aliens to sue in the courts of this country¹⁹ seems to be well settled now. In a well reasoned opinion in *Kaufman v. Eisenberg*,²⁰ the New York Supreme Court said that "until it is manifested by legislative expression or presidential announcement that the right of a resident alien enemy to sue or to prosecute in our courts has been withdrawn, the court must recognize and enforce the right." This opinion was followed in decisions of the New York Supreme Court²¹ and of other states.²² In California, in *Matter of Kohn*,²³ a resident national of an enemy country having resided in the United States for three years and having declared his intention to become a citizen, petitioned for an order changing his name to Kent. The petition was granted because "a subject of an enemy nation is entitled to maintain an action in and to invoke the process of the courts of this state as long as he is guilty of no act inconsistent with the temporary allegiance which he owes to this government . . . (and) may prosecute an action for his own benefit and to

¹⁹ Following the practice as recognized in the First World War in *The Oropa*, 255 Fed. 132 (S. D. Ala. 1919); *Breuer v. Beery*, 194 Iowa 243, 189 N. W. 717 (1922), but see *Schneeman v. Schneeman*, Illin. App. Ct., December 30, 1942, 317 Ill. App. 286, 45 N. E. (2d) 1016.

²⁰ 177 Misc. 939, 32 N. Y. S. (2d) 450 (January 19, 1942).

²¹ *Horner v. Sassoon*, N. Y. L. J. January 28, 1942, p. 421; *Herz v. Argyle House, Inc.*, N. Y. L. J. January 31, 1942, p. 479; *Sello v. N. Y. Hanseatic Corp.*, N. Y. L. J. July 9, 1942, p. 69; *Stillman v. Atlantic Tours, Inc.*, N. Y. L. J. November 17, 1942, p. 1497. Cf. *Gruhn v. J. H. Taylor Const. Co., Inc.*, *ibid.* March 4, 1943, p. 867.

²² *Cala v. City of Cleveland*, Ohio Sup. Ct. October 3, 1942, C.C.H.W.L.S. ||9740; *Leiberg v. Vitangeli*, 70 Ohio App. 479, 25 Ohio Op. Adv. 211 (October 8, 1942); *Caparell v. Goodbody*, 29 A. (2d) 563 (Ch., N. J., December 29, 1942).

²³ Cal. Sup. Ct., Los Angeles, Feb. 18, 1942, C.C.H.W.L.S. ||9704.

protect his personal rights." In *State ex rel. Gasper v. District Court*,²⁴ in a proceeding to set aside certain orders made by the court in the matter of an estate of a deceased, it was held that the rule preventing alien enemies from prosecuting actions in the courts of this country did not apply to a citizen of Rumania, since he was residing here.

It must be emphasized that the right of resident aliens to sue is not statutory, but established by court decisions, in this country as well as in England and Canada.²⁵ As early as 1813, in *Clarke v. Morey*,²⁶ Chief Justice, later Chancellor Kent said: "A lawful residence implies protection, and a capacity to sue and to be sued." There exists no statute expressly authorizing resident aliens of enemy nationality to sue in the courts of this country. On the other hand, sec. 7 (b) of the Trading with the Enemy Act, though sometimes construed as "recognizing a settled rule against permitting alien enemies to prosecute suits,"²⁷ does not itself prohibit suits by enemies in the courts of this country. In the Solicitor General's brief for the United States as *amicus curiae* in the *Kawato* case,²⁸ it was said that "sec. 7 (b) , however, does not in itself contain any affirmative prohibition against suits by enemies. On the contrary, it provides only that nothing in the Act 'shall be deemed to authorize the prosecution' of such suits. This language would seem to indicate that Congress was deliberately refraining from any legislative regulation of the

²⁴ 124 Pac. (2d) 1010 (Sup. Ct. of Montana, April 29, 1942, rehearing denied May 7, 1942).

²⁵ See *Porter v. Freudenberg*, (1915) 1 K. B. 857; McNair, *Procedural Capacity of Alien Enemies: Statutes of Limitation*, (1942) 58 L. Q. Rev. 191; *Emergency Laws, Orders and Regulations of Canada*, vol. 1 (1942), Annotations and Commentaries by Crankshaw and Saylor, No. 3, p. 48.

²⁶ 10 Johns. 69 (N. Y.).

²⁷ *Rothbarth v. Herzfeld*, 179 App. Div. 865, 167 N. Y. S. 199 (1917), aff'd 223 N. Y. 578, 119 N. E. 1075 (1918).

²⁸ Sommerich, *Recent Innovations in Legal and Regulatory Concepts as to the Alien and His Property*, (1943) 37 Am. J. Int. L. 58, 61.

subject, and was seeking merely to make certain that it was understood that the common law remained in effect." In the same sense, Assistant Attorney General Warren, who drafted the Act in 1917, commented²⁹ upon the purposes of that statute to the effect that it was intended "the common law should govern in all matters not within the scope of its enactment."³⁰

It should be recalled that Sec. 7 (b) of the Trading with the Enemy Act applies only to those cases where the plaintiffs are enemies within the meaning of the Trading with the Enemy Act. As long as resident aliens of enemy nationality are not declared enemies by Presidential Proclamation under sec. 2 (c) of the Trading with the Enemy Act, sec. 7 (b) does not apply to alien enemies resident in this country. Thus, interned enemy aliens who are not declared enemies under the Trading with the Enemy Act³¹ have the right to sue in this country as held in the *Kawato* case. In other countries, this right has also been granted to such internees, as during this war in Transvaal in *Matthiesen v. Glas*,³² where an interned enemy national was not debarred from sequestrating the estate of his debtor, a citizen of the Union of South Africa.

The same view as to the right of alien enemies to sue has been taken in United States extraterritorial courts.³³ In *Poo Shong Hing v. Consolidated Steel Corporation*³⁴ the United States Court for China held that one of the plaintiffs, though a German national and alien enemy, had

²⁹ Book review, (1918) 12 Am. J. Int. L. 676, 677.

³⁰ In *Strauss v. Schweizerische Kreditanstalt*, 45 F. Supp. 449 (D. C. S. D. N. Y., June 20, 1942), it was held that the right of a resident alien enemy to sue in the courts of this country does not confer jurisdiction of a federal court.

³¹ Chapter VII, n. 14-21.

³² (1940) South Africa L. Rep. 147 (Sup. Ct., Transvaal Provincial Division).

³³ See the Treaty with China for Relinquishment of Extraterritorial Rights in China, January 11, 1943, (1943) 8 Bull. Dep't of State, p. 59.

³⁴ 2 Extraterritorial Cases 39 (1920); Hackworth, *Digest of International Law*, vol. 2 (1941) p. 576.

the right to sue. The modern rule is that permission to an alien enemy to reside in a country carries with it permission to sue in its courts, and while this was an extraterritorial court, the United States had done nothing to withdraw the plaintiff's right to sue and China had taken no steps to terminate his residence there.

In divorce suits, the rights of resident aliens of enemy nationality to bring the action in the courts of the country of their residence was recognized during this war in Scotland in *Weiss v. Weiss*,³⁵ and in this country in *Harf v. Harf*.³⁶ In Canada, in *Trefnicek v. Martin*,³⁷ the plaintiff was held to be entitled to sue by virtue of r. 21 (i) of the Defence of Canada Regulations,³⁸ which provides that "all enemy aliens legally admitted to Canada and ordinarily resident in Canada, so long as they peacefully pursue their ordinary avocation, shall be allowed to continue to enjoy the protection of the law and shall be accorded the respect and consideration due to peaceful and law-abiding citizens."

In the New Zealand case *Paul Arnerich v. The King*,³⁹ it was recently held that a resident alien enemy (there called an alien friend) may petition the King under the Crown Suits Act, 1908, in the same way as a subject of the King, for damages incurred as an employee of the Public Works Department. The report of the case does not state the nationality of the claimant. It was only said that "an alien *ami* while in this country is, as a matter of law, in the allegiance of the Crown, an allegiance to which several of the learned judges refer as a local allegiance, and that

³⁵ (1940) Scots L. T. Rep. 447 (Outer House, July 17, 1940).

³⁶ Maryland, C. C., Baltimore, December 18, 1942, 11 U. S. L. Week 2494.

³⁷ (1939) 4 Dom. L. R. 737 (Sup. Ct. Ontario, November 22, 1939).

³⁸ Now: Defence of Canada Regulations (Consolidation) 1941, July 15, 1941, P. C. 5295.

³⁹ (1942) N. Z. L. Rep. 380, (1942) Gaz. L. Rep. 264 (Court of Appeals, May 22, 1942).

while he is resident within the realm he is given the same rights for the protection of his person and his property as a natural born or naturalized subject." As this case is reported in Australia⁴⁰ without dissenting comment, it may be assumed that the same view prevails in Australia, one permitting the resident alien enemy the resort to the courts of the country.

In this country, then, *resident* aliens of enemy nationality are not excluded from prosecuting lawsuits. But the notion of residence must not be understood in the narrow sense which prevails in other statutes, in the naturalization laws.⁴¹ Thus, during the First World War, in *Arndt-Ober v. Metropolitan Opera Co.*,⁴² the German singer who did not permanently reside in the United States and maintained a residence in Germany, was allowed to sue for the alleged breach of contract by the defendant. The rationale may have been that an alien enemy, who by his professional activity is connected with American life, should be allowed to maintain his rights in American courts. For the same reason, alien enemies temporarily admitted to the United States as visitors may be allowed to sue, particularly since the change of their status to that of immigrants, which would enable them to establish permanent residence here, is not facilitated during wartime.⁴³

On the other hand, aliens, not necessarily of enemy nationality but residing in a country allied to the enemy, like Finland, were not allowed to sue for damages which they incurred while visiting New York. In *Sundell v. Lotmar*,⁴⁴ residents of Finland, one of them of Swedish

⁴⁰ (1942) 16 Australian L. J. 205.

⁴¹ *United States v. Shapiro*, 43 Fed. Supp. 927 (D. C. S. D. Cal., March 30, 1942).

⁴² 102 Misc. 320, 169 N. Y. S. 304, aff'd 182 App. Div. 513, 169 N. Y. S. 944 (1918).

⁴³ See Chapter IV, n. 18.

⁴⁴ 44 F. Supp. 816 (D. C. S. D. N. Y., February 17, 1942).

nationality, were not authorized to sue since they were considered allies of the enemy, because of their residence in a country allied to the enemy, and thus excluded from the courts of this country by virtue of sec. 7 (b) of the Trading with the Enemy Act.

The question of residence also arises in another situation, namely, where the alien of enemy nationality is not legally admitted to this country or remains here illegally. Thus, in *Szanti v. Teryazos*,⁴⁵ a citizen of Hungary who was employed as a fireman on board the *S. S. Leontios Teryazos*, a ship of Greek registry, suffered injuries while working on the ship. As he had overstayed his shore leave, he was subject to deportation and could not be regarded as a resident alien enemy for the purpose of maintaining an action. On the other hand, in *Dezfosi v. Jacoby*,⁴⁶ a Hungarian who had entered this country illegally was not denied the right to bring an action for services rendered after his entrance. The court pointed out that the plaintiff, even if in this country unlawfully, could not be denied the benefits of the Fourteenth Amendment to the Constitution of the United States, which does not discriminate since it provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."^{46a}

A further question arises in cases where the claimant is an alien of enemy nationality but resides neither in the country where he seeks access to the courts nor in an enemy or enemy-occupied country. If he resides in a neutral or even an allied country there will be no reason, in principle, to deny him access to the courts of a country where "contacts" to the forum are established.⁴⁷ This is the case where the proper law of contract is that of the country where he

⁴⁵ 45 F. Supp. 618 (D. C. E. D. N. Y., July 21, 1942).

⁴⁶ 178 Misc. 851, 36 N. Y. S. (2d) 672 (July 2, 1942).

^{46a} This constitutional view was considered in *Leiberg v. Vitangeli*, *supra* n. 22.

⁴⁷ Cf. Nussbaum, *Principles of Private International Law* (1943) p. 117.

intends to bring suit, or where the cause of action arose, by breach of a contract to be performed there. Thus, in a Canadian case, *I. S. White Engineering Corporation v. Canadian Car and Foundry Corporation*,⁴⁸ a German refugee of Polish origin, domiciled in New York and temporarily residing in Paris, France, then unoccupied territory, was allowed to bring action in Canadian courts. But, as was pointed out in the opinion, the court might attach the moneys belonging to the plaintiff until the cessation of hostilities with Germany, or "if the Foreign Exchange Control Board deemed it proper, it might refuse permission to pay the sum recovered by plaintiff; but, nevertheless, the plaintiff was entitled to a declaration on his right to recover." The court referred to *Lampel v. Berger*,⁴⁹ where during the First World War an Austro-Hungarian residing in a neutral country was held entitled to specific performance of an agreement for the sale of land, "but the court will impound the purchase money to prevent it being used to assist the enemy."

The court in the *White* case did not consider this refugee an alien enemy, either within the meaning of the Consolidated Regulations Respecting Trading with the Enemy, sec. 1 (b) (ii), or at common law "inasmuch as defendant did not allege that his [plaintiff's] conduct in the country of his domicile [U. S. A.] was that of an enemy or even that there might be reason to believe that he might be in sympathy with Germany and acting in aid of its policy."

The question of the rights of an alien of enemy nationality to prosecute an appeal may arise in cases where the alien seeks relief from a judgment unfavorable to him. Such was the case in *Buxbaum v. Assecurazioni Generali*⁵⁰

⁴⁸ (1940) 4 Dom. L. Rep. 812 (Quebec Sup. Ct., March 6, 1940).

⁴⁹ 38 Dom. L. Rep. 47 (Ontario Sup. Ct., 1917).

⁵⁰ 34 N. Y. S. (2d) 480 (March 31, 1942).

and in *Kaplan v. Assicurazioni Generali*.⁵¹ There plaintiffs obtained money judgments on life insurance policies issued by the branch offices in Prague, Czechoslovakia, and Vienna, Austria, of the defendant Italian insurance corporation. The defendant, whose principal office was in Italy, had a branch office in New York, the funds of which under the freezing regulations were placed in charge of the Insurance Department of the State of New York in July, 1941. The enemy defendant applied for a stay of the execution of the judgments. Said the court: "The fact that the declaration of war makes this defendant an alien enemy does not lessen its right to appeal in litigations in which it is the defendant." The appeal has since been dismissed,⁵² and only recently the assets of this Italian corporation were vested in the Alien Property Custodian.⁵³

From the right to appeal follows the right of a resident alien enemy to defend a judgment which he obtained prior to the entry of the United States into this war. In *Matsuda v. Luond*,⁵⁴ in an action for injuries suffered in an automobile accident, a Japanese residing in California for several years was held to have the right after the outbreak of war to appear by his counsel in the Appellate Court. In any event, in the absence of a Presidential Proclamation declaring resident alien enemies "enemies" within the meaning of the Trading with the Enemy Act, such individuals are not precluded from prosecuting actions in the courts of this country, as long as the Alien Property Custodian does not vest such claims in himself.

There remains the question whether resident aliens of

⁵¹ 34 N. Y. S. (2d) 115 (March 31, 1942).

⁵² 264 App. Div. 855 (June 23, 1942).

⁵³ 8 Fed. Reg. 1038 (1943); cf. *In re General Ins. Co., Lim., of Trieste and Venice*, N. Y. L. J. March 11, 1943, p. 971.

⁵⁴ 126 Pac. (2d) 359, 52 Cal. App. (2d) 453 (D. C. of Appeal, Fourth District, Cal., June 2, 1942), commented on by Culpepper, (1942) 5 Georgia B. J. 67.

enemy nationality may be precluded from bringing actions in the courts by the fact that alien enemies residing in enemy territory, who are enemies under the Trading with the Enemy Act, are interested in the outcome of the suit. In *Nortz v. Clinton Trust Corporation*,⁵⁵ the surviving members of the plaintiff partnership, as well as the deceased partner, were naturalized citizens of this country. They had made loans on the security of warehouse certificates issued by the defendant and alleged that the holder of the certificates actually had no goods in the warehouse. In an action to recover damages for fraud and conspiracy, the court denied a motion of the defendant for a stay under sec. 7 (b) of the Trading with the Enemy Act. It held that "under the will of the deceased partner there is a possibility but not a certainty, that non-resident aliens may be interested in the outcome of this action. Their interest will arise only in case the plaintiff shall renounce a part of the residuary estate bequeathed to him."

Again, in *Propper v. Buck*,⁵⁶ an action was brought by a resident of New York in his capacity as receiver, appointed under sec. 977 (b) of the New York Civil Practice Act, of the assets of an Austrian corporation. He sued to recover a sum of money due to the corporation, which was an enemy as defined in sec. 2 of the Trading with the Enemy Act. In denying a motion of the defendants to stay the action, the court allowed the receiver to prosecute the action⁵⁷ although the proceeds might ultimately benefit some non-resident alien enemies. The decision was based on the ground that the receiver acted under appointment

⁵⁵ N. Y. L. J. January 23, 1942, p. 356 (Westchester County), aff'd 263 App. Div. 994, 33 N. Y. S. (2d) 828 (March 2, 1942), leave to appeal denied, 34 N. Y. S. (2d) 524 (April 6, 1942); N. Y. L. J. February 9, 1943, p. 558.

⁵⁶ 178 Misc. 76, 33 N. Y. S. (2d) 11, aff'd 263 App. Div. 948, 34 N. Y. S. (2d) 134; cf. *Lourie v. Chase Nat. Bank*, N. Y. L. J. February 20, 1943, p. 706.

⁵⁷ The court referred to *Oliner v. American-Oriental Banking Corp'n*, 252 App. Div. 212, 297 N. Y. S. 432, aff'd 277 N. Y. 588, 13 N. E. (2d) 783.

of the court and was accountable to it, and that no distribution of any recovery could be made except upon the court's order and thus the court could control the proceeds of the action. The court further said that "it may be that the entire recovery, if any, will be consumed in paying local creditors of the Austrian corporation, and, if not, a stay may be invoked when some resident alien enemy attempts to obtain a share of the recovery." In this case, the question arose whether the suspension of the right of non-resident alien enemies to prosecute actions⁵⁸ is a disability attendant upon the personal status of the record plaintiff⁵⁹ or one dependent upon the enforcement of any cause of action the enforcement of which may benefit non-resident alien enemies. The court did not find it necessary to decide this question, though it stated that "there well may be circumstances under which the interposition of a record plaintiff who is not a non-resident alien enemy might not serve to avoid the suspension—as, for example, an assignment of a cause in action shown to have been made solely for the purpose of the suit."

Such an assignment by a non-resident alien enemy, a citizen of Italy, was the reason why a New Jersey court in *Fileccia v. Propati*⁶⁰ granted a motion of the defendant to stay the action by the assignee. Similarly, in *Elief, Adm. v. The Ohio Fuel Gas Co.*,⁶¹ an action by an American plaintiff was stayed because the beneficiaries who would profit by the recovery were nationals of a country at war with the United States.

⁵⁸ Cf. Borchard, *The Right of Alien Enemies to Sue in Our Courts*, (1918) 27 Yale L. J. 104, 105.

⁵⁹ See *Cohn v. James C. Gismond & Co., Inc.*, 203 App. Div. 453, 197 N. Y. S. 41 (1922), and the *Fritz Schulz, Jr., Co. v. Raimés* case, cited Chapter IX, n. 27. The latter case has been referred to recently in *George Ehret Brewery, Inc. v. Juniper Valley Dairy Co., Inc.*, N. Y. L. J. January 9, 1943, p. 116.

⁶⁰ New Jersey Supreme Court, May 28, 1942, C.C.H.W.L.S. ||9716.

⁶¹ Court of Common Pleas of Lucas County, Ohio, cited by Noll, (1942) 15 Ohio St. B. Ass. Rep. 120, 122, n. 2.

This question had previously been dealt with in the same way in *Rothbarth v. Herzfeld*,⁶² where the alien enemy plaintiffs residing in Germany had assigned the cause of action to American lawyers, as trustees for the benefit of creditors of the plaintiffs among which were New York banks. The court granted a stay on motion of the defendant, on the ground that non-resident alien enemies still controlled the litigation and that the assignees "would be required to distribute the bulk of the proceeds of the judgment, after paying the two American creditors, to alien enemies."

In *Propper v. Taylor*,⁶³ the plaintiff as receiver for an Austrian corporation, the Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as AKM, brought an action for sums due under an agreement against the defendant as president of the American Society of Composers, Authors and Publishers, an unincorporated association commonly known as ASCAP. The court granted the defendant's application to stay the trial of this action during the continuance of the present state of war between the United States and Germany.

It may become important that lawsuits are not precluded because alien enemies have an interest in their outcome, especially when the proper party is a resident, even an American citizen or American corporation. So, in *Manila Motors Co., Inc. v. S. S. Ivaran*,⁶⁴ a domestic insurance company to which a claim for cargo damage had been transferred as a pledge to secure the repayment of money paid by the insurer, was not precluded from prosecuting an action for the recovery of the cargo damage. The cor-

⁶² 179 App. Div. 865, 868. The disability of the enemy plaintiff, however, is but temporary in its nature, *ibid.*, referring to *Jackson v. Decker*, 11 Johns. 418.

⁶³ N. Y. L. J. February 6, 1943, p. 518.

⁶⁴ 46 F. Supp. 394 (D. C. S. D. N. Y., June 12, 1942).

poration was held "the real party in interest" though the nominal libellant was a Philippine corporation having its principal place of business in Manila, now enemy-occupied territory, and thus was an enemy under the Trading with the Enemy Act.⁶⁵

A related situation was considered in *Manaka ex rel. owner of vessel "Ocean Gift" v. Monterey Sardine Industries, Inc.*⁶⁶ In that case an American citizen brought action for himself and the owner and crew of a fishing vessel for damages. The question of liability having been denied,⁶⁷ the amount of damages was to be determined by final judgment, which would benefit alien born Japanese of the crew. The court, referring to cases which permitted suits by resident alien enemies, was unwilling to deal differently with persons who would be beneficiaries only. The court, however, directed that entry of final judgment in favor of the plaintiff be stayed only until appropriate steps had been taken to give the Government an opportunity to assume full power to control any proceeds of it.

But several cases have been decided differently during this war, both in this country and in the United Kingdom, where deposits of money had been made on behalf of prospective emigrants from European countries. These cases, *Weiner v. Central Fund for German Jewry*,⁶⁸ *Hansen v. Emigrants Saving Bank*,⁶⁹ and *Dobschiner v. Levy*,⁷⁰ are dealt with in Chapter XI, n. 23-25. In another case, *Stillman v. Atlantic Tours, Inc.*,⁷¹ an agreement was reviewed by which defendant had promised to have visas

⁶⁵ Cf. *Chase Nat. Bank of the City of New York v. Manila Electric Co.*, N. Y. L. J., February 20, 1943, p. 706.

⁶⁶ 48 F. Supp. 625 (D. C. N. D. Cal., S. Div., July 2, 1942).

⁶⁷ 41 F. Supp. 531 (October 20, 1941).

⁶⁸ (1941) 2 All E. R. 29 (K. B., February 18, 1941).

⁶⁹ N. Y. L. J. March 27, 1942, p. 1305.

⁷⁰ 39 N. Y. S. (2d) 277 (December 21, 1942, rehearing January 15, 1943).

⁷¹ N. Y. L. J. November 17, 1942, p. 1497.

issued for plaintiff's relatives in Vienna, Austria, and to bring them to Cuba. A stay because of the plaintiff's alien enemy character was denied and the defendant held liable to reimburse the prepaid amount.

There is no doubt that enemy aliens within the meaning of the Trading with the Enemy Act are precluded from bringing suits as plaintiffs in the courts of this country. Sec. 7 (b) of the Act expressly provides that "nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of war."

Sec. 10 (f) of the Act merely permits the maintenance of suits after the end of the war and until the expiration of one year thereafter, by enemy owners of patents, trademarks or copyrights against a licensee.⁷²

Said the Appellate Division of the New York Supreme Court in *Rothbarth v. Herzfeld*:⁷³ "It is inconceivable that our courts could permit a German subject, resident in Germany, to prosecute an action in our courts during the war."

This denial to non-resident enemy aliens of access to the courts of this country is not affected by any prohibition of international law. Thus the United States Supreme Court in the *Kawato* case said: "The clause in art. 234 of the Annex to the 4th Hague Convention of 1907: 'It is especially prohibited . . . to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party,' was construed to apply solely in enemy areas occupied by a belligerent."⁷⁴

⁷² See Chapter XVIII.

⁷³ 179 App. Div. 865, 867.

⁷⁴ Cf. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942) p. 129.

The same legal situation prevails in the United Kingdom, where no alien enemy may prosecute any action during the war, all suits being suspended until the end of hostilities.⁷⁵ This rule was confirmed recently by the House of Lords in *N. V. Gebr. van Uden Scheepvaart Agentuur v. V/O. Soufracht*.⁷⁶ It was held in this case that a Dutch corporation, having its place of business at Rotterdam, in enemy-occupied territory, was not allowed to maintain arbitration proceedings in England unless licensed. Such a corporation, which was an enemy within the meaning of sec. 2 (1) of the British Trading with the Enemy Act, as carrying on business in enemy-occupied territory, was also to be considered an enemy at common law. Said the House of Lords, at p. 102: "It is, of course, common ground that an 'alien enemy' cannot sue in the King's Court or otherwise take the position of an actor in British litigation, save with royal licence." In reversing the decision of the lower courts,⁷⁷ the House of Lords established that the test of enemy character at common law was objective, "turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled; it is not a question of nationality or of patriotic sentiment." As there was in the occupied Dutch area effective control by the enemy, who is "exercising some kind of government or administration over it," residents ought to be denied any access to English courts. "The common-law disability to sue in such cases cannot be regarded as got rid of because Emergency Regulations would prevent the transmission abroad of the sum recovered. The asset would be created, even though it necessarily remained here till the end of the war. Such

⁷⁵ *Supra* n. 25.

⁷⁶ 59 T. L. R. 101 (H. L., December 3, 1942).

⁷⁷ (1942) 1 K. B. 222 (C. A., November 5, 1941).

an asset might well operate as security for an advantage to the enemy from a neutral lender."

Nevertheless, under special circumstances an exception from this rule was made. In *Eichengruen v. Mond*,⁷⁸ a German plaintiff residing in Germany, and hence an enemy within the meaning of sec. 2(1) of the British Trading with the Enemy Act, as well as at common law,⁷⁹ was allowed to prosecute an action that he had instituted before the outbreak of this war. The action was based on an issue of shares by the defendant company in 1915, and the alleged failure of the company to give notice of the issue to the plaintiff, who was at that time a shareholder and an alien enemy. However, the action was dismissed as being "upon its face quite unsustainable" on the ground that the plaintiff could have litigated nearly twenty years ago and ought not "to have the advantage, for what it is worth, of indefinitely holding an action over the head of a British subject."⁸⁰

A misunderstanding of decisions of the United States Supreme Court seems to occur when non-resident alien enemies are allowed to sue in the courts of this country, provided only the courts control the proceeds to be recovered by plaintiffs.

Certainly the rule has always been to allow suits in the interest even of non-resident aliens of enemy nationality when the proceeds of the action would not benefit the enemy.⁸¹ This will always be the case when the court con-

⁷⁸ (1940) 3 All E. R. 148, 56 T. L. R. 845 (C. A. June 3, 1940).

⁷⁹ Chapter V, n. 61.

⁸⁰ For criticism see Webber, *Effect of War on Contracts* (London 1940) p. 518; Blum and Rosenbaum, *The Law Relating to Trading with the Enemy* (London 1940) p. 137.

⁸¹ See *Birge-Forbes Co. v. Heye*, 251 U. S. 317 (1920); *Weiditschka v. Supreme Tent*, 188 Iowa 183, 170 N. W. 300 (1918); *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435, 95 S. E. 851, L. R. A. 1918 E. 801, Ann. Cas. 1918 E. 840(1918).

trols the payment to be made in the interest of the plaintiff and where the remittance to enemy country so as to give aid and comfort to the enemy will be avoided. As pointed out recently in *Bernheimer v. Vurpillot*:⁸² "It is not even the case that a suit may not be prosecuted on behalf of an enemy subject even though resident in enemy or neutral territory. Such suits are occasionally allowed to proceed to judgment where adequate measures may be taken to prevent advantage to the enemy." So, too, it was said in *Ex parte Kumezo Kawato*:⁸³ "Even if petitioner were a non-resident alien, it might be more appropriate to release the amount of his claim to the Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323, in which this Court said that the sole objection to giving judgment for an alien enemy 'goes only so far as it would give aid and comfort to the other side.' "

But this does not necessarily mean that the non-resident alien may sue as plaintiff in the courts of this country. In *H. P. Drewry, S.A.R.L. v. Onassis*,⁸⁴ the plaintiff, a French corporation residing in Paris, enemy-occupied territory, and thus an enemy within the meaning of the Trading with the Enemy Act, sued for the recovery of the dollar equivalent of an amount predicated on an English judgment⁸⁵ which confirmed an award in a London arbitration proceeding. A motion to dismiss the complaint on the ground of the plaintiff's enemy status was denied, although the fact that most of the corporate stock was owned by a British subject who had fled to England "does not affect the plaintiff's status to the extent of cancelling the enemy alien status." Said the court, in referring to the *Bern-*

⁸² 130 F. 2d 396 (C. C. A. 3d, August 3, 1942).

⁸³ 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (November 9, 1942).

⁸⁴ 39 N. Y. S. (2d) 688 (November 16, 1942).

⁸⁵ (1942) 71 Lloyd's List L. Rep. 179 (C. A., December 18, 1941).

heimer, Kawato and Birge-Forbes cases: "If it would further the purpose of the Act, and not violate its spirit, jurisdiction should be retained to the extent of permitting the action to go to judgment, and the avails—in the event plaintiff recovers—should be released to the Alien Property Custodian."⁸⁶ On reargument⁸⁷ the original decision was adhered to.

The court mentioned the fact that the English authorities explicitly permitted the French plaintiff to institute and prosecute the arbitration proceedings. As has been shown, Chapter XIV, n. 39, the English court held that letters by the Trading with the Enemy Branch (Treasury and Board of Trade) to the solicitors of the claimant amounted to a license authorizing the French company to institute proceedings in the United Kingdom. There is no doubt that with an appropriate license any non-resident alien enemy may institute or prosecute any action, but to grant such a right to proceed in the courts is up to the appropriate administrative authorities which may prefer to vest the claim in the Alien Property Custodian.

The decision in the *Drewry* case was followed in *Transandine v. Massachusetts Bonding and Insurance Co.*,⁸⁸ where the plaintiff sued for recovery of its costs out of the bond made for it in *Anderson v. Transandine*⁸⁹ by the defendant surety corporation. The court held that the plaintiff, though an enemy within the definition of sec. 2 of the

⁸⁶ From the quotations of decisions, besides the *Bernheimer*, *Kawato* and *Birge-Forbes* cases the *Propper* case, *supra* n. 56, regards a resident receiver as plaintiff of an Austrian corporation; the *Geiringer* case, *infra* n. 94, an Austrian residing in New York, prosecuting in London; the *White Engineering* case, *supra* n. 48, a Polish refugee residing in New York and temporarily in then unoccupied Paris. Here in the *Drewry* case, however, there is no doubt of the enemy qualification of the plaintiff company, registered in France with its principal place of business in enemy-occupied territory.

⁸⁷ 39 N. Y. S. (2d) 695 (December 18, 1942).

⁸⁸ N. Y. L. J. November 19, 1942, p. 1527.

⁸⁹ See Chapter XXI, n. 42; *ibid.* n. 76 the later decision of March 2, 1943.

Trading with the Enemy Act, as a corporation carrying on business in occupied Dutch territory, may proceed to judgment, but "that the proceeds of the judgment, if and when obtained, shall be delivered to the Alien Property Custodian for such disposition as may later be determined."

The question of the Dutch decree of May 24, 1940, vesting the assets of the plaintiff in the Dutch government in exile (but see Chapter XXI, n. 76), was not considered in this decision. But a motion of the plaintiff's attorney to intervene as party plaintiff for the purpose of enforcing his attorney's lien was denied, because the attorney's lien is amply protected and "the Trading with the Enemy Act cannot be circumvented in this indirect fashion."

In *Lederer v. Kahn*,⁹⁰ plaintiff was a national of Haiti, residing in Shanghai, China, as consul-general of the Republic of Haiti. He sued to recover the proceeds of a check allegedly collected for his use and benefit and wrongfully converted by the defendant. Though a resident in Japanese occupied territory, he was to be considered an enemy within the meaning of the Trading with the Enemy Act. The court, relying on the authority of *H. P. Drewry v. Onassis*, permitted "to proceed to judgment with the proviso, however, that if and when same be collected that the proceeds thereof be deposited with the Alien Property Custodian for such future disposition of same as may be ordered in accordance with governmental regulations."

The court therewith established a doctrine which, it may be submitted, is justified by neither the terms of the Trading with the Enemy Act nor by the precedents cited.

Sec. 7 (b) of the Trading with the Enemy Act expressly excludes individuals and corporations in enemy or enemy-occupied territory—enemies within the meaning of sec. 2

⁹⁰ 39 N. Y. S. (2d) 696 (January 5, 1943).

of the Act—from the benefits of instituting or prosecuting actions in the courts of this country.

The precedents do not allow non-resident alien enemies to sue, but only provide for the possibility to have such lawsuits, commenced before the outbreak of war, prosecuted to judgment. It will then be up to the appropriate authorities, especially the Alien Property Custodian, to take care of the proceeds of the judgment. The *Birge-Forbes* case, to which reference is made in *Lederer v. Kahn*, dealt with a special situation. There a German plaintiff, a cotton broker in Bremen, Germany, brought suit against a cotton exporter in Texas to recover sums which plaintiff had paid to the defendant. The plaintiff prevailed, but before the Circuit Court of Appeals a motion was made to dismiss or suspend the suit on the ground that the plaintiff had become an enemy by reason of the declaration of war between the United States and Germany. The court affirmed the judgement with the modification, however, that it should be paid to the clerk of the trial court and by him turned over to the Alien Property Custodian. The special circumstances of the case were taken into account by the United States Supreme Court, which said:⁹¹ "The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up."

No such situation existed in the forementioned cases, where non-resident alien enemies introduced actions *after* the entrance of this country into the war. In the interest of certainty of decisions and of proper administration of justice, non-resident alien enemies ought not to be allowed to sue, but the appropriate administrative authority ought to be free to take over their claims.

⁹¹ 251 U. S. 317, at p. 323.

In *Stern v. Wertheimer*,⁹² where the residence of the alien enemy plaintiff was the question to be tried, a stay was not granted, but the court said: "If the defendant owes the money, he should pay it. The war does not absolve defendants. If the proceeds should not be paid to the plaintiff but impounded by the United States as enemy property that can be done by the trial court in the judgment."

The interests of administration of justice are by no means jeopardized if non-resident plaintiffs are not allowed to sue. In *Rothbarth v. Herzfeld*,⁹³ it was said that "the interests of American banks may be prejudiced by halting the prosecution of the case during the war, would not justify the court in failing the settled and established rule of law," but that the Alien Property Custodian may intervene by taking over and continuing the litigation.

An unusual situation of an enemy alien plaintiff was presented in *Geiringer v. Swiss Bank Corporation*.⁹⁴ In this English case the plaintiff, a resident of New York, brought an action against the London branch of the Swiss bank for certain securities held by the bank. The Swiss bank interpleaded, alleging that it held the securities for a Viennese bank, the Oesterreichische Credit-Anstalt Wiener Bankverein. Thereupon, it was ordered that the issue of ownership be tried between the plaintiff Geiringer and the Viennese bank, the Viennese bank to be the plaintiff and Mr. Geiringer the defendant. After the outbreak of war, Mr. Geiringer asked that security for costs be furnished by the Viennese bank as plaintiff. Since during the war the right of the Viennese bank to prosecute the action was suspended, because it was an enemy carrying on business in enemy territory, the court held that it

⁹² N. Y. L. J. December 12, 1942, p. 1858.

⁹³ 179 App. Div. 865, 868.

⁹⁴ (1940) 1 All E. R. 406, 84 Sol. J. 151 (Ch., January 24, 1940).

would be unfair to them to make now the order for security for costs asked for. They could not comply with it, the more so since they were "unable to proceed with their claim until after the cessation of hostilities."⁹⁵

The question whether aliens of enemy nationality may be allowed to sue in this country if they are not residents here may come up in cases where a stay of the proceedings is asked by defendants on the ground that non-resident alien enemies have no right to proceed in this country. Such a stay was granted in *Fileccia v. Propati*,⁹⁶ where plaintiff was an assignee of an Italian citizen non-resident in this country. A stay may be granted if non-resident enemies are plaintiffs. In *Groupement Financier Liègeois v. Cutten*,⁹⁷ where all plaintiffs were resident in occupied territories (Belgium and France) and thus enemies within the meaning of the Trading with the Enemy Act, suits were brought to recover damages for conversion and fraud from the unauthorized sale of securities. The defendants made the interesting point that the Trading with the Enemy Act does not forbid the prosecution of an action in tort. It was held, in *Kaufman v. Eisenberg*,⁹⁸ that sec. 7 (b) of the Trading with the Enemy Act (admitting even non-resident enemies to the defense) is applicable to any suit and, furthermore, that the suit is but an incident of the fundamental character of the transaction, which is commercial. The court held that even an alien enemy plaintiff may apply for a stay under sec. 7 (b), there being no prohibition in that regard. The court referred to *Rothbarth v. Herzfeld*,⁹⁹ where it was said: "It is entirely competent for

⁹⁵ For criticism see Webber, *supra* n. 80, at p. 46; Annual Digest of English Law 1939, p. 400.

⁹⁶ New Jersey Supreme Court, May 28, 1942, C.C.H.W.L.S. ||9716.

⁹⁷ 178 Misc. 275, 33 N. Y. S. (2d) 562 (February 14, 1942).

⁹⁸ 177 Misc. 939, 32 N. Y. S. (2d) 450 (January 19, 1942).

⁹⁹ 179 App. Div. 865, at p. 868; cf. *Pipe v. S. S. La Salle*, D. C. S. D. N. Y., February 10, 1943, 1943 Am. Mar. Cas. 263.

the court to act summarily in such a case [non-resident alien enemy as plaintiff] and suspend the further prosecution of an action upon its being established to its satisfaction by affidavit or otherwise that the action is being prosecuted by an alien enemy."

We have already discussed whether alien enemies at common law, subjects of a country which is at war with the United States, if they are residents of a neutral or allied country are permitted to sue in the courts of this country. For instance, a Rumanian living in Switzerland or Canada is neither an enemy within the meaning of the Trading with the Enemy Act, because he does not reside in enemy country, nor is he favored on account of residence in this country. The mere fact of his residence in non-enemy country alone does not admit him to the courts of this country.

Decisions of the First World War involved facts and circumstances which no longer generally exist. A neutral corporation, in *Nederlandsche Petroleum en Asphalt Maatschappij v. Interocean Oil Co.*,¹⁰⁰ was considered a national of that country, and there was not "any likelihood of proof of its being an enemy alien." But in this war, such a corporation would be an enemy within the meaning of the Trading with the Enemy Act because of doing business in what is now enemy-occupied territory. Property of such corporation would be "frozen" as that of an "enemy national," within the meaning of General Ruling No. 11, as amended, and eventually vested in the Alien Property Custodian as property in which nationals of a designated foreign country may have an interest. For that reason, residence in a neutral country, even in an allied country, alone, is not sufficient to grant a non-resident enemy alien access to the courts of this country. Neutrals who are in a

¹⁰⁰ 203 N. Y. S. 45, 208 App. Div. 107 (1924).

neutral country deserve different treatment than enemy aliens (subjects of an enemy state) who are in neutral or allied territory.

In the recent decision of the House of Lords in the *Uden case*¹⁰¹ reference was made to a Scottish decision of the last war, in *Gebruder van Uden v. Burrell*.¹⁰² There a Dutch firm of steamship owners in Rotterdam, probably the precursor of the party in the instant *Uden case*, was held an enemy within the meaning of the Trading with the Enemy Act, 1914, because the partners also carried on business in Germany, and were thus "defeated as pursuers by the plea of alien enemy."

Turning to the retaining of attorneys by alien enemies, it must be noted that the retainer of an attorney for a person who becomes an alien enemy by the outbreak of war is not terminated.

The principle that the outbreak of war does not end a retainer by a client's becoming an enemy was upheld in England in *Eichengruen v. Mond*,¹⁰³ and recently by the Court of Appeals in the *Uden case*, where it was said:¹⁰⁴ "The effect of that (Trading with the Enemy) Act was merely to make it illegal to act under the retainer for the benefit of the respondents unless and until a valid authority was obtained under the provisions of the Act."¹⁰⁵

In this country, recent discussion of the question of a retainer by an enemy has raised the query whether a license is necessary to represent an enemy.¹⁰⁶ As prohibitions

¹⁰¹ 59 T. L. R. 101 (H. L., December 3, 1942).

¹⁰² (1916) Scottish Session Cases 391.

¹⁰³ (1940) 3 All E. R. 148 (C. A. June 3, 1940).

¹⁰⁴ (1941) 3 All E. R. 419, at p. 427.

¹⁰⁵ This dictum was not reviewed in the opinion of the House of Lords, 59 T. L. R. 101 (December 3, 1942); see Lord Wright, (1943) 1 All E. R., at p. 83; 74 Lloyd's L. L. Rep., at p. 66.

¹⁰⁶ Bucher, *Presidential License Required for Lawyers to Represent Enemy Aliens*, (1942) 17 St. Bar. J. Calif. 33; Sterck and Schuck, *No Presidential*

are directed only against trading with enemies, within the meaning of the Trading with the Enemy Act, and as long as the President has not issued a proclamation regarding resident aliens of enemy nationality, no license is necessary for representing an alien of enemy nationality residing in this country, as such a person is neither an enemy within the meaning of the Trading with the Enemy Act, nor a designated enemy national within the meaning of the General Orders of the Alien Property Custodian unless expressly so determined in a (special) Vesting Order regarding such person's property in this country.

Similarly, the view has been taken in recent decisions in this country and in England that interests of enemies ought not to be allowed to prevent the administration of estates so as to keep other persons out of their due shares in the estate. Thus, in *Burges v. Gilchrist*,¹⁰⁷ the administrator of the estate of a deceased resident alien (Italian) was not barred from maintaining an action for wrongful death of the deceased, due to an automobile accident, though the only beneficiaries of a recovery in such action, the widow and children of the deceased, were non-resident aliens who were and always had been residents of Italy, enemy territory. It was said in this decision that Exec. Order No. 8389, as amended, blocking the proceeds due to the beneficiaries, does not affect the right to prosecute the action.¹⁰⁸

In *Estate of Robert Kunitzer*,¹⁰⁹ legacies to three chari-

License Required for Lawyer to Represent Enemy Alien, (1942) 15 So. Calif. L. Rev. 478.

¹⁰⁷ 17 S. E. (2d) 804 (W. Va. Sup. Ct. of Appeals, December 2, 1941), (1942) 138 A. L. R. 676. Cf. *Tellier, Right to Maintain Action for Wrongful Death for Benefit of Nonresident Aliens*, (1942) 138 A. L. R. 684, 702.

¹⁰⁸ On the treatment of inheritance claims of American citizens to the estates of persons deceased in Germany, see the correspondence of the Dep't of State 1938-1940, and the Oregon and California Statutes, cited in Chapter XX, n. 15, 16.

¹⁰⁹ N. Y. L. J. January 28, 1943, p. 376.

table institutions in Austria under the will of a citizen of the United States who died in Vienna, were questioned. "Because of the unsettled conditions in Austria, due to its seizure by the Nazi regime," and later because of the existence of the war, it was impossible to obtain valid proof as to whether these charities were in existence and were capable of taking the legacies. Determination of the validity of these legacies which were earmarked in the hands of a temporary administrator was deferred. Again, in *Estate of Veronica Flinsch*,¹¹⁰ in an accounting proceeding, the relations of the family with the father in Germany could not be sufficiently determined. Therefore, the property in controversy was to be deposited with the clerk of the court "to await an application for its disposition after the conclusion of peace." Similar questions arose in English cases. In *Estate of San Pietro*,¹¹¹ two Italian subjects, residents of Milan and therefore enemy aliens, acquired reversionary interests in an English trust fund which fell into the possession on the death of the life tenant, their mother, a British subject by birth who became an Italian by marriage. Letters of administration *ad colligenda bona* were granted by the court, with power to reimburse the solicitors who had acted as attorneys to the two children. In *Estate of van Tuyll, van Servooskerken*,¹¹² a Dutch national domiciled in the Netherlands died testate in England. His brother, who was still resident in enemy-occupied territory, was named executor in the will. The court granted letters of administration, with the direction to pay the income from the residue to the widow in accordance with the terms of the will.

In Italy, sec. 280 (1) of the Act on War and Neutrality

¹¹⁰ N. Y. L. J. December 2, 1942, p. 1710.

¹¹¹ (1941) P. 16, (1940) 4 All E. R. 482, 110 L. J. P. 23, 57 T. L. R. 137, 84 Sol. J. 705 (P., November 5, 1940).

¹¹² Ibid. Cf. Note, *Legacies to Enemies*, (1941) 91 L. J. 230.

of July 8, 1938,¹¹³ provides that a person of enemy nationality retains his capacity to sue and to be sued.¹¹⁴ Contrariwise, the Egyptian Proclamation of September 14, 1939,¹¹⁵ sec. 7, provides that "no persons, individual or legal of German nationality or residing in German territory, may institute any law suit, civil or commercial, before any jurisdiction in Egypt, nor prosecute a law suit already instituted."

Under German law, during the last war, persons of enemy nationality residing in Germany were allowed to sue. But persons outside Germany, whether they were enemies or not, were denied the right to sue at least on pecuniary claims originating before July 31, 1914, the day before Germany's entrance into the war.¹¹⁶ In this war, no similar decree has been enacted for the simple reason that foreign exchange regulations existing in Germany since 1931 already prevented the prosecution of any claim by persons and corporations abroad. A license from the appropriate Foreign Exchange Control Agency (*Devisenstelle*) must be obtained before any action in favor of such a plaintiff living outside the German Reich (*Devisenauslaender*) may be prosecuted.¹¹⁷ Such licenses were rarely granted to claimants outside the German Reich, even before the outbreak of this war. In Germany, as well as in other totalitarian countries, Foreign Exchange Control was intended as a weapon of economic warfare and used as such long before the formal declaration of war.¹¹⁸ In principle,

¹¹³ *Gazetta Ufficiale*, September 15, 1938, p. 4294.

¹¹⁴ *Le persone di nazionalita nemica conservano la piena capacita civile e il libero esercizio dei loro diritti, salve le limitazioni stabilite dalla legge. Esse conservano la capacita processuale attiva e passiva.*

¹¹⁵ (1939) 29 *Gaz. Trib. Mixtes* 359.

¹¹⁶ See Gathings, *International Law and American Treatment of Alien Enemy Property* (1941) p. 52.

¹¹⁷ Nussbaum, *Money in the Law* (1938) p. 478.

¹¹⁸ See Chapter XX.

enemies have the right under German law to sue in German courts. A decree of September 1, 1939,¹¹⁹ expressly provides for a possible restriction of this right by way of retaliation. But it must always be borne in mind that any judgment, even if obtained by enemy subjects residing in neutral countries, cannot be enforced or executed without license of the Foreign Exchange Control Agency. Because of the requirement to obtain such a license there is no need to apply for another license, namely, under the (German) Trading with the Enemy Act of January 15, 1940, as amended.¹²⁰

In French law, which generally restricts the right of aliens to sue in the courts, the Trading with the Enemy Act, sec. 15 (8),¹²¹ expressly permits suits to be brought, subject to the condition of reciprocity, by enemy subjects or persons residing in enemy territory if such suits are "necessary to enforce their legal rights" (*faire valoir leurs droits*). In none of the cases dealing with the release of sequestered property¹²² was the right to sue denied, not even in the *Somatex* case¹²³ where the sequestration of the corporation was maintained because of the enemy character of the controlling stockholders.

The position of alien enemies before commercial arbitration tribunals seems to be the same as before ordinary courts. No provisions in arbitration agreements are known that provide for a special regulation of this question.¹²⁴ It is governed by the same considerations at common law as

¹¹⁹ Reichsgesetzblatt 1939 I p. 1656.

¹²⁰ The same source of September 1, 1939, provides in sec. 8 for a general suspension of all prescriptions of private and procedural law.

¹²¹ Journ. Off. September 4, 1939, p. 11091.

¹²² Chapter IX, n. 48.

¹²³ *Ibid.*, n. 51.

¹²⁴ See Note, (1942) 6 Arbitration J. 50; Mayper, *Status of Enemies and Alien Enemies in United States Courts and in Arbitral Proceedings*, *ibid.* 175, 176.

apply to ordinary judicial proceedings, as discussed in the foregoing pages. No contrary rule has been established by decisions rendered in arbitration proceedings during this war either in this country or in England, as is evidenced by the *Drewry* case¹²⁵ in New York, and the *Uden*¹²⁶ *Drewry*¹²⁷ and *Hindley*¹²⁸ cases in England.

It is beyond our scope to discuss the usefulness of arbitration proceedings in this field for the solution of the many intricate questions, of national and international character, which may arise later on from the application of trading with the enemy legislation, especially the freezing regulations in the United States and related provisions such as the Defence (Finance) Regulations in England. Suffice it to say that arbitration proceedings may serve to settle not only questions of public international law like those involved in the administration by governments-in-exile of assets abroad of their nationals, but also those dealing with the numerous claims, counter-claims and cross-complaints, of creditors arising out of the freezing and blocking of assets in various countries.

¹²⁵ N. Y. L. J. November 17, 1942, p. 1496; December 19, 1942, p. 1975.

¹²⁶ (1942) 1 K. B. 222 (C. A., November 5, 1941), *rev'd* 59 T. L. R. 101 (H. L., December 3, 1942).

¹²⁷ (1942) Lloyd's List L. Rep. 179 (C. A., December 18, 1941).

¹²⁸ 56 T. L. R. 904 (K. B. June 28, 1941), concerning an award in the form of a special case stated by the Appeal Committee of the Jute Association.

16. Suits Against Enemies.

THE QUESTION whether suits against enemies may be maintained in courts during war-time will hardly arise in cases where the defendant enemy himself is desirous of defending an action brought either before the outbreak of war or later. In separate libels, *United States v. The Pietro Campanella*; *United States v. The Euro*,¹ for forfeiture because of willful damage by the masters and crew of the ships under orders from the Naval Attaché² of the Italian Embassy to the United States in March, 1941, the court said that "even where an enemy is assailed in court with respect to his person or property, he has the right to defend, even though he might not have the right to originally sue or litigate as plaintiff."³ This right of enemy individuals or corporations, within the meaning of the Trading with the Enemy Act, has been expressly provided for by sec. 7 (b) of the Act, according to which "an enemy or ally of an enemy may defend by counsel any suit in equity or action at law which may be brought against him." The same view was followed in *Horvath v. Mitsubishi Shoji Kaisha, Lim.*,⁴ namely, that "even though an alien enemy, defendant is entitled to defend this action and have its day in court." Moreover, it was held in the *Campanella* case that the statutory permission to the enemy to defend by counsel "any suit in equity or action at law"

¹ 47 F. Supp. 374 (D. C. D. C. Maryland, October 13, 1942).

² The master and certain members of the crew of each ship were convicted under 18 U. S. C. A. §502, *Bersia v. United States*, 124 F. (2d) 310 (C. C. A. 4th C.), cert. den. 316 U. S. 665, 62 S. Ct. 1033.

³ *International Ins. Co. v. Sherman*, 262 U. S. 346, 43 S. Ct. 574, 67 L. Ed. 1018; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9, 39 S. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323.

⁴ 178 Misc. 52, 33 N. Y. S. (2d) 8 (January 20, 1942).

must be construed broadly enough to include admiralty suits *in rem*.

Whether an action against enemies within the meaning of the Trading with the Enemy Act can be commenced generally depends upon the possibility of serving process abroad. In New York, for instance, the Rules of Civil Practice were amended on March 9, 1942, in relation to orders for service of summons by publication (Rule 50).⁵ Furthermore, a new Rule 302 was added, which provided that an order may dispense with mailing of any papers to defendants "within a country with which the United States of America is at war, or in a place with which by reason of the existence of a state of war, the United States of America does not maintain postal communication." In lieu thereof the order shall direct that such papers be mailed on behalf of the defendant to the Secretary of the Treasury at Washington, D. C.⁶

The question is now regulated by General Order No. 6 of the Alien Property Custodian, August 3, 1942,⁷ regarding Service of Process Upon Any Person Within Any Designated Enemy Country or Any Enemy-Occupied Territory. Sec. 1a reads as follows: "In any court or administrative action or proceeding within the United States in which service of process or notice is to be made upon any person in any designated enemy country or enemy-occupied territory, the receipt by the Alien Property Custodian of a copy of such process or notice sent by registered mail to the Alien Property Custodian at Washington, D. C., shall be service of such process or notice

⁵ See Laws of 1942, c. 681, as amended April 8, 1943, c. 407.

⁶ See on Constructive Service, Annotation (1942) 137 A. L. R. 1365. Cf. New York Laws of 1941, c. 313, and c. 687; Bogue, *New Laws Affecting Corporations*, (1942) 14 N. Y. St. Bar Ass. Bull. 74, 77, N. Y. L. J. August 8, 1942, p. 304, and Note, *The Effect of the Freezing Orders in Civil Actions*, (1942) 42 Col. L. Rev. 1190, 1194.

⁷ 7 Fed. Reg. 6199 (1942).

upon any such person, if, and not otherwise, the Alien Property Custodian within sixty days from the receipt thereof shall file with the court or administrative body issuing such process or notice, a written acceptance thereof." Sec. 2 provides that "such process or notice shall otherwise conform to the rules, orders or practice of the court or administrative body issuing such process or notice." Though this General Order No. 6 of the Alien Property Custodian made it possible to serve notice upon him, further legislation was deemed necessary to provide for uniform regulations in the laws of the different states. For that reason, the Council of State Governments, Chicago,⁸ asked the Attorneys General of the states to make suggestions for a proposed bill or amendments to existing legislation, with a view to conforming the mode of service of process to service of process on the Alien Property Custodian in accordance with the provision of General Order No. 6. Sec. 3 of this Order provides that "this order shall not be construed to limit the authority of the Alien Property Custodian to take any measures in connection with representing any such person in any action or proceeding as in his judgment and discretion is or may be in the interest of the United States."

The question whether under war conditions service upon an enemy defendant is effective does not arise if the defendant's business is carried on not only abroad but also in the country of the forum, where process can be served upon the manager or the representative of the defendant enemy who is carrying on business with the appropriate license. In *Meyer v. Louis Dreyfus et Cie*,⁹ the defendant, a company with principal place of business in Paris, enemy-

⁸ Letter of October 8, 1942, reprinted in (1942) 27 Massachusetts L. Q. 34. Cf. General Order No. 20, February 9, 1943, 8 Fed. Reg. 1780 (1943).

⁹ (1940) 4 All E. R. 157, 163 L. T. R. 335 (C. A., September 21, 1940).

occupied territory, had a branch in London. The Board of Trade issued a license to the manager to carry on the business of the London branch of the French company, no vesting order having been made. It was held that service on the manager was good, regardless of whether the defendant became an enemy, since the manager had control over the defendant partnership by reason of the license.

An unsatisfactory situation arose in England, when the only service possible was deemed insufficient. In *V. L. Churchill & Co., Ltd. v. Lonberg*,¹⁰ an English company wished to serve a Dane, living in Copenhagen, enemy-occupied territory, and, therefore, an enemy within the meaning of the Trading with the Enemy Act, with a writ based upon a contract made in 1932 to pool certain patents. The company requested an order permitting service by way of advertisement in a Swedish newspaper which was said to have a circulation in Copenhagen. The court refused to grant the order because "German authorities take every possible step to prevent notice of proceedings against persons in Germany or German-occupied territory reaching those persons. . . . If we were to accede to this application, we should be doing the very thing which English law does not permit us to do." The English law here referred to was laid down in *Porter v. Freudenberg*,¹¹ where it was held that the method of service must be one which "will in all reasonable possibility, if not certainty, be effective to bring knowledge of the writ to the defendant."

The decision in the *Churchill* case led to a new rule of the English court, overruling this decision for any future case on similar facts. This rule¹² permits an order to be

¹⁰ (1941) 3 All E. R. 137, 165 L. T. R. 274, 85 Sol. J. 377 (C. A., July 28, 1941); see Notes, (1940) W. N. 456; (1941) 192 L. T. 199.

¹¹ (1915) 1 K. B. 857, at p. 889.

made dispensing with service altogether on any defendant who is an enemy within the meaning of the Trading with the Enemy Act, if the applicant produces *inter alia* statements in court showing that he is entitled to succeed on the merits of the action.¹³ The new rule was held inapplicable to a prisoner of war, as being no enemy within the meaning of the Trading with the Enemy Act, in *Vandyke v. Adams*,¹⁴ and in a divorce petition, in *Read v. Read*.¹⁵

In this country, where service is to be made upon the Alien Property Custodian, General Order No. 6 provides that such service of process is validly made even if the Alien Property Custodian does not take over the position of the defendant enemy. On the other hand, the statutory permission to the enemy "to defend by counsel any suit in equity or action by law" exists even though the property involved was ultimately to be turned over to the Alien Property Custodian. Thus the enemy is a proper if not a necessary party, even if the property has been taken over by the Alien Property Custodian.¹⁶

A special situation was presented in this war in the

¹³ R. 14 (B)1 to Order IX of the Rules of the Supreme Court, (1941) 91 L. J. 416, (1941) 192 L. T. 248.

¹⁴ "Perhaps the far-reaching consequences of the new rule may be neutralized—or should we say sterilized?—by the absence of extendible assets," Note, *Dispensing with Service of an "Enemy,"* (1942) 92 L. J. 43. Cf. Note, *Defendants in Enemy Countries*, (1942) 193 L. T. 47, and the Notice, issued at the request of the Secretary of State for Foreign Affairs, as to service of English documents in foreign countries, November 12, 1942, (1942) 92 L. J. 376, 194 L. T. 192, 86 Sol. J. 348.

¹⁵ (1942) 1 Ch. 155 (Ch., January 21, 1942).

¹⁶ (1942) P. 87, (1942) 1 All E. R. 226, 58 T. L. R. 160, 86 Sol. J. 291 Feb. 2, 1942); see *Read v. Read* (No. 2), (1942) 2 All E. R. 423 (P., July 31, 1942), dismissing a motion to dispense with service on the wife in Germany, under Matrimonial Causes Rules, 1937, r. 10. See Note, *Dispensing with the Service of Petitions for Divorce*, (1942) 92 L. J. 391, 86 Sol. J. 291, and for a similar situation in this country, *Harf v. Harf*, Maryland, C. C. of Baltimore City, December 18, 1942, 11 U. S. L. W. 2494 (service by publication where the wife of a resident German citizen was absent from the United States by her own will). Cf. *Luccioni v. Luccioni*, Probate, February 2, 1943, Note (1943) 195 L. T. 57; *aff'd* (C. A., March 8, 1943), *ibid.* 112.

¹⁶ See the authorities cited in the *Campanella* case, *supra* n. 1, at p. 380.

aforementioned cases *United States v. The Pietro Campanella*; *United States v. The Euro*. In these libels by the United States against the Italian ships for forfeiture, the Alien Property Custodian, after having vested in himself all rights, title and interest of the enemy owners of the two vessels—the Società di Navigazione Tito Campanella, and the Società di Navigazione Ligure di Armamento at Genoa, Italy—asked to be substituted for them as claimant. The court denied the substitution of the Alien Property Custodian as *dominus litis* to the exclusion of the Italian (enemy) claimants. It reasoned that the Custodian did not assert any absolute right in the ships but only “conditional or contingent rights dependent upon the determination of the libels for forfeiture.” Since the Custodian acted “in the interest of and for the benefit of the United States” and a suit against him is in effect a suit against the United States, his substitution for the prior owners would leave no “adverse claims” before the court. But the Custodian was allowed to be a party with full right to receive and hold any interest in the ships which the enemy claimants had at the time of the Vesting Order.¹⁷

A similar situation was considered in *United States v. A Certain Motor Vessel*.¹⁸ There the *Odenwald* belonging to the German Hamburg American Line was brought into the port of San Juan, Puerto Rico, shortly before the outbreak of war. The Government filed a libel for salvage against the ship and her cargo. Meanwhile, the Alien Property Custodian vested all rights of the German corporation in himself and asked for his substitution as a party to the salvage proceedings on the ground that the German owner had no longer any interest to defend. The court, however, recognized that the interest of the enemy cor-

¹⁷ No. 52, July 22, 1942, 7 Fed. Reg. 5738 (1942).

¹⁸ D. C. Puerto Rico, December 9, 1942, 1942 Am. Mar. Cas. 1623.

poration in a future compensation, if any, might be affected by the outcome of the proceedings. Referring to the *Campanella* case, the court made the Alien Property Custodian a party to the salvage proceedings, but ordered also that the enemy corporation be allowed to defend. As in the *Campanella* case, a stay of proceedings during the continuance of the war was granted.

The position of the Alien Property Custodian may be different in cases where he makes no order vesting in himself any interest in property blocked in this country. This question was considered in *Estate Marie F. K. Renard*,¹⁹ where decedent was domiciled in France and a French notary residing in Paris was determined to be the lawful foreign administrator of the estate.²⁰

The ancillary representative and the attorney for the French administrator agreed to deposit the distributable balance with a New York bank for the account of the French administrator "subject to any pertinent governmental regulations." The Alien Property Custodian interposed a notice of appearance and denied the right of the attorney to represent the French administrator, but did not vest in himself the interest of the estate. The court held that it had the duty to hear both. "The alien has asserted no claims in conflict with the best interest of the United States. If such conflict had been shown the court would have been obliged to resolve it so as to protect the interests of the nation but the alien is entitled to present his views through his own chosen agent when he is able to make a choice. What the court will do in any case of conflict should be done only after giving the alien the hearing which elementary principles entitle him to demand."

¹⁹ 39 N. Y. S. (2d) 968 (February 8, 1943).

²⁰ 157 Misc. 174 (1935).

In this decision, the French administrator was called "a friendly alien."²¹ Said the court: "If a resident enemy alien may prosecute actions in our courts and if a non-resident enemy may defend by counsel, should it be said that the accredited attorney in fact of a friendly alien is to be denied the privilege of appearing in a proceeding to which his principal has been named a party respondent?" It may be submitted that the French administrator cannot be determined to be a friendly alien, for the purpose of these proceedings. Since he resides in occupied France, enemy-occupied territory, he is an enemy within the meaning of sec. 2 of the Trading with the Enemy Act, and an enemy national within the meaning of sec. 2 (a) (iii) of General Ruling No. 11, as amended. In order to facilitate the hearing of the attorney of the French administrator, it was not necessary to determine this administrator as a "friendly alien."

As long as the Alien Property Custodian has not made a vesting order, he seems not to be in a position to exclude the real party. Even if he has made a vesting order, recent decisions, as has been shown, do not exclude enemy parties as defendants, in cases where the United States itself is a party.

In *Birnbaum v. Irving Trust Co.*,²² the defendant held property of an alien enemy, the *Amsterdamsche Liquidatiekas N. V.*, a banking corporation carrying on business in Amsterdam, enemy-occupied territory. A motion by the defendant to have his principal made a party defendant (under sec. 287b of the New York Civil Practice Act) was granted. The United States Attorney General was considered the proper person upon whom service could validly be made, pursuant to Rule 50, until the President made

²¹ See Chapter V, n. 75; VI, n. 48.

²² 178 Misc. 206, 33 N. Y. S. (2d) 551 (February 17, 1942).

the designation under sec. 301 of the First War Powers Act. In this connection, reference may be made to the Regulations of February 16, 1942,²³ and the Memorandum of February 12, 1942,²⁴ meanwhile superseded by Exec. Order No. 9095 of March 11, 1942,²⁵ as amended by Exec. Order No. 9193, July 6, 1942,²⁶ establishing the Office of the Alien Property Custodian.

In England, the appointment of the Custodian of Enemy Property as a defendant in legal proceedings—similar to that of the Alien Property Custodian provided now in this country by General Orders No. 6 and 20²⁷—was considered in recent cases. In *In re Barbe, Ellisen v. Griffiths*,²⁸ the question was whether the effect of a codicil was to revoke a gift of residue under a will in favor of a German resident in Germany, who was not represented. Concerning the practice of the Board of Trade to make an order vesting in the Custodian of Enemy Property such rights as the enemy residuary legatee might possess, the Solicitor-General observed: "The Board of Trade will consider each case on its merits, and as long as they are reasonably satisfied that there is enemy interest—perhaps not actually in hand but a possible interest and, secondly, that the enemy interest must be preserved in contemplation of arrangements to be made at the conclusion of peace, then and in

²³ 7 Fed. Reg. 1021 (1942).

²⁴ *Ibid.* p. 1409.

²⁵ *Ibid.* p. 1971.

²⁶ *Ibid.* p. 5205

²⁷ Cf. *Novick v. United Steel Works Corp'n*, N. Y. L. J. April 16, 1942, p. 607; *In re Klivan (Japan Cotton & Silk Trading Co., Inc.)*, N. Y. L. J. August 29, 1942, p. 457; *Engel v. Temkin & Levinsohn, Inc.*, N. Y. L. J. December 24, 1942, p. 2027; *The Old Colony Co. v. N. Y. Foreign Trade Zone Operators, Inc.*, N. Y. L. J. February 2, 1943, p. 447.

²⁸ 7 Fed. Reg. 6199 (1942); 8 Fed. Reg. 1780 (1943).

²⁸ 192 L. T. R. 290, 85 Sol. J. 474 (Ch., December 3, 1941). See Notes, *The Board of Trade and Defendants in the Chancery Division*, (1941) 192 L. T. 199, 289, (1942) 193 L. T. 37; *Vesting Orders and Enemy Property* (1941) 85 Sol. J. 464; Bodkin, *Administration of Alien's Estates in War-times*, (1942) 92 L. J. 230; *Execution of Alien's Trusts in Wartime*, *ibid.* 325.

those cases the Board of Trade will always make vesting orders." Reference is here made to sec. 7 (1) of the (British) Trading with the Enemy Act which provides for the appointment of custodians by the Board of Trade "with a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace."

In *In re Forster's Settlement; Forster v. Custodian of Enemy Property for England*,²⁹ an Englishwoman married to an alien enemy was entitled to a life interest in a settled trust. Advancements in favor of children could not be made without the alien enemy's consent. The whereabouts of this alien enemy, a resident of Austria or Germany, were unknown. To obtain the consent, which could not be dispensed with, the court made the Custodian a defendant to the summons as the person in whom any money arising from the settlement and due thereunder to be paid to the enemy would vest; the Custodian in turn intimated that he would give his consent to such advancement as the court might approve. In *Estate of Fischer, dec'd*,³⁰ where distributees of the estate of a German national were Germans residing in Germany, a note of the Probate Registry regarding the consent of the Custodian of Enemy Property to grants of representation is fully reprinted, at p. 253 of the opinion.

One of the most important questions in proceedings against enemy aliens is that of a stay of proceedings. The mere fact that a defendant is a non-resident alien enemy does not warrant the exercise of the court's discretion on

²⁹ (1942) 1 Ch. 199, (1942) 1 All E. R. 180, 193 L. T. R. 32, 58 T. L. R. 99, (Ch., December 17, 1941); Note (1942) 86 Sol. J. 49.

³⁰ (1940) 2 All E. R. 252, 56 T. L. R. 560 (P., March 11, 1940). As to the recent regulation in this country regarding the administration of estates of decedents, see General License No. 30 A and Public Circular No. 20, October 23, 1942, 7 Fed. Reg. 8632 (1942).

his behalf. The court will determine upon the facts of each particular case whether a stay is necessary to protect the interests of the defendant enemy alien. This may sometimes be of great importance for the plaintiff. If the stay is granted, "so that justice may properly be administered,"³¹ the suit is suspended and judgment postponed until the end of the hostilities and sometimes even until several months after the termination of the war. The impossibility of communication between counsel and defendant may be one of the decisive points. "The right of consultation between attorney and client in order to properly plead or defend has always been considered a fundamental prerogative to a fair trial."³²

Usually, a stay is granted.³³ In *Murray Oil Products Co., Inc. v. Mitsui & Co. Limited*,³⁴ in an action for breach of contract for non-shipment of vegetable oil from Dairen, Manchukuo, instituted after the outbreak of war between the United States and Japan, the plaintiff had obtained an attachment on funds of the Japanese company in this country. Said the court: "The right to defend an action brought against one is one of the fundamental rights inherent in our jurisprudence as well as in our conception of the very democracy for which we are fighting, and the opportunity for consultation between client and counsel is a part of that right, and the right must be accorded to alien enemies as well as to others."³⁵

³¹ *Von Neumann v. Greiner*, N. Y. L. J. March 6, 1942, p. 987.

³² *Holzer v. Wohl*, N. Y. L. J. April 10, 1942, p. 1513.

³³ Cf. *Watts, Watts & Co., Lim. v. Unione Austriaca di Navigazione*, 248 U. S. 9, 39 S. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323; *The Kaiser Wilhelm II*, 246 Fed. 786, L. R. A. 1918 C 795; *City National Bank of Selma v. Dresdner Bank of Bremen*, 255 Fed. 225; *Kintner v. Hoch-Frequenz-Maschinen-Aktien-Gesellschaft fuer Drahtlose Telegraphie*, 256 Fed. 849.

³⁴ 178 Misc. 82, 33 N. Y. S. (2d) 92 (February 3, 1942).

³⁵ Aff'd without opinion, 263 App. Div. 979, 34 N. Y. S. (2d) 137 (First Dep't, March 13, 1942). But later a motion to terminate the stay was granted to a certain extent, N. Y. L. J. June 26, 1942, p. 2694.

Similarly, in *S. K. Adams Inc. v. Mitsubishi Shoji Kaisha, Limited*,³⁶ an action was brought for breach of a contract for the sale of a shipment of sesame seeds. Personal service of process was effected upon an officer of the defendant Japanese corporation doing business in New York, and examination before the trial of the defendant was held before the outbreak of war. A stay of action was denied to the defendant by the trial court and on reargument the decision was adhered to.³⁷ The Appellate Term reversed³⁸ and granted a stay until three months after the restoration of peace between the United States and Japan, because it appeared necessary to secure testimony from the defendant's Shanghai office. Thus the defendant would be enabled to establish his defense that the shipment was not delivered because of conditions beyond his reasonable control (cancelling of sailings by the Japanese Government). Said the court at p. 535: "Such testimony, of course, cannot be obtained by deposition under present conditions and this evidence will not be available until the termination of the war between this country and Japan." The court referred to cases (cited *supra* n. 33) which "proceeded upon the doctrine that the courts would protect the rights of any enemy aliens even though the interest of some of our citizens might be prejudiced by holding up a case during the war."

This same view, in favor of granting a stay of proceedings to a defendant enemy, was followed by decisions of federal courts. Thus, a stay was granted in *J. D. & A. B. Spreckels Co. v. The Takoaka Maru*,³⁹ where the defendant, a corporation under the law of Japan, moved for a stay of all proceedings until the end of the war. Again, in *The*

³⁶ N. Y. L. J. March 14, 1942, p. 1142.

³⁷ N. Y. L. J. April 15, 1942, p. 1589.

³⁸ 178 Misc. 689, 37 N. Y. S. (2d) 533 (First Dep't, June 24, 1942).

³⁹ 44 F. Supp. 939 (D. C. S. D. N. Y., February 4, 1942).

Santa Lucia, The Conte Biancamano,⁴⁰ a libel suit by the Grace Line, the owner of S. S. *Santa Lucia*, against the Italia Società Anonima Di Navigazione, as owner of S. S. *Conte Biancamano*, for collision damages, the proceedings were stayed as the libellant's proctor could not communicate with his client. So, too, in *United States v. The Campanella*; *United States v. The Euro*, and in *United States v. A Certain Motor Vessel*,⁴¹ a stay was granted on behalf of the defendant enemy corporations.

To grant a stay of proceedings is also the usual practice now in the New York Supreme Court. Some former decisions of this court showed a contrary attitude. For instance, a stay was denied in *Galtrof v. I. G. Farbenindustrie Aktiengesellschaft*,⁴² in an action on bond obligations of the German corporation which was commenced by the issuance of a warrant of attachment in June, 1941, and where answer was served in August, 1941; in *Stasi v. "Italia" Società Anonima Di Navigazione*,⁴³ an action of a resident Italian for personal injuries through alleged negligence of the defendant in Hoboken, N. J., where defendant through counsel had interposed an answer; in *Braun v. "Italia" Società Anonima Di Navigazione*,⁴⁴ where it did not appear that the defendant must procure evidence for the trial from Italy or elsewhere outside of this country, and in *Sabl v. Laenderbank Wien Aktiengesellschaft*,⁴⁵ where the case was heard and determined upon its merits⁴⁶ before the outbreak of war.⁴⁷ But all these denials of a stay of proceed-

⁴⁰ 44 F. Supp. 793, 1942 Am. Mar. Cases 957 (D. C. S. D. N. Y., February 16, 1942).

⁴¹ *Supra* n. 1, 19.

⁴² 33 N. Y. S. (2d) 756 (February 23, 1942); Note, (1942) 29 Va. L. R. 110.

⁴³ 36 N. Y. S. (2d) 573 (June 30, 1942).

⁴⁴ 35 N. Y. S. (2d) 246 (May 3, 1942).

⁴⁵ 33 N. Y. S. (2d) 764 (March 5, 1942).

⁴⁶ 30 N. Y. S. (2d) 608, 621 (October 28, 1941).

⁴⁷ Cf. *American Scotti Corp'n v. Henry Pollak, Inc.*, 264 App. Div. 711, 34

ings occurred without prejudice to an application for adjournment or stay for sufficient reason at a later stage of the proceedings.

In numerous decisions of the New York Supreme Court, however, a stay of proceedings has been granted to defendant non-resident alien enemies in order to protect their right of defense, expressly granted in sec. 7 (b) of the Trading with the Enemy Act. It may suffice to mention the following cases: *Dunajewski v. Société Nationale des Chemins de Fer Francais*;⁴⁸ *Freund v. Laenderbank Wien Aktiengesellschaft*;⁴⁹ *Matter of Gunze Silk Corp'n (Charles Rudolph Corp'n of New York)*;⁵⁰ *Holzer v. Wohl*;⁵¹ *Marine Trading & Mfg. Co., Limited, v. Société Générale*;⁵² *Miller v. D. Baraha & Stetten, Limited*;⁵³ *In re Mitsubishi Shoji Kaisha, Limited (Charles Rudolph Corp'n)*;⁵⁴ *von Neumann v. Greiner*;⁵⁵ *Reiss v. Ostier*.⁵⁶

So, too, in *Bollack v. Société Générale*,⁵⁷ and in *Commission for Polish Relief v. Banca Nationala a Rumaniei*,⁵⁸ stays were granted to protect the interests of the defendants, both enemies within the meaning of the Trading with the Enemy Act, the French bank because of carrying on business in occupied France, and Rumania as an enemy of this country since the declaration of war on July 2, 1942.⁵⁹

N. Y. S. (2d) 527 (April 10, 1942), 35 N. Y. S. (2d) 262 (April 24, 1942); N. Y. L. J. July 3, 1942, p. 29.

⁴⁸ 35 N. Y. S. (2d) 102 (April 10, 1942).

⁴⁹ N. Y. L. J. August 4, 1942, p. 269.

⁵⁰ N. Y. L. J. May 12, 1942, p. 2014.

⁵¹ 34 N. Y. S. (2d) 500 (April 10, 1942).

⁵² N. Y. L. J. June 23, 1942, p. 2646.

⁵³ N. Y. L. J. September 12, 1942, p. 567.

⁵⁴ N. Y. L. J. May 12, 1942, p. 2014.

⁵⁵ N. Y. L. J. March 6, 1942, p. 987.

⁵⁶ N. Y. L. J. October 16, 1942, p. 1049.

⁵⁷ N. Y. L. J. June 5, 1942, p. 2394.

⁵⁸ N. Y. L. J. October 6, 1942, p. 912.

⁵⁹ But see N. Y. L. J. February 4, 1943, p. 490.

On the other hand, there is an obvious hardship imposed upon plaintiffs by granting stay of proceedings to non-resident alien enemy defendants. In *Sumitomo Bank, Ltd. v. A. L. Tuska Son & Co., Inc.*; *Yokohama Specie Bank, Ltd. v. A. L. Tuska Son & Co., Inc.*,⁶⁰ in an action to recover on drafts, the defendant alleged that the plaintiff was not a bona fide holder of the drafts for value, but merely an agent for collection of Japanese shippers. The defendant further pleaded release from its obligation on the drafts by agreements with the Japanese shippers. In order to afford some protection to the plaintiff as the representative of American creditors, a motion to stay was granted upon condition that the defendant furnish a surety company bond sufficient in amount to cover any possible recovery by the plaintiff.

Though this seems a very convenient way to relieve the hardship to which the plaintiff may be subjected by stays of proceedings until the restoration of peace, it must be borne in mind that even when defendants dispose of assets in this country which are not yet vested in the Alien Property Custodian, such assets can be used as security for a surety company's bond only with appropriate license of the Treasury Department. It may be that the use of part of such assets in favor of a creditor who introduced a lawsuit, impairs the situation of other creditors of such enemy debtor⁶¹ which may be settled only after the end of the hostilities.⁶²

From the foregoing it is evident that the mere fact that the defendant is a non-resident alien enemy is not in

⁶⁰ 39 N. Y. S. (2d) 636 (January 18, 1943).

⁶¹ As to the *par conditio creditorum*, see Nadelman, *The Recognition of American Arrangements Abroad*, (1942) 90 U. of Pa. L. Rev. 780, 806.

⁶² On the position of creditors to assets of a Philippine company, cf. *Chase Nat. Bank of the City of New York v. Manila Electric Co.*, N. Y. L. J. February 20, 1943, p. 706.

itself a sufficient reason to have the proceedings stayed. But inability to obtain witnesses for a trial, or impossibility of communication due to wartime difficulties may impose such hardship upon the defense of the case that it becomes necessary to stay further proceedings in the interest of a right administration of justice.

A related question arose in *Hauer v. Italian Line "Italia" Società Anonima di Navigazione of Genoa*.⁶³ There the non-resident alien, an Italian, brought an action against the defendant before the outbreak of war between the United States and Italy to recover for loss of personal property as the result of the sinking of a ship of the defendant while en route from Genoa to Arica, due to the alleged failure of the defendant to use care and caution in the protection of the property. Nothing in any way connected with the contract, which was made in Germany, took place in the United States, nor was there any relationship to the activities of the defendant in New York. Although the court sympathized with the plight of the plaintiff, it held that "to compel the Italian Line to defend the action in this state would be unconstitutional in that it would impose an undue burden upon foreign commerce."⁶⁴ Therefore, the court dismissed the action of the non-resident alien, probably because there were no sufficient "contacts" to the forum to take jurisdiction.

A stay of proceedings sometimes becomes necessary too when there is no question about the enemy qualification of one of the parties, but when communications with occupied countries or other territories are difficult or impossible, due to wartime conditions. See the cases of *Brandel v. American Express Co., Inc.*⁶⁵ (Hong Kong), and *Fried-*

⁶³ 175 Misc. 817, 25 N. Y. S. (2d) 199 (January 10, 1941).

⁶⁴ See *Ball v. Canadian Pacific Steamships, Ltd.*, 286 N. Y. 650, 12 N. E. (2d) 804 (1938).

⁶⁵ N. Y. L. J. December 3, 1942, p. 1728.

*heim v. Lawetzky*⁶⁶ (Casablanca, Morocco). But a stay is denied when evidence from such territory is considered of no help to a defendant, as in *Philippine Nat. Bank v. Barclay Knitwear Co., Inc.*⁶⁷ (Philippine Islands).⁶⁸

The question whether a suit can be prosecuted until judgment against an alien enemy, resident or non-resident, or an American defendant, comes up in cases where no execution in assets in this country is possible without a license of the Treasury Department under the freezing regulations. This problem arises in the numerous cases where lawsuits are instituted and attachments are levied upon assets in this country which are frozen by virtue of the fact that the owner of such assets is a national of a foreign (blocked) country under Executive Order No. 8389, as amended. Chapter XIX will deal with this matter in detail.

⁶⁶ N. Y. L. J. February 10, 1943, p. 570; March 17, 1943, p. 1054.

⁶⁷ N. Y. L. J. January 8, 1943, p. 96.

⁶⁸ On a similar legal situation in France, after the Armistice of June 22, 1940, when communications between the two zones (occupied and Vichy-France) became impossible, see Cour d'appel Paris, December 24, 1940, *Societe Industrielle des Peaux et Cuir v. Societe de Commerce et Commissions*, *Juris-Classeurs* 1941, Periodique 1609, ann. by Dyot.

17. Remedies Against Seizures Under the Trading with the Enemy Act.

THE REMEDIES available under the Trading with the Enemy Act are of greater importance in this war than were those in the First World War. In the first place, the value of the property involved is higher now. In this country, while property administered by the Alien Property Custodian in the last war amounted to something over five hundred million dollars, the value of the property blocked by foreign funds control today is estimated at much more than seven billion dollars. This amount covers those frozen assets which are the property of nationals of blocked countries. Only a part of such property has so far been vested in the Alien Property Custodian. The Vesting Orders of the Alien Property Custodian, of which about one thousand have been issued as of April 1, 1943, cover additional important assets, which are not accounted for in the aforementioned sum of seven billion dollars, such as fifty thousand patents registered in this country in the name of nationals of designated enemy countries and now vested in the Alien Property Custodian.¹

The number of individuals, corporations and enterprises affected is much greater now than it was in the last war. This results not only from the greater number of "enemies" within the meaning of the Trading with the Enemy Act, as amended, inasmuch as inhabitants of the occupied territories in Europe and Asia are considered enemies, and their assets in this country are frozen. It also results from the fact that nationals of foreign (blocked)

¹ Administration of the Wartime Financial and Property Controls of the United States Government (Treasury Dep't, December 1942) p. 40.

countries, resident in this country, whose residence dates only from June 17, 1940, are subject to the freezing regulations, and remain so even though they are generally licensed by General License No. 42, as amended.²

Among the reports under TFR-300 on foreign-owned property received by the Treasury Department, no less than 350,000 concern blocked assets of nationals of foreign countries. The greater number of individuals and corporate owners of blocked or seized assets, in turn, involves a greater number of diverse claimants and creditors, interested persons who may submit cross-claims, participation-claims, trust-claims, etc. In this connection it must be recalled that persons who were not enemies under the Trading with the Enemy Act in the last war, may now be determined nationals of a foreign country by the Secretary of the Treasury.³ Even if they are American citizens resident in this country, they may be declared nationals of a designated enemy country and their assets in this country may be vested in the Alien Property Custodian in the interest of the United States.⁴

The number of persons interested in remedies under the Trading with the Enemy Act is increased further by the fact that, besides the freezing and seizure of assets by the authorities of the United States, governments-in-exile, namely of Belgium, the Netherlands and Norway, vested title to assets in themselves insofar as such assets belong to persons domiciled in their national territories occupied by the enemy. Questions arising under the latter action will be dealt with in Chapter XXI.

In this country freezing and vesting of assets are measures of economic warfare. At first intended to prevent the

² 7 Fed. Reg. 1492 (1942).

³ Chapter III, n. 106, 116.

⁴ See the *Draeger* case, *infra* n. 36.

invader of European territories from looting assets abroad, these measures have more and more become aggressive weapons. It is understandable that application of such measures is designed to remain unhampered. Governmental agencies charged with the successful economic prosecution of the war must not be impeded in preventing any business or other activity that might be detrimental to the war effort of the United States or even of assistance to the enemy.⁵ By the very nature of economic warfare, remedies will be restricted, not only as to how far they may be put at the disposal of interested parties, but also as to the extent of judicial interpretation and review to which governmental actions may be subject.

Any judicial review of measures which are taken against the persons and property of individuals deemed to be dangerous to the war effort is restricted. This is indicated by the numerous decisions rendered during this war in habeas corpus proceedings of apprehended suspect persons. These cases have been dealt with, as to Germans and nationals of allies of Germany, in Chapter V, and as to individuals of Japanese ancestry, in Chapter VII. Summarizing the cases, we find judicial review *f. i.* confined to a purely legal question, that is, whether the apprehended person is an enemy within the terms of the statute (Alien Enemy Act of 1798, as amended).⁶ The discretionary aspect of this question never was reviewed nor could it have been.

The tendency to hold as not reviewable findings of fact by the President,⁷ and by the agencies or persons designated

⁵ Cf. *Dieffenbaugh v. Cook*, 47 Fed. Supp. 645 (D. C. N. D. Indiana, S. B. Div., November 11, 1942); *Kittrell v. Hatter*, 10 So. (2d) 827 (S. Ct. Alabama, November 27, 1942). For a recent discussion of Canadian law, see (1943) 1 Can. L. Rep. 1, Note (1943) 21 Can. Bar Rev. 141.

⁶ 40 Stat. 531 (1918).

⁷ Cf. *American Economic Mobilization. A Study in the Mechanism of War*, (1942) 55 Harv. L. Rev. 427, at p. 510 n. 511, p. 513 n. 532, p. 518 n. 565.

by him to exercise war-time measures, also prevails in the field of freezing regulations and foreign funds control. Indeed, decisions of the Treasury Department and of the Alien Property Custodian are sometimes based on facts which in the interest of the war effort cannot be revealed in court proceedings, at least not completely. Not only is judicial review of administrative determinations thus restricted in scope, but any judicial decision, and any administrative interpretation of rulings of agencies as well, must be confined to the subject with which it deals. This has been shown in connection with the application of alien enemy war-time legislation. Administrative determination of alien enemy character and its judicial review is confined to the application and interpretation of the specific statute. For example, interned aliens of enemy nationality are not enemies within the meaning of the Trading with the Enemy Act—because the President issued no proclamation under sec. 2 (b) of the Act⁸ but their property may be seized, by vesting order of the Alien Property Custodian,⁹ as may that of Italian residents who are expressly exempted from certain restrictions imposed upon aliens of enemy nationality in this country.¹⁰

The question of remedies is important in the whole field of application of Trading with the Enemy legislation, including the freezing regulations of the Treasury Department and the administration of foreign-owned property by the Alien Property Custodian. To be sure, many questions which arose in the First World War under the (old) Trading with the Enemy Act of 1917, do not seem to come up any longer, for the very reason that the United States, long before its entrance into this war in December,

⁸ Chapter VII, n. 14.

⁹ *Ibid.* n. 17.

¹⁰ Chapter V, n. 52.

1941, had already issued very effective freezing regulations under the Trading with the Enemy Act. In particular, the licensing system under these regulations and reporting under Form TFR-300 made consideration of numerous questions superfluous.

It must be noted in this connection that the decision of the Treasury Department to grant or decline the issuance of a license, a purely administrative matter, is not reviewable in the courts. Sec. 130.3 of the Regulations under Exec. Order No. 8389, as amended,¹¹ expressly provides that such decision "with respect to an application for license shall be final." No cases have become known where such measures were challenged in civil courts. In the same way, the determination of an individual or a corporation as a national of a foreign country under Exec. Order No. 8389, as amended, or as an enemy national under General Ruling No. 11, as amended, is not reviewable. Such decisions could be reviewed incidentally with other questions. Here again no court decisions have been reported.

It seems that there is only one reported case related to this question. In *Carbone Corp'n v. First National Bank of Jersey City*,¹² the plaintiff, a national of France, asked for a withdrawal of funds from his blocked account. He had filed no application with the appropriate Federal Reserve Bank (as agent of the Treasury Department) for permission to effect the transaction which was prohibited under the freezing regulations. In denying an injunction to restrain the defendant bank from interfering with the plaintiff's right to withdraw funds from his blocked banking account, the court said: "The defendant in the instant case is very properly observing the aforesaid Executive

¹¹ 6 Fed. Reg. 2906 (1941).

¹² 21 Atl. (2d) 366, 130 N. J. Eq. 111 (Ch., N. J., August 1, 1941).

Order of the President of the United States. Were it to ignore the order, it would become liable to the imposition of a severe penalty. The complainant is entitled to apply to the Secretary of the Treasury of the United States, or to the Federal Reserve Bank for a license to withdraw its funds. That method of procedure is made quite clear in the Executive Orders. For some unexplained reason, the complainant, up to the present, does not choose to follow that course. It seems to me to be more feasible than a litigated suit."

Though the administrative determination in granting or refusing a license can by no means be supervised by the courts,¹³ the scope and the meaning of licenses granted is subject to judicial construction, with regard to relations between the parties involved. Thus, English decisions during this war have been determined, for instance, whether licenses were appropriate authorizations to enable non-resident alien enemies to resort to English courts.

In the *Uden*¹⁴ case, a letter from the Custodian of Enemy Property, authorizing a Dutch corporation carrying on business in the Netherlands, enemy-occupied territory, was not considered a license under the proviso to sec. 1 (2) of the (British) Trading with the Enemy Act, because the Custodian had no authority to act on behalf of the Secretary of State, the Treasury or the Board of Trade. Therefore the fact that the Custodian had no objection to the proceedings was not considered the appropriate license under which alien enemies may proceed in English courts.

In this country the scope and extent of a license issued by the Secretary of the Treasury under Exec. Order No.

¹³ Cf. *Armand Schmoll, Inc. v. The Federal Reserve Bank of New York*, 286 N. Y. 503, 37 N. E. (2d) 225 (October 16, 1941).

¹⁴ Chapter XIV, n. 40.

8389, as amended, was considered in *In re Miller's Estate*.¹⁵ In this case a license was issued to the petitioner, a resident of Lithuania, to effect all transaction in proceedings. The surrogate held that "the word 'transactions' in the license must be interpreted in accordance with the language of the Exec. Order itself and that the effect of such license is merely to permit the attorney-in-fact to receive any property which should be delivered to her principal." Thus the license was held not to include the right to institute proceedings to compel the administrator to render and settle his account.

Perhaps a judicial review of freezing regulations may be had in cases of criminal prosecutions for violation of statutory provisions. An English author comments on this question as follows:¹⁶ "It is unfortunate that, although the interpretation of the Regulations [Defence (Finance) Regulations, 1939] is frequently very complex, there is considerable difficulty in obtaining an authoritative interpretation from the Courts. Where a conflict arises between the Control [Foreign Exchange Control Department of the Bank of England] and the subject there is no practical means of testing the legality of the issue involved, except by submitting to a prosecution which involves the risk of heavy penalties. Solicitors must necessarily gravely hesitate before advising their clients to expose themselves to such a risk, and the client himself is naturally equally hesitant. This may be in the interest of the country at large, but it leads to a sense of injustice and increases the difficulties confronting the lawyer, especially as there is a complete dearth of judicial interpretation. No doubt hundreds of prosecutions have taken place before the magis-

¹⁵ 179 Misc. 169, 37 N. Y. S. (2d) 906 (Surr. Ct., Bronx County, November 12, 1942).

¹⁶ Howard, *The Defence (Finance) Regulations, 1939* (1942) Preface p. iii.

trates, but there is, of course, no report of the case unless there is an appeal to the Divisional Court."¹⁷

In this country, the Treasury Department has stated¹⁸ that "the Foreign Funds Control has succeeded from the beginning in obtaining the cooperation of the banks of the United States and has placed upon them the primary responsibility for the enforcement of the provisions of the freezing order and for the adherence to the terms of the licenses issued thereunder."

Questions of criminal law, with regard to foreign funds control, have been considered in several decisions of French courts during this war, which deal with violations of statutory provisions concerning unlicensed commerce in gold and foreign currencies.¹⁹ In this country, no decisions on violations of freezing regulations under the Trading with the Enemy Act seem to have been reported. Notes on such criminal proceedings may be found in newspaper reports.²⁰

The problem of the judicial review of freezing regulations by courts of this country has no relation to the question whether and to what extent these regulations may be applied in foreign courts. The subject is discussed in Chapter XX in relation to foreign exchange control and its international law aspects.

Remedies under the Trading with the Enemy Act are dealt with in the Act itself inasmuch as sec. 9 (a) provides that any person not an enemy or an ally of an enemy claiming any right in any property which may have been

¹⁷ As to the interpretation of Statutory Rules, see the recent House of Lords decision in *Potts v. Reid*, (1943) A. C. 1 (June 15, 1942) and Note (1942) 194 L. T. 69.

¹⁸ Administration, *supra* n. 1, at p. 6.

¹⁹ Trib. corr. de la Seine, March 1, 1940, aff. *Kmeisels*; March 16, 1940, aff. *Elociv*; December 23, 1940, aff. *Breger*; Rec. Gaz. Pal. 1940 I, 413, 459; 1941 I, 76.

²⁰ *Blackmer* case, N. Y. Herald Tribune June 23, 1942; *Von Clemm* case, (D. C. S. D. New York) N. Y. Times, August 25, 1942.

seized by the Alien Property Custodian may file with the Custodian a notice of this claim²¹ and may then institute a suit in equity to establish his interest, and that if so established, the court shall order the payment to the claimant. The section expressly states that if the suit is instituted such property shall be retained in the custody of the Alien Property Custodian until the suit has been terminated. According to this provision the Alien Property Custodian is entitled to possession of the property right of an alien enemy, and the claims of others against the property are restricted to the "sole relief and remedy—provided by the terms of this act," sec. 7 (c) (4).

The question of remedies was important under the Trading with the Enemy Act in the First World War, when it gave rise to numerous court decisions.²² Today courts are still dealing with cases which arose out of conditions of the First World War.²³ But the question of relief under the Trading with the Enemy Act, as amended, appears now to be complicated by several factors. First, it is doubtful whether art. 9 of the old Act, as amended, is still in force, because several of its provisions deal with specific circumstances of the First World War. Secondly, it must be recalled that upon the provision of sec. 9 for judicial relief against seizures from non-enemies, the constitutionality of the Act was deemed to depend. Seizures by the Alien Property Custodian during the First World War were held constitutional only because adequate remedies were provided by the Act to secure return of the property or

²¹ For forms used in the First World War, see Meares, *Trading with the Enemy Act* (1924) p. 635.

²² Cf. the table of cases in Gathings, *International Law and American Treatment of Alien Enemy Property* (1940) p. 135.

²³ *Jackson v. Irving Trust*, 311 U. S. 494, 61 S. Ct. 326, 85 L. Ed. 297 (January 6, 1941); *Isenberg v. Biddle*, 125 F. (2d) 741 (C. A. D. Col., December 15, 1941).

its proceeds in case the property was erroneously seized.²⁴ Said the United States Supreme Court in *Stoehr v. Wallace*:²⁵ "It [the Act] distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and to establish his claim by a suit in equity unembarrassed by the precedent executive determination."

Whether the constitutionality of the Act and the orders thereunder still depend on the same provision for relief as provided in sec. 9 has not been determined. But provision for such relief may no longer be decisive. This uncertainty as to constitutionality may continue to complicate the question of remedies until settled by an authoritative decision or clarified by a new legislative enactment.

Vesting Orders by the Alien Property Custodian are no longer issued under sec. 7 of the Act, but under sec. 5 (b) as amended by sec. 301 of the First War Powers Act, 1941. Seizures during this war are based exclusively on sec. 5 as amended by sec. 301 of the First War Powers Act, 1941. This new provision does not involve application of sec. 9 of the Act, which refers only to seizures of property of enemies or allies of enemies under sec. 7 (c) of the Act. Thus, in no vesting order of this war is any reference made to "enemies" within the meaning of the Trading with the Enemy Act, as amended, or to sec. 7 of the Act; the only reference is to "nationals of a designated enemy country" within the meaning of Exec. Order No. 9095, as amended, and to sec. 5 (b) of the Act, as amended by sec. 301 of the First War Powers Act.

The development of economic warfare as emphasized by the institution of foreign funds control in this country

²⁴ Cf. *Miller v. Kaliwerke Aschersleben A. G.*, 283 Fed. 746 (C. C. A., Second Circ., 1922); *Central Union Trust Co. v. Garvan*, 254 U. S. 554 (1920); *Great Northern Railway Co. v. Sutherland*, 273 U. S. 182 (1927).

²⁵ 255 U. S. 239. See Divesting Order, April 19, 8 Fed. Reg. 5276 (1943).

clearly shows that the old concepts of enemy and ally of enemies are no longer sufficient to adapt administrative measures to the constantly changing conditions of this war. It has been shown in Chapter II that the concepts of the Trading with the Enemy Act of the First World War had to be superseded by new concepts of "enemy nationals" in the field of freezing regulations and of "nationals of a designated enemy country," used in both the General and Vesting Orders of the Alien Property Custodian.

It may be recalled briefly that sec. 301 of the First War Powers Act, 1941, "gives the President flexible powers, operating through such agency as he might choose, to deal comprehensively with the many problems that surround alien property or its ownership or control in the manner most effective in each particular case. In this respect, the bill avoids the rigidity and inflexibility which characterized the Alien Property Custodian law enacted during the last war."²⁶ Whereas sec. 9 of the Trading with the Enemy Act was designed to implement sec. 7 (c), sec. 5 (b) as amended by sec. 301 of the First War Powers Act, 1941, contains no limitation. On the contrary, it confers upon the President, acting "through any agency," the comprehensive and broad powers which are deemed necessary to meet the ever-changing situations of actual economic warfare. This raises the question whether sec. 5 (a) as amended by sec. 301 of the First War Powers Act, 1941, is an entirely new and separate enactment, apart from and in no way limited by secs. 7 and 9 of the Trading with the Enemy Act, as amended, and is intended to be self-sufficient, in and of itself, to deal with foreign-owned (not only enemy-owned) property.²⁷

²⁶ Sen. Rep. No. 911, 77th Cong., 1st Sess. (1941) 2.

²⁷ Cf. Turlington, *Vesting Orders Under the First War Powers Act, 1941*, (1942) 36 Am. J. Int. L. 460, 463; Sommerich, *Recent Innovations in Legal*

Moreover, the present Office of the Alien Property Custodian is by no means a continuation of the old office which existed during the First World War. The original office was abolished and its functions were transferred to the Department of Justice by Exec. Order No. 6694, May 1, 1934.²⁸ The new Office was established by Executive Order No. 9095, March 11, 1942,²⁹ as amended by Executive Order No. 9193, July 6, 1942.³⁰ By Executive Order No. 9142, certain functions, property and personnel were transferred from the Department of Justice to the Alien Property Custodian, as of April 21, 1942.³¹

The Alien Property Custodian himself has made provisions for an administrative remedy. By Regulations Relating to Property Vested in the Alien Property Custodian of March 25, 1942,³² a committee was established to be known as the Vested Property Claims Committee. This committee, composed of three persons designated by the Alien Property Custodian, will hear claims the notice of which is filed with the Alien Property Custodian within one year from the date of the Vesting Order. After a report of this committee the Alien Property Custodian will issue a decision. Until now neither hearings before this Committee nor decisions of the Alien Property Custodian are known. It may be questioned whether claimants have to exhaust administrative remedies before they may seek judicial relief. Generally speaking, the modern tendency seems to be that nobody has a standing in a court of equity to contest an action of an administrative

and Regulatory Concepts as to the Alien and His Property, (1943) 37 *Am. J. Int. L.* 58, 66.

²⁸ Cf. Regulations of February 16, 1942, 7 *Fed. Reg.* 1021 (1942).

²⁹ 7 *Fed. Reg.* 1971 (1942).

³⁰ 7 *Fed. Reg.* 5205 (1942).

³¹ 7 *Fed. Reg.* 2985 (1942).

³² 7 *Fed. Reg.* 2290 (1942); for extension of time, see General Order No. 21, March 13, 1943, 8 *Fed. Reg.* 3245 (1943).

agency until he has at least availed himself of the administrative remedies open to him.³³ But independently of whether recourse must first be had to the agency charged with the supervision of Vesting Orders, namely, the Vested Property Claims Committee, the judicial remedies themselves are restricted.

This restriction is not of merely theoretical interest but of great practical importance. Vesting Orders affect not only the owners of seized property but also the rights of creditors. The Vesting Order entitles the Alien Property Custodian to immediate possession of the property in question. He cannot be prevented from exercising this right by any judicial inquiry into ownership. Therefore, determinations of the Alien Property Custodian are not reviewable as to whether the person whose property has been vested in the Alien Property Custodian is to be considered as a national of a designated enemy country and whether this person is really the owner of the seized assets.³⁴

Judicial review of the validity and the scope of the powers of the Alien Property Custodian is not available.³⁵ It is also excluded if the claimant is an enemy or ally of an enemy within the meaning of the Trading with the Enemy Act. The Act itself restricts remedies to persons who do not fall in these categories. But even resident enemy nationals, who as such are not enemies within the meaning of the Trading with the Enemy Act, as amended, are denied judicial relief if the determination of facts by the Alien Property Custodian is in question.

³³ See *Perkins v. Endicott Johnson Corp.*, 128 F. (2d) 208, 223 (C. C. A., 2d Circ., May 6, 1942); *Henderson v. Kimmel*, 47 Fed. Supp. 635, 645 (D. C. D. Kansas, Sec. Div., October 23, 1942); and, generally, Berger, *Exhaustion of Administrative Remedies*, (1939) 48 Yale L. J. 981.

³⁴ See the *Draeger* and *Stern* cases, *infra* n. 36, 39.

³⁵ See, as to the Canadian procedure, *Keller v. Secretary of State of Canada*, (1939) 4 Dom. L. Rep. 145, (1939) Exchequer Court Rep. 221 (Ex. Ct. of Canada, April 5, 1939); Note, *Annual Digest and Reports of Public International Law Cases, Years 1938-1940* (1942) p. 553.

In this connection it must be recalled that in this war seizures under sec. 5 (a) of the Trading with the Enemy Act, as amended by sec. 301 of the First War Powers Act, 1941, are not confined to enemies within the meaning of the Trading with the Enemy Act, as amended. Anyone's assets in this country, even those of American citizens living here, may be seized if the Alien Property Custodian makes the determination, not reviewable by the courts, that such seizure is in the interest of the United States.

The right of residents of this country to seek relief against Vesting Orders has been considered in only a few decisions. In *Draeger Shipping Co., Inc. and Frederick Dreager v. Crowley, as Alien Property Custodian*,³⁶ an American citizen naturalized since 1898, and continuously residing in this country, was determined by Vesting Order 161 of September 22, 1942,³⁷ a national of a designated enemy country (Germany). It was assumed that he held the whole stock of capital in the Draeger Shipping Co., Inc., on behalf of Schenker & Co., a German firm carrying on business in Germany, controlled through stock ownership and otherwise by the Deutsche Reichsbahn Gesellschaft, the German railway system.³⁸ The American corporation as well as its stockholders were deemed to be acting for the benefit of or under the direction of Germany or a national thereof and thus declared to be nationals of Germany, both by the Secretary of the Treasury and the Alien Property Custodian. The latter has caused the liquidation of the business. Without reviewing the determination of an American corporation and an American citizen as nationals of an enemy country, the court granted an application of the plaintiffs "only to the extent of directing

³⁶ 1943 Am. Mar. Cas. 256 (D. C. S. D. N. Y., February 13, 1943).

³⁷ 7 Fed. Reg. 8568 (1942); cf. *J. Schnyder A. G. v. Draeger*, N. Y. L. J. March 20, 1943, p. 1102.

³⁸ Cf. *Holzer v. Deutsche Reichsbahn Gesellschaft*, 277 N. Y. 474 (1938).

the defendant not to liquidate the business of the company or sell its stock pending the determination whether they are nationals of a foreign or enemy country, or whether the seized property is owned or controlled by a foreign or enemy country or national thereof." The court further stated that this disposition "following the specific direction of Congress in section 9(a) that the property shall be retained by the Custodian until the suit is terminated, without affecting any rights of the plaintiffs under the Constitution and without any apparent interference with the successful prosecution of the war."

In *Stern v. Newton*,³⁹ the plaintiff brought action against the partners of the New York banking firm of Hallgarten & Co. to recover possession of certain securities held in an account in the name of a French company (A. J. Stern & Cie., en liquidation, Paris). The securities of the French company were vested in the Alien Property Custodian. The plaintiff contended that the securities were his property and were only being held in the name of the French company as a nominee. As the Alien Property Custodian had seized the property itself and not merely the company's interest therein, he had taken the "entire right, title and interest therein, regardless of the *quantum* owned by the enemy national." The Court did not enter any judicial review of the determination of the Alien Property Custodian and refused to discuss a third party's (the plaintiff's) claim to be the real owner of the property which was seized as belonging to the French company "controlled by, or acting for or on behalf of or as a cloak for a designated enemy country (Germany)." The court referred to *Central Union Trust Co. v. Garvan*,⁴⁰ where it was said that "for the purposes of immediate pos-

³⁹ 39 N. Y. S. (2d) 593 (February 5, 1943).

⁴⁰ 254 U. S. 554 (1920).

session the determination of the Enemy Property Custodian is conclusive, whether right or wrong," and to *Stoehr v. Wallace*:⁴¹ "There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized, and the practice has been the other way." The court, on the intervention of the Alien Property Custodian, directed the delivery of the securities from the depositor Hallgarten & Co. to the Alien Property Custodian.

A similar situation arose under the French Trading with the Enemy Act during this war. In *Brown v. Douspis, ès qual. de séquestre de la Banque Métropolitaine*,⁴² it was held that any seizure of property is directed against the property of an enemy but not against that of third persons. Here the Hungarian plaintiff, a non-enemy resident in Paris, had deposited gold coins in a small bag marked with his name with the French bank just before the outbreak of the war. The director of the bank rented a safe at the Crédit Lyonnais at Paris in his own name and put the gold into the safe. After the outbreak of the war, the Banque Métropolitaine was sequestered as enemy property, the bank being considered under dominant enemy (German) influence. The sequester however was held liable to restitute the value of the gold coins to the plaintiff because the sequestration is "imposed upon the enemy corporation but not directed against its creditors."⁴³

The position of the owner after the seizure has not as yet been considered in decisions during this war.⁴⁴ As

⁴¹ 255 U. S. 239, 245 (1921).

⁴² Trib. civ. de la Seine, November 28, 1939, (1939) 34 Revue Crit. Droit Int. 478, Rec. Gaz. Pal. 1939 II, 351.

⁴³ Cf. on questions of competence of the custodian (sequestre), Cour Douai, January 10, 1940, *Compagnie des Hôtels de Grand Luxe v. Vienot es qual.*, Rec. Gaz. Pal. 1940 I, 335, Dalloz Hebd. 1940, 94.

⁴⁴ See *Balkan National Insurance Co. v. Commissioner of Internal Revenue*, 101 F. (2d) 75 (C. C. A., 2d Circ., 1939); *Swiss National Insurance Co. v. Biddle*, D. C. D. Col., July 7, 1942, C.C.H.W.L.S. ||9726.

between the former owner and the Custodian, the seizure does not determine the title and does not settle the property rights finally, but merely gives preliminary control to the Alien Property Custodian and thus prevents the owners from any disposition of the property. It may, however, be questioned if the broader terms of sec. 5 (a) as amended by sec. 301 of the First War Powers Act, 1941, allow any direct application of the numerous decisions rendered during and after the First World War.⁴⁵

On the other hand, former owners whose property or whose interest in this property is vested in the Alien Property Custodian, are not excluded from remaining defendants in a lawsuit. This was held in *United States v. The Campanello*, *United States v. The Euro*, and *United States v. A Certain Motor Vessel*,⁴⁶ where the United States itself was the claimant and the Alien Property Custodian, as an official of this Government, could not act on behalf of the enemy defendant to its exclusion.⁴⁷

The most important question arising out of the seizure of property by a Vesting Order of the Alien Property Custodian concerns the ensuing legal consequences, especially with regard to compensation. International law,⁴⁸ it is true, permits property of alien enemies to be seized without due process and converted to the public use without compensation,⁴⁹ and it was held by the United States Supreme Court that Congress in the exercise of the war power enacted laws directing the seizure of enemy property and the disposition of property in this country belong-

⁴⁵ Cf. *Cummings v. Deutsche Bank und Disconto-Gesellschaft*, 300 U. S. 115 (1937).

⁴⁶ Chapter XVI, n. 1, 17, and 18; cf. the *Renard* case, *ibid.* n. 19.

⁴⁷ But in *U. S. v. Vessel Antonietta*, D. C. E. D. Pa., March 8, 1943, C.C.H. W.L.S. ¶9790, it was held that the right of an enemy defendant can be excluded by administrative action.

⁴⁸ See the articles cited Chapter XXI, n. 38, 39.

⁴⁹ Cf. Gathings, *supra* n. 22, at p. 87.

ing to enemy subjects. The legislative history of the Trading with the Enemy Act of 1917, its amendments and the War Settlements Act of 1928⁵⁰ made it evident that any compensation as finally granted to former enemy owners was an act of grace on the part of the United States.⁵¹ But in no event did the Custodian in the former war, nor does the Custodian now, attempt to confiscate property that is not subject to confiscation, that is, property not belonging to or controlled by an individual or corporation who is an enemy within the meaning of the Trading with the Enemy Act.⁵² On the contrary, every Vesting Order contains a statement to the effect that nothing done therein "shall be deemed to indicate that compensation may not be paid for the property vested in the Alien Property Custodian for the interest of the United States." Thus, any ultimate disposition of vested property has been left to later Congressional enactments.⁵³

Whether decisions of the last war can be applied to cases where, let us say, property of an American citizen was seized erroneously as enemy property, remains an open question.⁵⁴ These decisions granted adequate compensation. Today administrative determination can cause even an American citizen, resident in this country, to be deemed "a national of a designated enemy country," if his activity is deemed inimical to the interests of the Western Hemisphere, to use the "loyalty" test.⁵⁵ The question of just compensation for the seizure of property that does

⁵⁰ 45 Stat. 254.

⁵¹ Cf. Borchard, *Reprisals on Private Property*, (1936) 30 Am. J. Int. L. 108; *Nationalization of Enemy Patents*, (1943) 37 Am. J. Int. L. 92.

⁵² Cf. *U. S. v. S. S. White Dental Mfg. Co.*, 274 U. S. 398, 47 S. Ct. 598, 71 L. Ed. 1120 (1931), and the authorities cited there; *Commissioner of Internal Revenue v. Brown*, 54 F. (2d) 563, 569 (C. C. A., First Circ., 1931).

⁵³ See Chapter XVIII, n. 64, Hyde, *International Law* vol. 2, (1922) p. 239.

⁵⁴ Cf. *Henkels v. Sutherland*, 271 U. S. 298 (1926); *Becker Steel Co. of America v. Cummings*, 296 U. S. 74 (1935).

⁵⁵ Chapter III, n. 106.

not belong to an enemy within the meaning of the Trading with the Enemy Act is complicated by the absence of any mention of compensation in sec. 301 of the First War Powers Act, 1941, amending the Trading with the Enemy Act, which extends authority to seize property to all foreign-owned assets in this country. It may be that this situation will be solved later by an Act of Congress, which Act may also sanction the necessary international agreements for a solution of questions resulting from the administration of foreign funds in this country.

In this connection it may be recalled that the authority of the Alien Property Custodian in this war, namely, to deal with any foreign interest, includes not only the vesting power, but also the supervision of any transactions relating to property in which there is or has been any foreign interest.^{55a}

Special questions may arise if creditors try to use the frozen or seized assets of their debtors for the performance of the debtors' obligations. Any transfer out of these assets, by assignment or by execution of a judgment, is possible only with an appropriate license. This problem will be dealt with in Chapter XIX. The position of creditors with regard to assets vested in governments-in-exile is considered in Chapter XXI. The Vesting Order itself "immediately effectuates transfer of title."^{55b} As these Vesting Orders are exclusively based on sec. 5 of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, decisions regarding the interpretation of secs. 9 and 30 of the Trading with the Enemy Act, as amended, are no longer directly in point.⁵⁶

^{55a} Werner [General Counsel for the Alien Property Custodian], *The Alien Property Custodian*. Address, January 16, 1943, (1943) 16 Bull. St. Bar Ass. Wisconsin 12, at p. 15.

^{55b} *Ibid.*, at p. 15.

⁵⁶ See *Anglo-Continental Trust Maatschappij v. General Electric Co., Germany*, 12 N. Y. S. (2d) 964 (April 4, 1939).

A similar regulation prevails in British Trading with the Enemy law. The Trading with the Enemy (Custodian) Order, 1939,⁵⁷ sec. 3 (3) provides: "Any money paid to the Custodian under this order and any property in respect of which a Vesting Order has been made shall not be liable to be attached or otherwise taken in execution."⁵⁸

The licensing system now in force under the freezing regulations is a temporary solution. Ultimately, a settlement of international payments out of the blocked assets will, in one way or another, involve claims of creditors to frozen assets which at that time might not have been vested in the Alien Property Custodian.

For such claims of creditors, counter-claims, and cross-complaints between individuals, a judicial rather than an administrative determination seems desirable, especially in view of the many questions of international law and conflict of laws which are involved.

⁵⁷ Statutory Rules & Orders 1939 No. 1198.

⁵⁸ Cf. Blum and Rosenbaum, *The Law Relating to Trading with the Enemy* (1940) p. 111.

18. Patents, Trademarks, and Copyrights.

THE IMPORTANT role which industrial property rights play in the economic life of the belligerent nations is emphasized by the fact that now, as in the First World War,¹ the International Convention for the Protection of Industrial Property, the Madrid Agreements, and the Hague Arrangement on Designs were not abrogated by the outbreak of war. Moreover, in most of the belligerent countries special legislation has been enacted for the preservation of industrial property rights of foreigners, even of alien enemies.

But on the other hand such rights have become an important weapon of economic warfare, especially during this war. This is particularly true of patents, trade-marks, and copyrights, the administration of which, by governmental agencies in this country and in England, gave rise to judicial decisions and numerous special regulations.

Industrial property rights are used as a weapon of economic warfare in the exploitation of occupied and controlled countries. Thus, for instance, among the measures of the Nazi "New Order" in Europe, is the penetration of the industrial and commercial life of controlled territories by the creation of mixed corporations, as German-French: the Francolor Corp.² (Etablissements Kuhlmann, I. G. Farben Industrie), or German-Rumanian: the Continental Oil Corp.,³ where the capital investment by the German

¹ Ladas, *War Legislation and Trade-Marks*, (1941) 31 Trade-Mark Rep. Part I, p. 35.

² N. Y. Times November 24, 1941; January 21, 1942; June 17, 1942.

³ Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York, 1942) p. 276.

partner consisted mostly in German patents.⁴ Industrial property rights were used by the Axis powers long before the outbreak of hostilities to further the purposes of economic warfare. In this country, discussion of this aspect of economic warfare, through infiltration of the industrial life of many countries and strangulation and restriction of research, has resulted in numerous publications,⁵ relating especially to the world-wide activity of the German dye trust, the I. G. Farben Industrie Aktiengesellschaft.⁶

The economic implications of such measures of economic warfare are not to be considered here.⁷ The scope of this book is restricted to their legal aspects under the trading with the enemy legislation. Their importance is reflected in the policy of administration of industrial property rights which are vested in the Alien Property Custodian. On the other hand, international commercial affiliations, as manifest in patents and trademarks agreements,⁸ led to court proceedings in England in this war in which such rights, registered in the name of the German dye trust, were claimed as the property in trust for an English corporation. In *In re I. G. Farbenindustrie Ak-*

⁴ The Penetration of German Capital into Europe, Statement No. V of the United Nations Information Committee, London, December 30, 1942, p. 4.

⁵ Patch, *Foreign Control of American Patents*, (1941) 2 Editorial Research Reports 41; Kronstein, *The Dynamics of German Cartels and Patents*, (1942) 9 U. of Chi. L. Rev. 643; (1943) 10 *ibid.* 49.

⁶ *Free Enterprise in Our Time: II. The World Patent Cartel. No Peace with I. G. Farben*, (1942) 26 *Fortune* 105; Porter, *The Nazi Chemical Trust in the United States* (National Policy Committee Papers, No. 5, 1942); Borkin and Welsh, *Germany's Master Plan* (New York, 1943) p. 19.

⁷ See Stewart, *Patents: War Secrecy and Beyond*, (1942) 30 *Geo. L. J.* 285; Holland, *Patent Law in War and in Peace*, (1942) 28 *Am. Bar Ass. J.* 585; Michaelis and Schaich, *Restoration of Patent Rights Affected by War*, (1942) 10 *Geo. W. L. Rev.* 161; McClur, *Copyright in War and Peace*, (1942) 36 *Am. J. Int. L.* 383; Borchard, *Nationalization of Enemy Patents*, (1943) 37 *Am. J. Int. L.* 92; Wood, *Agreements Concerning Patent License Restrictions*, (1943) 37 *Ill. L. Rev.* 350.

⁸ Bulletin Dep't of Justice, Consent Decrees Entered Against Dye Concern, N. Y. L. J. October 24, 1941, p. 1187.

tiengesellschaft's Agreement,⁹ the Bayer Products, Ltd., an English corporation formed in 1933 by the American company Bayer Co., Inc., itself a subsidiary of Sterling Products, Inc., asked for an order vesting in the petitioner certain letters patent registered in the name of I. G. Farben Industrie Aktiengesellschaft. The English corporation claimed title to the patents under an agreement of 1926 between the two corporations and a declaration of trust made by I. G. Farben Industrie Aktiengesellschaft in favor of Bayer Products, Ltd., in 1932, alleging that I. G. Farben Industrie Aktiengesellschaft was a mere trustee of the patents for Bayer Products, Ltd.

The Comptroller General of Patents in exercise of the power conferred by sec. 2(1) of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939,¹⁰ had already granted compulsory licenses in respect of a number of the patents to manufacture the articles concerned. He did not "desire to offer any observation on the application." Imperial Chemical Industries, Ltd., however, to which these licenses had been granted, as respondent to the summons, pretended that a Vesting Order by the court would be an assignment within the meaning of sec. 4(1) of the Trading with the Enemy Act, namely, on behalf of I. G. Farben Industrie Aktiengesellschaft, a transaction for which the sanction of the Treasury had not been obtained. The court overruled the preliminary objection. It held (at p. 150) that, even assuming an assignment of a bare legal estate in a chose in action, namely, the registered title, is within the terms of the section, "it would not be an assignment made by or on behalf of an enemy. It would be an assignment made on

⁹ (1941) 1 Ch. 147; (1940) 4 All E. R. 486; 57 T. L. R. 148; 110 L. J. Ch. 167; 165 L. T. 290; 58 Reports of Patent, Design and Trade Mark Cases 31 (Ch., November 22, 1940).

¹⁰ 2 and 3 Geo. 6 c. 107.

the application of a person claiming to be beneficially interested who is not an enemy."

The Court, however, did not decide if and when it would make a vesting order even if it were satisfied of the beneficial title of Bayer Products, Ltd. But it further said that the making of a vesting order could not in any way affect the question as to whether, since September 3, 1939, I. G. Farben Industrie Aktiengesellschaft has been "the proprietor of a patent." The making of a vesting order would not deprive the Comptroller General of those powers under sec. 2 (1) of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, which runs as follows: "Where, (a) an enemy or an enemy subject is, or has at any time since the beginning of the third day of September, 1939, been, whether alone or jointly with any other person the proprietor of a patent . . . and (b) the Comptroller is satisfied that it is in the interest of all or any of His Majesty's subjects that the rights conferred by the patent should be exercised . . . and that a person who is not an enemy or an enemy subject desires to exercise the said rights . . . and is in a position so to do, the comptroller may, on the application of that person, make an order granting to him a license under the patent . . . either for the whole of the residual of the term of the patent, . . . or for such less period as the comptroller thinks fit."

A related question, as to trademarks, arose in *Rex v. Comptroller General of Patents; Ex Parte Bayer Products, Ltd.*¹¹ There the English company claimed to be the absolute owner in equity of pharmaceutical patents registered in the name of I. G. Farben Industrie Aktiengesellschaft. As in the aforementioned case, licenses had been

¹¹ (1941) 2 K. B. 306; 111 L. J. K. B. 117; 165 L. T. R. 278; 58 R. P. D. T. C. 251 (C. A., July 1, 1941).

granted by the Comptroller General of Patents to certain licensees since the German company at the beginning of the war was the registered proprietor of the patents. But the trade marks under which the patented products had been sold were not within the scope of sec. 3 of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, since they belonged to Bayer Products, Limited, and not to the German company. The English company still retained its exclusive rights to sell its products under its trade marks, and those rights constituted the principal goodwill of the company.

This position, however, was altered by an Amendment to the Act by an Order in Council,¹² which added Regulation 60 E to the Defence (General) Regulations, 1939. This provision authorized the Comptroller, in cases where licenses had been granted under the Act, to suspend the rights in connection with the trademarks registered in respect of the patents, notwithstanding the fact that the trade mark was not and never had been property of or registered in the name of an enemy. Application was made to the Comptroller by British manufacturers for the suspension of rights in respect of some trade marks ("Evipan" and "Avertin"). The English company, in opposing these applications, alleged that if licensees of the patents became entitled to advertise their products as the "British equivalent for Evipan," the value of those trade marks and of the goodwill of the company would practically cease to exist. Yet, on the other hand, it is obvious that any exploitation of a licensed patent without the use of the trade mark would be difficult.

¹² Statutory Rules & Orders 1940 No. 1328, July 23, 1940; cf. Jarratt, *Enemy-Owned Trade-Marks in Great Britain*, (1942) 32 Trade-Mark Rep. Part I, p. 119.

Bayer Products, Ltd., applied to the Court for an order of prohibition to be directed to the Comptroller to restrain him from exercising any jurisdiction or making any orders under the Order in Council. This Order in Council would have the effect *inter alia* of confiscating the trade mark rights of British or neutral proprietors, without any provision for compensation. The contention, however, that Reg. 60 E would be invalid as being *ultra vires* the Emergency Powers Defence Act, 1939, was rejected by the Divisional Court. The Court of Appeal, affirming this decision, held that the British Act conferred on the regulatory authority the power to make Regulation 60 E.¹³ Said Lord Justice Scott (at p. 266): "The principle upon which delegated legislation must rest in our constitution, is that, where legislative discretion is left in plain language by Parliament, it is a discretion which is intended to be final and not subject to control subsequently by the courts."¹⁴

There are other incidents which brought out the economic war character of legislative measures of the Axis powers even before the entrance of the United States into this war, namely, the practice of the Axis powers with regard to royalty payments. Licensees in those countries and the occupied territories are prevented, by reason of the respective foreign exchange legislation,¹⁵ from paying to American patent owners the license fee for using the processes of American inventions. Authorizations for the transfer of the amounts in question, which the exploiting firms were willing to pay, were not given by the Foreign Exchange Control Agencies,¹⁶ unless foreign exchange

¹³ Cf. Carr, *A Regulated Liberty*, (1942) 42 Col. L. Rev. 339, 341.

¹⁴ *E. H. Jones (Machine Tools), Ltd. v. Farrell and Muirsmith*, (1940) 3 All E. R. 608 was not approved. Cf. Carr, *supra* n. 13, at p. 343.

¹⁵ Chapter XX, n. 1, 10.

¹⁶ *Ibid.* n. 27.

could be obtained by exporting the products for which a license fee was to be paid.

But, on the other hand, the Axis authorities insisted that payments due on licenses given on patents, say, of German inventors registered in the United States should be transferred. This method, "as a deliberate policy of economic warfare against the United States,"¹⁷ led to different proposals in the House of Representatives for Joint Resolutions¹⁸ which were intended to establish the "principle of international reciprocity in the protection of American patents, trade marks, secret formulas and processes, and copyrights by providing a method for assuring the payments of amounts due to persons in the United States from users thereof in countries restricting international payments from their territories." But such proposals for special clearing of payments became superfluous with the extension of the freezing regulations to nearly all European countries through Exec. Order No. 8785, June 14, 1941.¹⁹ By this provision all assets in this country in which nationals of designated foreign countries had any interest whatsoever were blocked. Thus, legislation which was to provide especially for the protection of American industrial property rights against unilateral acts of foreign legislation was no longer necessary. But the earlier discussions retain their importance for any later settlement of these questions, which probably will emerge again after the end of this war.

The Trading with the Enemy Acts of the belligerents do not contain special provisions for industrial property rights of enemies, as these rights are covered by the gen-

¹⁷ Statement of Prof. Deak, Hearings Before the Committee on Patents, H. R., April 15, 1941, *Royalty Payments*, p. 17.

¹⁸ 77th Cong., 1st Sess., H. J. Res. 32, 73 and 123, reprinted *supra* n. 17, at p. 1, 2, 4.

¹⁹ 6 Fed. Reg. 2897 (1941).

eral provisions regarding property located in the enacting country.²⁰ Industrial property rights of enemies are subject to the restrictions which govern all enemy property in this country. On the other hand, in nearly all countries special regulations were issued which on the basis of reciprocity provided for the protection of enemy industrial property and its preservation by extensions of different periods fixed by the law.²¹

In this country, patents, trade marks and copyrights were subject to the freezing regulations insofar as a national of a foreign country, within the meaning of Exec. Order No. 8389, as amended, had any interest in them. They were not treated differently from other assets of such nationals, with one exception. Assets such as patents, trade marks and copyrights had to be reported, under Form TFR-300, even when they might be evaluated at less than \$1,000.²² Moreover, in the case of such assets, the obligation to report continues²³ for nationals of foreign countries entering the United States at any time after October 31, 1941, except nationals "entering the United States on a purely transitory visit, whether for business or pleasure" and those acquiring residence in the United States after February 23, 1943, who apply to be generally licensed under General License No. 42, as amended.²⁴ Furthermore, persons in the United States have to report patents if their property is blocked by specific direction of the Treasury Department or if these persons have custody or control of property of specifically blocked or blacklisted persons. The number of such persons for whom the obli-

²⁰ See sec. 10 of the Trading with the Enemy Act, as amended.

²¹ See Ladas, *supra* n. 1, at p. 41; (British) Patent and Designs Act, 1942, 5 & 6 Geo. 6, c. 6.

²² Sec. III F of Public Circular No. 4, and Sec. 3 of Public Circular No. 5, September 3, 1941, 6 Fed. Reg. 4196, 4587 (1941).

²³ Public Circular No. 4 C, September 21, 1942, 7 Fed. Reg. 2506 (1942).

²⁴ 7 Fed. Reg. 1492 (1942).

gation to report continues to exist may increase, especially by additions to the blacklists. Reports to the Treasury Department under the freezing regulations became by no means superfluous since industrial property rights are subject to the control of the Alien Property Custodian under his different orders and regulations.

Under the freezing regulations, General License No. 72, as amended,²⁵ under special conditions authorized the filing and prosecution of applications for letters patent in the United States Patent Office and provided for the filing of reports on Form TFR-132. Public Circular No. 5 A,²⁶ May 8, 1942, established the policy of the Treasury Department to deny licenses insofar as applications and fees in enemy territory and in the United States on behalf of enemy nationals, within the meaning of General Ruling No. 11, were concerned. It confined the authorization to cases "which do not involve trade or communication with an enemy national." But these regulations need not be considered here in detail because on November 17, 1942, the Alien Property Custodian issued new regulations. On the same date the Treasury Department amended the aforementioned freezing regulations.

The new administration was inaugurated by Exec. Order No. 9095, as amended by Exec. Order No. 9193, July 6, 1942,²⁷ establishing the Office of the Alien Property Custodian. This agency has assumed full power and authority over the filing and prosecution of applications for United States patents, trade marks, and copyrights. It also controls the transfer and other dealings with respect to assets in which nationals of a foreign country, within the meaning of Exec. Order No. 8389, as amended, have

²⁵ 6 Fed. Reg. 4586 (1941).

²⁶ 7 Fed. Reg. 3471 (1942).

²⁷ 7 Fed. Reg. 5205 (1942).

“any interest of any nature whatsoever.” The Alien Property Custodian is authorized “to take such actions as he deems necessary in the national interest, including, but not limited to, the power to direct, supervise, control and vest” such property.

The administration of these industrial property rights by the Alien Property Custodian in this war was facilitated and rendered more effective by several circumstances. First, the report of all foreign property in this country as of October 11, 1941, long before the entrance of the United States in this war, on Form TFR-300, presented a full and complete picture, one not available when the United States entered the First World War. Secondly, the administration of all bank accounts and securities by the Treasury Department made it possible for the Office of the Alien Property Custodian to proceed much more effectively than might have been possible had the whole of enemy-owned or enemy-controlled property in this country been administered by the Alien Property Custodian alone. Thus detailed provisions by the Alien Property Custodian regarding foreign-owned industrial property were issued, and they are now administered under a definite policy.

In order to administer enemy-owned and enemy-controlled industrial property rights in this country, extensive investigation was necessary. Though the rights to patents were already reported under Form TFR-300 to the Treasury Department as of October 1, 1941, the Alien Property Custodian issued General Order No. 2, June 15, 1942,²⁸ which required a report on Form APC No. 2 from every resident of the United States claiming any such right, title or interest in any patents or patent applications in which a designated foreign national has or has had an interest.

²⁸ 7 Fed. Reg. 4634 (1942).

For the purposes of this order the term "designated foreign national" included, in addition to the blacklisted persons, any resident of, or business organization in, "any country other than the American Republics, the British Commonwealth of Nations, and the Union of Soviet Socialist Republics." General Order No. 3 of the same day²⁹ extended the duty to report to persons who changed their citizenship or moved out of any foreign country other than those aforementioned.

Meanwhile, a new regulation for the administration of enemy-owned and enemy-controlled industrial property rights was issued on November 17, 1942, supplemented until now by minor amendments only. The entire control is now administered by the Alien Property Custodian, since the Treasury Department "to the extent that the Alien Property Custodian has assumed jurisdiction" relinquished it under Exec. Order No. 8389, as amended.³⁰ General License No. 72, as further amended, November 17, 1942,³¹ authorizes the filing and prosecution in the United States of patent, trade mark and copyright applications, the receipt of letters patent, trade mark registration and copyright certificates, in which a national of a blocked country has an interest, as well as the payments of fees and customary charges of attorneys in the United States. Notwithstanding the provisions of General Ruling No. 11, these transactions may be effected even though they involve a communication from (not to) an enemy national, but payment is not permitted from an account in which an enemy national has an interest.

General License No. 72 A³² authorizes corresponding

²⁹ 7 Fed. Reg. 4635, 5080 (1942).

³⁰ Sec. 2 of Public Circular No. 5, as amended, November 17, 1942, 7 Fed. Reg. 9481 (1942).

³¹ 7 Fed. Reg. 9480 (1942).

³² *Ibid.*

transactions for a blocked foreign patent, trade mark, or copyright, by any person who is not a national of any blocked country. The term blocked foreign patent "does not include industrial property rights in which an enemy national has an interest." This General License does not authorize any transaction involving trade or communication with an enemy national, and "the Treasury Department will continue to observe its general policy of denying applications to effect such transactions."³³

By these provisions of the Treasury Department, the administration of General Orders Nos. 11, 12, and 13, all issued on the same day, and the Regulations issued thereunder by the Alien Property Custodian will be facilitated. General Order No. 11³⁴ forbids, unless authorized by the Alien Property Custodian, the filing and prosecution of applications and the execution or recording of assignments, licenses or other agreements in the United States Patent Office when such transactions are made on behalf or pursuant to the direction of nationals of a blocked country or involve property in which such persons have "any interest of any nature whatsoever direct or indirect." By Regulation No. 1,³⁵ persons residing in this country on December 7, 1941, and companies in which such persons have an interest are exempted from the prohibitions of General Order No. 11. "Thus, enemy nationals who are resident in this country, many of whom have been employed for a long time in our research laboratories in perfectly legitimate capacities, will be free to deal with their inventions as they wish."³⁶ A further Regulation No. 2, as amended, January 6, 1943,³⁷ generally licensed the

³³ Sec. 7 of Public Circular No. 5, as amended, 7 Fed. Reg. 9481 (1942).

³⁴ 7 Fed. Reg. 9475 (1942).

³⁵ 7 Fed. Reg. 9477 (1942).

³⁶ Special Bulletin, American Patent Law Association, November 25, 1942, (1943) 25 J. Pat. Off. Soc. 60.

³⁷ 8 Fed. Reg. 291 (1943).

filing or prosecuting of an application for letters patent and for trade mark registrations in the United States Patent Office, except those received from enemy nationals after November 17, 1942. The person filing such application is obliged to file a report with the Alien Property Custodian on Form APC-13P for patents, or APC-13T for trade marks, and a report with the United States Patent Office on Form APC-14, but he is not permitted to give any communication, direct or indirect, to an enemy national. Any instrument, however, that is recorded under the general license of this Regulation No. 2, as amended, is subject to the condition that it may be set aside by the Alien Property Custodian and the property so transferred vested by the Alien Property Custodian "at any time within a period of three years from the date of recording, except that the Alien Property Custodian may in his discretion reduce such period of time."³⁸ By this regulation, *bona fide* transactions which are in no way harmful to the interest of the United States are facilitated, inasmuch as the general license renders possible the prompt performance of such transactions. On the other hand, through the authority to reduce the time for vesting, the title to the property may be speedily clarified.

A further General Order, No. 12, of November 17, 1942,³⁹ refers to cases where formal papers have not been filed with the United States Patent Office. This Order requires the reporting of papers and correspondence by every person in the United States "who has custody, control or possession of any models, blueprints, drawings, sketches, correspondence, memoranda of inventions, reports or other written information" received in this country since January 1, 1939, relating to patents or trade mark

³⁸ Form APC-15, November 17, 1942.

³⁹ 7 Fed. Reg. 9477 (1942).

applications and disclosures of inventions of enemy nationals. The Order further requires the reporting of any assignments recorded in the United States Patent Office where such instrument was executed prior to the effective date of Exec. Order No. 8389, as amended, and where any of the parties is a national of a foreign country. The dates in question are May 10, 1940, for the Netherlands, June 17, 1940, for France, and June 14, 1941, for Germany, Italy, and Japan.

Finally, by General Order No. 18 of January 9, 1943,⁴⁰ a report is required on Form APC-19 from all persons who are obliged to pay royalties to the Alien Property Custodian "by virtue of the vesting of a patent or patent application or of an interest in an agreement with respect to a patent or patent application." Furthermore, the payment of such royalties ("serial payments under a license, assignment or other agreement") shall be accompanied by a report on Form APC-20.

As to copyrights, provisions similar to those of General Order No. 11 were issued by General Order No. 13 of November 17, 1942,⁴¹ prohibiting the execution or recording of any application for copyright or renewal thereof under the copyright laws of the United States and the execution or the recording of any instrument with respect to "any interest in any work subject to copyright in the United States," on behalf of a national of a foreign country within the meaning of Exec. Order No. 8389, as amended. Regulation No. 1, as amended February 8, 1943,⁴² exempts from the prohibitions of the General Order not only residents of the United States on December 7, 1941, as does the corresponding Regulation No. 1 under General Order

⁴⁰ 8 Fed. Reg. 1707 (1943).

⁴¹ 7 Fed. Reg. 9476 (1942).

⁴² 8 Fed. Reg. 1872 (1943).

No. 11 (*supra* n. 35), but also any individual who is a resident on the date of making the application in the United States Copyright Office for a registration or renewal of a copyright or of executing any recordable instrument.⁴³ Similar to the treatment of patents and trademarks under Regulation No. 2 under General Order No. 11, as amended, Regulation No. 3 of December 30, 1942,⁴⁴ generally licenses certain transactions involving copyrights, for which reports on Form APC-23 are filed, provided that no communication, direct or indirect, with an enemy national is involved. Reporting on copyright was further provided for in General Order No. 14 of December 1, 1942.⁴⁵ All exploiters of works subjects to copyright under the laws of the United States were required to report on Form APC-18 detailed information as to each work, especially royalty-producing works in which nationals of enemy and enemy-occupied countries have an interest.

As regards the general legal character of vesting, it must be recalled that until now this activity of the Alien Property Custodian has been generally confined to industrial property rights in which nationals of designated enemy countries have an interest. Insofar as these persons are residents of enemy territory and enemy-occupied territories, they are also enemies within the meaning of the Trading with the Enemy Act, and at the same time enemy nationals within the meaning of General Ruling No. 11, as amended. However, such rights may also be seized where they belong to other persons, especially neutrals, if such persons seem to be controlled by or acting on behalf of enemies, as stated by the Alien Property Custodian before the Committee on Patents on April 27, 1942:⁴⁶ "When

⁴³ Cf. Regulation No. 2, November 17, 1942, 7 Fed. Reg. 9478 (1942).

⁴⁴ 8 Fed. Reg. 1 (1943).

⁴⁵ 7 Fed. Reg. 10546 (1942).

⁴⁶ Reprinted in (1942) 32 Trade-Mark Rep. Part I, p. 66.

citizens of neutral countries are licensees of enemy-owned patents they must be treated in no more lenient fashion than any licensees of enemy-owned patents who are American citizens."

The administration of industrial property rights by the Alien Property Custodian raises the question of remedies against vesting orders. Such orders concerning industrial property are to be treated like any other vesting orders. The remedies provided by the Regulations, especially the filing of claims with a request for a hearing thereon before the Vested Property Claims Committee, are discussed in Chapter XVII.

But the seizure of more than fifty thousand patents and patent applications during a period of a few months inevitably involved errors resulting from clerical mistakes and from changes affecting the patent or the inventor which are not on record at the United States Patent Office. General Order No. 15 of the Alien Property Custodian, January 6, 1943,⁴⁷ prescribes procedures by which "certain persons may regain title to their patent or patent application if and insofar as they have been seized by mistake." In order to clarify such errors in a more informal way, special forms to be filed with the Alien Property Custodian are provided by which a speedy redress may be sought against wrongful seizure. They include Form APC-16 for inventors who resided in enemy territory at the time their application was filed or their patent granted and are now residing in the United States, and Form APC-17 for assignees, who are residents and citizens of the United States, of enemy patents recorded in the United States Patent Office prior to January 1, 1939. Sec. 3 of General Order No. 15 provides that persons whose claims of wrongful vesting of patents and patent applications by the Alien

⁴⁷ (1943) 25 J. Pat. Off. Soc. 137.

Property Custodian are not recognized shall in no way be prevented from filing a notice of claim on Form APC-1⁴⁸ and from having a hearing on the validity of the claim. This recourse, however, as expressly stated in every Vesting Order, is open only to persons who are not nationals of a designated enemy country.

A further legal question arising out of the administration of industrial property rights by the Alien Property Custodian concerns the protection afforded to licensees under vested patent and patent applications. Pursuant to sec. 301 of the First War Powers Act, 1941, on which the delegation of the Presidential authority to the Alien Property Custodian is based, no person shall be held liable in any court for anything done in good faith in reliance upon the authority of the Act. "To encourage the most orderly and the widest possible use of the inventions covered by vested patents, licenses will be defended by the Alien Property Custodian to the full extent of his legal power in any suits brought on behalf of former owners charging infringement of the patents which have been licensed to them by the Custodian."⁴⁹

Finally it may be mentioned that an American licensee under a vested patent or patent application need not file a claim within one year of the vesting date, on Form APC-1, to assert his claim to rights under his license, exclusive or non-exclusive. He is not prejudiced by his failure to file a claim within this period. Such an American licensee is not relieved from complying with the reporting and the other requirements under General Orders 2, 11, and 12 and regulations thereunder."⁵⁰

⁴⁸ General Order No. 4, July 20, 1942, 7 Fed. Reg. 5539 (194).

⁴⁹ *Patents at Work*. A Statement of Policy by the Alien Property Custodian of the United States. (Booklet, January 18, 1943) p. 19. See *Woburn Degreasing Co. of N. J. v. Spencer Kellogg & Sons, Inc.*, D. C. W. D. New York, July 21, 1942, C.C.H.W.L.S. ¶9774.

⁵⁰ Office of War Information, Release 1326, February 23, 1943.

The investigation of industrial property right, through the reports to the Treasury Department under TFR-300 and through the General Orders of the Alien Property Custodian, created the basis for the administration of industrial property rights. The policy under which that control may be exercised, involves questions of far reaching importance.

As to the ownership of such rights, there is a difference between persons and corporations in enemy countries and enemy-occupied countries. Both categories of nationals of a designated enemy country are at the same time enemies within the meaning of the Trading with the Enemy Act, because enemy-occupied territories are assimilated to enemy countries. But it fits into the general policy of the United States to protect the victims of enemy-occupied territories from being deprived of their assets abroad by the invader. The Alien Property Custodian stated⁵¹ that his office has "a great responsibility toward the nationals of enemy-occupied countries who are now unable to prosecute the patent applications they have pending, or to administer the patents which have been issued to them. In addition, there is the ever-present danger of transfer of title under duress. In order to prevent the enemy from making use of these patents, in order to safeguard, under this country's broader responsibilities, the rights of the unfortunate residents of occupied countries, and in order to make these inventions a working part of this nation's war machinery, title to the patents and applications is also being vested in the name of the United States." He further stated that "the ultimate disposition of the patents vested from nationals of enemy-occupied countries will be the subject of discussion with the governments-in-exile."⁵²

⁵¹ *Supra* n. 49, at p. 6.

⁵² *Ibid.* p. 11.

This obviously refers to the rather intricate questions arising under the vesting decrees of the Dutch and Norwegian governments-in-exile. These decrees vested title to assets abroad of residents of occupied territories in the state represented by the respective government-in-exile. These questions will be discussed in Chapter XXI.

The administration of industrial property rights differs with regard to the varying character of patents, trade marks, and copyrights.

As to copyrights, the vesting of such rights serves the general purpose of the vesting policy, namely, to prevent the enemy owner from having royalties, even if that owner could not dispose of such royalties for the time being since they were blocked under the freezing regulations. Moreover, the Alien Property Custodian "received requests to take action to permit the translation of works of which the copyrights are held by enemy aliens in order that these works may be available in English for use in war work."⁵³

As to trade marks, they are necessary to licensees under compulsory licenses of patents, so that they may be able to sell the goods manufactured under such patents. This became evident in the English case *Rex v. Comptroller General of Patents, Ex Parte Bayer Products, Ltd.*⁵⁴

But, on the other hand, the control-program, for enemy-owned or enemy-controlled business enterprises as developed in this country through the freezing regulations, sometimes demanded the prevention of the use of undesirable trade marks. Said the Treasury Department:⁵⁵ "A trademark belonging to an Axis business enterprise represents an investment in good will, and is part of that

⁵³ *Supra* n. 46, at p. 66; Office of War Information, Release 1290, February 17, 1943, 56 U. S. Patent Qu., No. 8, p. III.

⁵⁴ *Supra* n. 11.

⁵⁵ Administration of the Wartime Financial and Property Controls of the United States Government (December, 1942) p. 31.

enterprise's enduring roots in the country. Disposition of an enterprise should include the disposition of the trademark as well. Destruction of a trademark might be the best method of disposition."

More legal and economic consequences are involved by the administration of vested patents. The greater number and value of these industrial rights is not the only reason why their administration is more important. Because of the experiences of the last war, especially with regard to the selling of patents to the Chemical Foundation,⁵⁶ the practice then followed has not been repeated. As explained by the Alien Property Custodian himself before the Senate Committee on Patents:⁵⁷ "During the last war the Alien Property Custodian seized about 17,000 enemy-owned patents and copyrights. Many of these were sold under arrangements which were designed to insure the permanent exclusion of detrimental and hostile alien control, but through the years alien interests have gradually regained a substantial degree of influence."

The Office of the Alien Property Custodian was specifically instructed by the President to "refuse to sell or to release title to the enemy patents. The inventions covered by these patents will be made a permanent possession of the American people and, through freely granted licenses, they will be incorporated in our national industrial machinery."⁵⁸ This policy, underlying the administration of vested patents and patent applications, has found public expression in a report of the Alien Property Custodian to the President of the United States, dated December 7, 1942.⁵⁹ Under the new responsibilities incurred by wise

⁵⁶ Cf. *U. S. v. Chemical Foundation*, 272 U. S. 1, 47 S. Ct. 1, 71 L. Ed. 131 (1926), and Gathings, *International Law and American Treatment of Alien Enemy Property* (1940) p. 78, n. 37.

⁵⁷ *Supra* n. 46, at p. 66.

⁵⁸ *Supra* n. 49, at p. 11.

⁵⁹ Reprinted (1943) 25 J. Pat. Off. Soc. 69.

utilization of vested patents, a detailed scheme has been worked out, described as "The Licensing Policy of the Alien Property Custodian,"⁶⁰ to which reference may be made for further details. A statement of the Treasury Department⁶¹ reveals the many ramifications of the policy of administering enemy-owned and enemy-controlled patents. "Since they [patents] represent not an investment in good will but an accrued investment in research, they should be used for the benefit of the local economy. In a problem of this type, production facilities and research facilities must either be developed in the individual country or relationships must be fostered between the local enterprise and an enterprise in another country of this Hemisphere having such production and research facilities." These research facilities are of great economic value especially with regard to pending patent applications,⁶² "which represent the latest research, kept secret until now. Patents vested in the Alien Property Custodian cover important recent developments of well-known foreign corporations, for example: the electrical ignition systems of Robert Bosch; the automobile motor inventions of Daimler-Benz, Fiat, Marelli; the chemical products of Montecatini, Kuhlmann, Norsk-Hydro; the armaments of Schneider et Cie and Skoda; the alloys and metallurgical equipment of Société Générale Métallurgique de Hoboken and the electrical equipment of Kwaisha Toden Denkyu Kabushiki."⁶³

⁶⁰ *Supra* n. 49, at p. 13, and (1943) 25 J. Pat. Off. Soc. 57. See the Index of Patents Vested in the Alien Property Custodian, Division of Patent Administration, Washington, D. C., and the Instructions for Preparing the Letter of Application for a License, reprinted, *supra* n. 49, at p. 24.

⁶¹ Administration, *supra* n. 55, at p. 31.

⁶² *Supra* n. 49, at p. 12.

⁶³ See, for instance, the Dornier patent for seaplanes dispensing with wing floats, which was applied for in 1938, and which recently was vested in the Alien Property Custodian, N. Y. Times, February 21, 1943.

Of especial importance among the legal effects of the administration of vested industrial property rights is the opportunity which such administration offers for their future disposition. In the words of the Alien Property Custodian:⁶⁴ "The office of the Alien Property Custodian will await a statement of Congressional policy concerning their ultimate disposition. No steps will be taken which will in any way interfere with the ultimate disposal of these patents in the public interest as Congress may direct." There is no doubt at all that this country has the right in war time to take over enemy-owned and enemy-controlled property without compensation, as explained in Chapter XVII. One aspect of this right is revealed in an account of the actual policy of the Alien Property Custodian in the administration of patents, when he said:⁶⁵ "We shall take all steps within our power to make certain that vested enemy patents are made available forever to American industry." In this connection, Professor Borchard in a recent article, "Nationalization of Enemy Patents,"⁶⁶ which was inserted in the Congressional Record,⁶⁷ points out that "citizens of the United States now have invested abroad some 11 billion dollars in direct investment and 4 billion dollars in indirect or portfolio investments. This country should therefore exert its influence to prevent the further corrosion of the institution of private property since the United States and its citizens have more to lose by confiscation than any other country." Assets of this country in Germany alone include⁶⁸ \$225,000,000 as the book value of branch plants of American corporations and about

⁶⁴ *Supra* n. 46, at p. 69.

⁶⁵ *Supra* n. 49, at p. 9; see Werner, *supra* Chapter XVII, n. 55a, at p. 18.

⁶⁶ (1943) 37 Am. J. Int. L. 92.

⁶⁷ By Senator Danaher, 89 Cong. Rec., February 8, 1943, at p. 715.

⁶⁸ Statement of Dr. Taylor, Hearings before the Committee on Patents, April 15, 1941, *supra* n. 17, at p. 29.

\$400,000,000 of bonds held by Americans who purchased the issues in American markets during the twenties.⁶⁹

The legal and economic questions involved are not confined to the actual administration of patents,⁷⁰ but rather concern the effect of a permanent seizure of enemy-owned and enemy-controlled property in this country. In a final settlement their effect on American investments abroad must certainly be taken into consideration. The solution will require early careful legal preparation. The manifold implications of the Trading with the Enemy legislation for the economic post-war situation will in no field be more important than in that of the protection of industrial property rights.

⁶⁹ The American direct investment in Germany (including Austria) is valued at about \$350 million, in *American Direct Investments in Foreign Countries—1940* (Dep't of Commerce, Econ. Ser. No. 20, 1942) p. 11.

⁷⁰ Cf. Post-War Plan of the Natl. Resources Planning Board: "Another sphere for action for these joint efforts [of mixed corporations] might be the control for the government of certain patents and properties seized from enemy aliens, and of domestic patents of basic necessity in the production of raw materials," *N. Y. Times*, March 11, 1943.

19. The Licensing System.

THE IMPORTANCE which the licensing system has assumed in the practical operation of Trading with the Enemy laws is reflected in the new concept of economic warfare. This war has demanded a broad interpretation of the statutory provisions of Trading with the Enemy law, one which could be effected only by a flexible administration equipped to meet the new and unforeseen situations of economic warfare, initiated by the Axis powers prior to the actual conflict.

Accordingly, the control theory (Chapter IX), the blacklisting (Chapter X), and the "benefit of the enemy" doctrine (Chapter XI) have served to increase the number of individuals and corporations, both within and out of this country, that are to be covered by the provisions of the Trading with the Enemy Act and the orders issued thereunder, especially the freezing regulations.

On the other hand, the licensing system has served to facilitate the normal functions of international trade, at least within the restricted area permitted by this war. More than eighty general licenses, and so far well over 500,000 special licenses, have been issued under the foreign funds control, authorizing the use of blocked assets for purposes which are deemed compatible with the policy of the control. At the same time, while certain territories were declared generally licensed areas,¹ administrative control has been extended over enemy trade and business connections favorable to the Axis Powers even in neutral countries.²

¹ General License No. 53, July 17, 1941, 6 Fed. Reg. 3556 (1941), as amended April 13, 1943, 8 Fed. Reg. 4876 (1943).

² For corresponding regulations, see Chapter XIV, n. 5, and Defence (Finance)

The Trading with the Enemy Act as amended thus provided a weapon against Axis economic warfare even before the entrance of the United States into this war. It was first used as a defensive instrument to counteract the looting of assets abroad by Axis Powers, but was later turned into an offensive weapon to further the war policies of the United Nations. In short, it provided a flexible system by which the purposes of the foreign funds control could be adapted to the ever-changing conditions of economic warfare. Its principal purpose, "the curtailment and elimination of the activity and influence of such persons and firms in so far as that activity and influence is inimical to the war effort and hemisphere defense,"³ has been accomplished since the inception of freezing regulations in the spring of 1940.

These economic purposes and effects of the administrative operation of the licensing system cannot all be detailed here. The treatment of the case of Schering Corporation of Bloomfield, New Jersey, may be quoted as illustrative of the use of licensing as a preliminary step to prevent transactions which are deemed undesirable.⁴ "This corporation, prior to the outbreak of war, was restricted by a cartel contract with Schering A. G. of Berlin to the United States market. After the outbreak of the war, Schering of Bloomfield formed a subsidiary corporation without objection from Schering A. G. of Berlin, the sole function of which was to export goods to other markets in the world which had formerly been supplied by Schering A. G. of Berlin. These transactions were subject to the

(Definition of Sterling Area) Order, December 24, 1942, Statutory Rules & Orders No. 2626; Union of South Africa Consolidated Emergency Finance Regulations, October 19, 1942, Government Gazette Extraordinary October 23, 1942.

³ Administration of the Wartime Financial and Property Controls of the United States Government (Treasury Dep't, December, 1942) p. 18.

⁴ *Ibid.* p. 37.

provisions of Executive Order No. 8389 as amended. The United States Treasury Department denied all export applications (there were 17 applications pending at the time this decision was made). This action, simply an intelligent use of the licensing technique, prevented Schering A. G. of Berlin from acquiring substantial amounts of local currency which would otherwise have been available to the Axis governments for propaganda and subversive activities in countries in which the sales were made. The German-owned stock of Schering Corporation and its subsidiaries has now been vested in the Alien Property Custodian."⁵

It must be borne in mind that many questions which arose under the Trading with the Enemy Act in the First World War are now handled by the licensing system which has functioned for more than twenty months prior to the entrance of the United States into the war. Thus numerous issues which would otherwise have been discussed in court proceedings were practically settled by the licensing system under the freezing regulations. Thus the influence of war on contract, important in cases in the previous World War,⁶ did not have to be considered in decisions during this war. Relations to individuals and corporations that became enemies within the meaning of the Trading with the Enemy Act upon the declaration of war were generally already determined by the operation of the freezing regulations.

Only one case seems to have been reported regarding a

⁵ Cf. Bulletin, Dep't of Justice, N. Y. L. J. January 23, 1942, p. 339.

⁶ Cf. *Sutherland v. Mayer*, 271 U. S. 272, 46 S. Ct. 538, 70 L. Ed. 943 (1926); *Munich Reinsurance Co. v. First Reinsurance Co. of Hartford*, 273 U. S. 666, 47 S. Ct. 458, 71 L. Ed. 830 (1927); *Neumond v. Farmers Feed Co. of New York*, 244 N. Y. 202, 155 N. E. 100 (1927); see Chapter XXI, n. 1, Chapter XIV, n. 53-55, and Thayer, Schoch and Ireland, *The Effect of a State of War Upon Statutes of Limitation or Prescription*, (1943) 17 Tulane L. Rev. 416.

contract for shipment to Japan. In *Takahashi v. Pepper Tank & Constructing Co.*⁷ plaintiff, an exporter, entered a contract on November 7, 1940, with the express clause that the material (dismantled steel storage tanks) was purchased "for shipment to Japan." The Presidential Proclamation No. 2449 of December 10, 1940,⁸ placed an embargo on certain articles, requiring a license for the export of the tanks. The plaintiff attempted to secure such a license, but demanded delivery of the tanks at Casper, Wyoming. On the defendant's refusal the plaintiff brought an action for specific performance, alleging that he had resold the tanks to other parties and that the clause stipulating for export to Japan was immaterial. The dismissal of his suit was affirmed on appeal, where the court said: "By reason of war, the resale contract with purchasers in Japan was dissolved, since the property in controversy is important war material, and would, if sent to Japan, give aid and comfort to the enemy."⁹ It is clear, accordingly, that plaintiff could not be damaged by reason of the resale of property in Japan, unexecuted as it is, and cannot furnish any basis for specific performance." The court further said that it "cannot hold that the embargo or suspension of trade with Japan could reasonably have been expected to be temporarily only. . . . We think that the contract was not merely suspended, but was dissolved, unless, perchance, it can be held that it is still in force by reason of the fact that the purpose of the contract to export to Japan, which became illegal, was entirely taken out of the case."¹⁰

⁷ 131 Pacific Reporter (2d) 339 (Sup. Ct. Wyoming, November 24, 1942).

⁸ 54 Stat. Part II, p. 2768.

⁹ Cf. *Second Russian Ins. Co. v. Miller*, 268 U. S. 552, 45 S. Ct. 593, 69 L. Ed. 1088 (1925).

¹⁰ Referring to *Industrial Development & Land Co. v. Goldschmidt*, 56 Cal. App. 507, 206 P. 134; *Bunch v. Short*, 78 W. Va. 764, 90 S. E. 810; *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501; 12 Am. Jur. 954, 955; Note 10 Ann. Cas. 1024.

The Trading with the Enemy Acts of all belligerents provide for licenses so as to permit transactions that are not deemed detrimental to the war effort. Such licensing system is the more important since the Acts of the various countries do not prohibit commercial intercourse alone but any relations, whether commercial or otherwise.

The paramount importance of the licensing system within the whole field of economic warfare is accentuated by the fact that the freezing regulations were integrated with the Trading with the Enemy Act, as amended, by sec. 302 of the First War Powers Act, 1941. Moreover, an unnumbered General License of December 13, 1941,¹¹ has licensed any prohibited transaction or act under sec. 3 (a) of the Trading with the Enemy Act, as amended, "authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise, pursuant to Executive Order 8389, as amended." Thus, an appropriate license under the freezing regulations serves also as a license under sec. 3 (a) of the Trading with the Enemy Act.

On the other hand, neither a general license nor a special license affects in any way whatsoever prohibitions under the Trading with the Enemy Act, as provided in sec. 16 of General Ruling No. 4, as amended:¹² "No license shall be deemed to authorize any transaction prohibited by reason of the provisions of any law, proclamation, order or regulation, other than the Executive Order No. 8389, as amended, and Regulations." A recent General License, No. 30A,¹³ October 23, 1942, relative to the administration of estates of decedents, provides in sec. 6 that "any transfer or other dealing in any property authorized under this

¹¹ 6 Fed. Reg. 6240 (1941).

¹² 5 Fed. Reg. 2133 (1940).

¹³ 7 Fed. Reg. 8633 (1942).

general license shall not be deemed to limit or restrict the exercise of any power or authority under sec. 5 (b) of the Trading with the Enemy Act, as amended." Public Circular No. 20, of the same date,¹⁴ in sec. 10 directs attention to the fact that General License No. 30A "does not affect any orders, rules or regulations of the Alien Property Custodian relating to estates." In any event, it is not only advisable but necessary to apply for a license even when there is room for reasonable doubt as to whether a license will be required at all for the transaction. The duty to apply for such license is not confined to transactions covered by the "evasion" clause of sec. 1 F of Executive Order No. 8389, as amended, which prohibits, except as specifically authorized, "any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."¹⁵

In this connection it may be mentioned that the Instructions for Preparation of Reports on Form TFR-300 of all Foreign-owned Property subject to the Jurisdiction of the United States,¹⁶ provided in sec. 2 (A): "Where a doubt exists as to whether or not a national had an interest in certain property, and also where there is reason to believe that a national had such an interest but the identity of the national is in doubt, all such property should be regarded as coming within the purview hereof."

Similarly, a license granted for a transaction by the Bank of England under the Defence (Finance) Regulations, 1939, as a rule is not sufficient to exempt such transaction from the prohibitions under the (British) Trading with the Enemy Act.¹⁷

¹⁴ *Ibid.* 8632.

¹⁵ See Note, *Foreign Funds Control by Presidential Freezing Orders*, (1941)

41 Col. L. Rev. 1039, 1068.

¹⁶ 6 Fed. Reg. 4196 (1941).

¹⁷ Chapter III, n. 91.

The German Trading with the Enemy Act of January 5, 1940, on the contrary, provides in sec. 10¹⁸ that insofar as acts and transactions require an authorization by the Foreign Exchange Control Agencies they do not require a license by any other authority that may be specified in the Act. This provision is readily understandable since the German Exchange Control Law (*Devisengesetz*) has always been an effective weapon of economic warfare and has functioned as such since its original enactment, August 1, 1931.¹⁹

A special provision regarding the licensing of transactions is to be found in sec. 6 (2) of the Dutch government-in-exile's Trading with the Enemy Act of June 7, 1940.²⁰ According to it, the prohibition of the Act "shall not apply to acts and services entered into or performed by persons within territory occupied by the enemy, insofar as these acts and services relate to property within such territory, provided their consequences do not extend beyond such territory, nor relate directly or indirectly to interests of persons outside of such territory." That is to say, the government-in-exile, whose measures tend primarily to protect the assets abroad of its nationals, does not interfere with transactions that are strictly confined to the occupied territory.

Though many legal questions may arise under the licensing system, only very few of them have as yet been considered in court decisions. This is especially true of licensed business enterprises during this war. Unlike the situation in the First World War, licensing of transactions with "enemies" within the meaning of the Trading with the Enemy Act, has not now become necessary because the

¹⁸ Reichsgesetzblatt 1940 I, 191.

¹⁹ Chapter XX, n. 27.

²⁰ Staatsblad No. A 6.

freezing of assets and foreign funds control effectively terminated business relations with individuals and corporations that became "enemies" with the entrance of the United States into this war.

In the English case *Meyer v. Louis Dreyfuss & Co.*,²¹ the fact that the London branch of a French partnership doing business in Paris, enemy-occupied territory, was licensed made it possible to commence a lawsuit by service of process to the London manager of the French partnership.²²

When it becomes necessary to obtain a license for a payment out of frozen funds, a controversy may arise between the creditor and the debtor as to which party is to apply for the authorization of transfer.²³ In *Brown v. J. P. Morgan & Co.*,²⁴ it was held that the obligation to apply for a license was upon the debtor. This decision followed cases in which it was held that where governmental or other restraint does not render performance absolutely impossible it is the duty of the promisor to make a bona fide effort to dissolve and be relieved of the restraint which operates to prevent the performance. But in *de Gunzburg v. J. P. Morgan & Co.*,²⁵ the plaintiff, the creditor, was held obliged to procure the license for the delivery of securities to him.

Quite distinct from this is the question whether a failure to obtain a license is a good defense for the debtor,

²¹ (1940) 4 All E. R. 157, 163 L. T. 335 (C. A., September 24, 1940); Note, Annual Digest and Reports of Public International Law Cases, Years 1938-1940 (1942), Case No. 202, p. 538.

²² On the judicial review of licenses, see Chapter XVII.

²³ In Publ. Interpretation No. 11, March 8, 1943, Fed. Res. Bank of New York Circular 2593, it is stated that "any person having an interest in a transaction or proposed transaction may file an application."

²⁴ 177 Misc. 626, 31 N. Y. S. (2d) 323 (November 25, 1941); 177 Misc. 763, 31 N. Y. S. (2d) 815; *rev'd*, on other grounds, N. Y. L. J. March 23, 1943, p. 1127.

²⁵ N. Y. L. J. January 27, 1942, p. 400; May 16, 1942, p. 2093.

relieving him of performance of a contract.²⁶ In other words, who is to take the risk of not getting a license? This question was considered in an English case during the present war, in *J. W. Taylor & Co v. Landauer & Co.*²⁷ Here the delivery of butter beans from a Madagascar shipper to an English purchaser in November, 1939, was prohibited by the then existing English embargo regulations. The purchaser was nevertheless held liable to pay the purchase price inasmuch as he had applied for a license several months too late (February, 1940) and did not prove that he would not have been granted one had he asked for it at an earlier date.²⁸

A similar question arose in *Katz v. Pielles y Lanas, S. A.*²⁹ There the plaintiff was obliged to furnish funds in payment of goods to be shipped by the defendant Spanish corporation. In view of Exec. Order No. 8785 of June 14, 1940,³⁰ which prohibited payments to nationals of Spain after June 14, 1941, the plaintiff applied for a license for a letter of credit payable to the order of the defendant in Madrid, Spain. He cabled notice of the license on July 17, 1941. Meanwhile, however, the defendant had cancelled the contract because of plaintiff's delay in furnishing funds for payment, and also because the funds were not deposited in a bank in Spain in accordance with the terms of the contract. The issue has not yet been decided, summary judgment having been denied because of the existence of a dispute as to facts.

²⁶ Cf. generally, though not mentioning licenses under the freezing regulations, Note, *Impossibility of Performance of Contracts Due to War-Time Government Interference*, (1941) 28 Va. L. Rev. 72, 74; Warp, *Licensing as a Device for Federal Regulation*, (1941) 16 Tulane L. Rev. 11.

²⁷ (1940) 4 All E. R. 335, 164 L. T. R. 299 (K. B., October 1, 1940).

²⁸ As to the duty of the buyer to procure a license, see the *Takahashi* case, *supra* n. 7, at p. 351, referring to 55 C. J. 374, Notes 6 L. R. A., N. S. 928, L. R. A. 1917 A, 1163.

²⁹ N. Y. L. J. June 26, 1942, p. 2694.

³⁰ 6 Fed. Reg. 2897 (1941).

Difficulties may occur in the course of legal proceedings as to when and at what stage of such proceedings a license must be procured. This question, whether a license to sue was necessary and, if granted, constituted an appropriate authorization, has not been decided by English cases.³¹ These cases were concerned only with the enemy qualification of the plaintiff who was otherwise prevented from prosecuting suits in English courts. They were not concerned with the problem whether a license is necessary during the prosecution of a suit by such plaintiff³² or before the levying upon an attachment, or before judgment, or only when the execution of a judgment, if any, involves a transfer from frozen funds. In other words, may liabilities be adjudicated and judgment entered before a license is granted or at least applied for?

At first, the failure of plaintiffs to produce a license at the beginning of proceedings was held a sufficient ground for denial of a motion for summary judgment, as in *Schneider v. National Bank of New York*.³³ There funds were attached that belonged to the City of Rome, a national of a foreign country. The defendant contended that the funds were deposited not by the debtor of the plaintiff, the City of Rome, but by another American bank, to be applied to the payment of coupons,³⁴ and that no relation of creditor and debtor existed between the defendant and the City of Rome. The claim was dismissed on the very ground that plaintiff had not obtained a license. Questions of this character may become important under different circumstances in the future, when other restrictions

³¹ Chapter XIV, n. 39-40.

³² As, for instance, in Germany under the German Exchange Control Law of December 12, 1938, Reichsgesetzblatt I, 1733; see Neumann, *Devisennotrecht und Internationales Privatrecht* (Berne, Switzerland, 1938) p. 151.

³³ N. Y. L. J. April 30, 1942, p. 1824.

³⁴ External Loan of the City of Rome 6½% of 1927.

of municipal law as to funds abroad may be invoked to establish that the owner of an account cannot freely dispose of his assets.³⁵ Such restrictions, of course, will have to be clearly distinguished from foreign decrees which require a license for the withdrawal of securities from bank accounts abroad. That decrees of the latter kind are not recognized in courts of this country will be shown in Chapter XX.

Subsequently, a view more favorable to claimants has been expressed by the Government itself. In its Brief as *amicus curiae* in *Commission for Polish Relief v. Banca Nationala a Rumaniei*,³⁶ the Government stated: "The Treasury regards the courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the equivalent of a voluntary payment order without the creation or transfer of any vested interest, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets."

Under the authority of the *Polish Relief* case defenses which are based on the failure to secure a license from the Treasury Department³⁷ are held insufficient.³⁸ The fact that a plaintiff may be required to secure a license from the Treasury Department for the transfer of blocked assets

³⁵ The question of frozen accounts as trust money and equitably belonging to bondholders was considered in *Brown v. J. P. Morgan & Co., Inc.*, *supra* n. 24, N. Y. L. J. March 23, 1943, p. 1127 (First Dep't, March 12, 1943).

³⁶ 43 N. E. (2d) 345, 288 N. Y. 332 (July 29, 1942).

³⁷ In this case a license had been issued, but "the plaintiff-respondent unfortunately did not bring this letter to the attention of the lower court and failed to make the argument that the Treasury Department authorized attachment." Brief of United States of America as *amicus curiae*, p. 40, n. 8.

³⁸ *Branigan v. Hans Holterbosch, Inc.*, N. Y. L. J. December 16, 1941, p. 1994; *Bollack v. Societe Generale*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (March 27, 1942), reversing 177 Misc. 136, 30 N. Y. S. (2d) 83 (September 4, 1941).

to him does not prevent the courts from adjudicating liability and entering judgment.³⁹ However, such a judgment may only be executed upon the condition of procuring an appropriate license for the transfer of funds under Exec. Order No. 8389, as amended. That a license would be necessary before a transfer could be effected upon obtaining a judgment, was held in several decisions of the New York Supreme Court, as *Wohlgemuth v. Bankers Trust Co.*,⁴⁰ *Brown v. J. P. Morgan & Co., Inc.*,⁴¹ *Sabl v. Laenderbank Wien Aktiengesellschaft*,⁴² *Rubensohn v. Guaranty Trust Company of New York*,⁴³ *Stiebel v. May*,⁴⁴ *International Investment Co. S. A. v. Swiss Bank Corp.*⁴⁵

This doctrine is entirely in accord with decisions in the First World War where, even in suits by non-resident enemies, courts proceeded to determine the rights of litigants although the proceeds of a judgment might be taken over by the Alien Property Custodian.⁴⁶ That the lack of an appropriate license would render "a judgment for plaintiff at this time valueless, so far as immediate satisfaction is concerned"⁴⁸ did not prevent the courts from determining the rights of litigants.

The same view prevails where an attachment is sought

³⁹ See *Chase National Bank of the City of New York v. Manila Electric Co.*, N. Y. L. J. February 20, 1943, p. 706 (republished), where a license was previously issued, before the rendering of the decision of the court, with regard to General Ruling No. 10 A, August 12, 1942, 7 Fed. Reg. 6383 (1942) concerning the moratorium on Philippine corporations. Cf. *supra* Chapter XIV, n. 18.

⁴⁰ N. Y. L. J. October 24, 1941, p. 1196.

⁴¹ *Supra* n. 24.

⁴² 34 N. Y. S. (2d) 764 (March 5, 1942).

⁴³ N. Y. L. J. May 6, 1942, p. 1920.

⁴⁴ N. Y. L. J. July 22, 1942, p. 173.

⁴⁵ N. Y. L. J. August 15, 1942, p. 355.

⁴⁶ Chapter XV, n. 81; cf. General Order No. 20, February 9, 1943, 8 Fed. Reg. 1780 (1943).

⁴⁷ *Galtrof v. I. G. Farben Industrie Aktiengesellschaft*, 33 N. Y. S. (2d) 756 (February 23, 1942).

against frozen funds without previous license. The question here is whether a seizure, subject to subsequent license, is in accordance with the regulations under the Trading with the Enemy Act, as amended, so that the license for the transfer out of blocked accounts would be no prerequisite for an attachment proceeding. This question was decided in the affirmative in the *Polish Relief* case. It must be borne in mind that the possibility of attachment to be levied upon blocked funds frequently provides the only means to acquire jurisdiction against non-resident debtors.⁴⁸ Numerous creditors in this country seek to obtain satisfaction for their claims against European debtors out of the latter's frozen assets in this country.

The position which the Treasury Department has always taken on litigation, including attachments, affecting blocked assets, was stated in the Press Release to General Ruling No. 12,⁴⁹ as follows: "The Treasury Department has no desire to limit the bringing of suits in courts within the United States, provided that no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license." It was stated further in the Government's Brief in the *Polish Relief* case:⁵⁰ "In this way the Department was in a position to postpone until after judgment was obtained the determination to grant or deny a license to transfer the blocked assets or any interest therein. The adjudicated facts and the judgment rendered in the case may well be relevant to the Treasury's consideration of the freezing control application."

In the *Polish Relief* case, the question of an attachment upon frozen funds was considered by the three New York

⁴⁸ See Annotation (1942) 137 A. L. R. 1361, at 1369.

⁴⁹ Fed. Res. Bank of New York, Circular 2420.

⁵⁰ At p. 42.

courts,⁵¹ all of which held, on different grounds, that such an attachment could be levied upon prior to the issuance of the license.⁵² In that case, the only question so far decided is that of the courts' jurisdiction which turned not upon the material facts of the dispute but solely upon the effect of Exec. Order No. 8389, as amended, on an attachment levied upon frozen funds without previous license. If the Exec. Order, as the defendants claimed, immobilized the accounts of the blocked foreign national (the National Bank of Rumania) so as to render them unattachable, then no jurisdiction over the cause of action could have been acquired. Jurisdiction now having been affirmed, the question of the debtor's liability for the safe-keeping of gold which the defendant received in October, 1939, at its office at Bucharest, Rumania, from an assignor of the plaintiff, namely, the Bank Polski, Warsaw, remains for judicial determination.⁵³

On the effect of Exec. Order No. 8389, as amended, the Special Term of the New York Supreme Court⁵⁴ said: "There has been no seizure of the funds, but merely a restraint against their transfer or payment with the view of protecting the dominated nations or its nationals and American creditors." The Appellate Division,⁵⁵ however, said: "Clearly the sole purpose of the order was to prevent the funds of certain foreign nations, including Rumania and their nationals, from falling into the hands of the aggressor Axis powers." In the opinion of the Special Term of the New York Supreme Court, the Exec. Order

⁵¹ Notes, 37 Ill. L. Rev. 270; (1942) Geo. Wash. L. Rev. 116; (1942) 91 U. of Pa. L. Rev. 260.

⁵² See Note, *The Effect of the Freezing Order in Civil Actions*, (1941) 41 Col. L. Rev. 1190, 1193.

⁵³ N. Y. L. J. February 4, 1943, p. 490.

⁵⁴ 176 Misc. 1070, 29 N. Y. S. (2d) 189 (July 15, 1941).

⁵⁵ 262 App. Div. 543, 30 N. Y. S. (2d) 690 (Second Dep't, November 3, 1941); cf. on General Ruling No. 12, *infra* Chapter XX, page 324.

does not prevent "an assignment of the defendant's claims against the banks that would carry the title"; the Appellate Division regarded the order as operating "exclusively in personam upon the banks." The majority of the Court of Appeals, however, expressed a different opinion upon this question.⁵⁶ Said the Court of Appeals: "The Executive Order is a check upon Trading with the Enemy. Its prime purpose is to stop such uses of foreign property rights as might imperil national defense. The words of the Chief Executive of the nation must be taken to have deprived the defendant of power to transfer any interest in these blocked accounts except through the medium of assignment subject to a releasing of the credit by the Secretary of the Treasury." But the Court of Appeals held that the Exec. Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. As the lien of an attachment is always hypothetical in some degree, a seizure subject to license⁵⁷ was held sufficient for the purpose of acquiring jurisdiction in rem over the deposits in question.⁵⁷ In support of its opinion, the majority opinion of the Court of Appeals mentioned a statement by the Government of the United States itself that the levies of this attachment do not offend any national policy implied by the Exec. Order. Said the court: "We do not presume to contradict this Executive determination (see *United States v. Pink*, 315 U. S. 203)." ⁵⁸

The question of attachments by creditors of such frozen funds which are at the same time claimed by governments-in-exile, as vested in themselves by virtue of their own

⁵⁶ 288 N. Y. 332, 43 N. E. (2d) 345 (July 29, 1942), expressly repudiating the view of the Appellate Division.

⁵⁷ As to the question of an attachable interest under New York law, see Brief of United States as *amicus curiae*, p. 42.

⁵⁸ See Chapter XXI, n. 35.

decrees, will be dealt with in Chapter XXI.

Another problem related to the topic of this chapter is whether an attachment, or even a claim, may be made upon funds of an alien enemy if such funds are vested in the Alien Property Custodian. This question is dealt with in Chapter XVII.

The fact that the Treasury Department does not interfere with legal proceedings does not in any way bind the Government later to grant a license, if judgment is entered in favor of the claimant who thereupon tries to execute it in blocked funds.

In *Milbert Importing Corp. v. Parent*,⁵⁹ in an action where money attached belonged to French nationals, the court said: "If an order is made by this court the fair assumption is that the federal government will cooperate to enable the orders or judgments to be enforced. But whether it will or not is beside the question."

Similarly the Court of Appeals in the *Polish Relief* case, discussing whether payment from the blocked accounts in favor of the claimant is permissible under Exec. Order No. 8389, as amended, said: "We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff."

In reserving for future consideration the question whether payment should be made from any blocked account, the Federal Government in its Brief in the *Polish Relief* case stated⁶⁰ that it is "anxious to keep to a minimum interference with the normal rights of litigants and the jurisdiction of courts to hear and determine cases consistent with the most effective prosecution by the Government of total war. . . . This means that the Federal Government must have its hands unfettered in using freezing control,

⁵⁹ N. Y. L. J. March 5, 1941, p. 999.

⁶⁰ At p. 53.

recognizing that it is desirable that private litigants be able to attach some interest with respect to blocked assets in order to clarify their rights and liabilities.”

20. Foreign Exchange Control.

FOREIGN exchange restrictions, frequently employed in European countries since 1931, following the economic crisis of the twenties, have become a more and more obvious weapon of economic warfare. They were used as such long before the outbreak of hostilities. Yet the relationship of foreign exchange restrictions to economic warfare has seldom been recognized either in the numerous decisions of the last few years dealing with the extraterritorial effect of such restrictive legislation or in articles in legal periodicals on this subject.¹

Attention has been focused rather on questions belonging to the conflict-of-laws sphere of private litigation, especially in suits against German corporation debtors which repudiated the service of bond issues abroad on the strength of the prohibitions of the German foreign exchange legislation.² The primary question which often

¹ For a summary, see Note, *Foreign Exchange Restrictions and the Conflict of Laws*, (1938) 47 Yale L. J. 451; Neumann, *Devisennotrecht und Internationales Privatrecht* (Berne, Switzerland, 1938); Nussbaum, *Money in the Law* (1939) p. 487; Cohn, *Currency Restrictions and the Conflict of Laws*, (1939) 55 L. Q. Rev. 23, 552; Domke, *Foreign Exchange Restrictions, A Comparative Survey*, (1939) 21 J. Comp. Leg. & Int. L. 54; Weiden, *Foreign Exchange Restrictions*, (1939) 16 N.Y.U. L. Q. Rev. 559; Bloch and Rosenberg, *Current Problems of Freezing Control*, (1942) 11 Fordham L. Rev. 71, 81; Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, (1942) 56 Harv. L. Rev. 30.

² Translation of the relevant German documents may be found in the 1936 Annual Report of the Foreign Bondholders Protective Council, Inc. (New York 1937) at p. 467; the Release No. 1294 of the Securities and Exchange Commission of March 2, 1937, is published *ibid.* at p. 493. For further documentation of the actions of the Department of State respecting discrimination against American bondholders, see *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protection and Reorganization Committees*, Part V (1937, Securities and Exchange Commission) p. 419.

arose in such suits in this country,³ England,⁴ France,⁵ Holland,⁶ and Switzerland,⁷ was whether foreign exchange restrictions of the debtor's country prevented the debtor's assets abroad from being used, by way of attachment and subsequent judgment, for the benefit of foreign creditors.

But evidently one of the principal effects of foreign exchange legislation was to build up a reserve of foreign funds in the name of private corporations and business organizations which could be used for the purposes of the economic warfare which the Axis powers were preparing to conduct on a global scale.⁸ The alleged impossibility of performance of obligations abroad, on the basis of municipal law of debtor corporations,⁹ served to save assets

³ Recent decisions not cited in the articles, *supra* n. 1: *National City Bank of New York, as Trustee v. Allgemeine Elektrizitäts-Gesellschaft* (otherwise known as "General Electric Company, Germany"), 9 N. Y. S. (2d) 780 (February 3, 1939), *aff'd* without opinion 20 N. Y. S. (2d) 1015 (May 24, 1940); *Rives v. Carl-Zeiss Stiftung*, N. Y. L. J. March 20, 1940, p. 1272, April 11, 1940, p. 1648, *aff'd* 259 App. Div. 1051, 21 N. Y. S. (2d) 203 (June 24, 1940); *David v. Veitscher Magnesitwerke Aktiengesellschaft*, (1940) 37 Pennsylvania District and County Reports, Adv. Sheets No. 11, p. 182 a; *Irving Trust Co. v. Deutsch-Atlantische Telegraphengesellschaft*, 22 N. Y. S. (2d) 581 (June 11, 1940); Note (1941) 54 Harv. L. Rev. 708. Cf. *South American Petroleum Corporation v. Colombian Petroleum Company*, 177 Misc. 756 (December 5, 1941).

⁴ *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Creditbank*, (1939) 2 K. B. 678 (K. B., May 8, 1939), *aff'd* *ibid.* p. 690 (C. A., May 23, 1939); Kahn-Freund, *International Effect of Currency Restrictions*, (1939) 3 Modern L. Rev. 158; Note (1940) 56 L. Q. Rev. 153.

⁵ *Rosenberg v. Siemens & Halske A. G.*, Civil Court of the Seine, June 24, 1938, (1938) 5 Nouvelle Revue Dr. Int. Pr. 367, ann. by Domke; Soc. C. H. Boehringer Sohn v. Legerlotz, Appellate Court of Paris, July 20, 1939, (1939) 37 Rev. Sc. et Legisl. Financ. 608, ann. by Jeze.

⁶ *Appeldoorn v. Osram GmbH. Kommanditgesellschaft*, Supreme Court (Hooge Rad), Ned. Jurispr. 1939 no. 896 p. 1386 (May 26, 1939).

⁷ *Hungarian Discount & Exchange Bank Ltd. v. Kleinwort, Sons & Co.*, Federal Court, September 23, 1941, 67 BGE II 215.

⁸ On the question of war as an instrument of policy, see recently: Murphy, *National Socialism: Basic Principles, Their Application by the Nazi Party's Foreign Organization, and the Use of Germans Abroad for Nazi Aims* (Department of State, 1943) p. 15.

⁹ Cf. *Central Hanover Bank and Trust Co. v. Siemens & Halske Aktiengesellschaft*, 15 F. Supp. 927 (S. D. N. Y. 1936), *aff'd per curiam* 84 F. (2d) 993 (C. C. A. 2d, 1936), *cert. den.* 299 U. S. 585 (1936); Notes (1936)

in foreign countries for economic war to be waged inside those very foreign countries.

Questions of private law and especially of conflict of laws, which arise in the application of foreign exchange legislation abroad and which continue to come up in suits between individual parties,¹⁰ will in time of economic warfare have to give precedence to the public law character of such restrictions. Before the United States entered this war, this special character of foreign legislation manifested itself on several occasions.

Since the German foreign exchange control increasingly prevented the use of foreign assets of German debtors for the performance of obligations abroad, the need for counter-measures became evident. Accordingly, the so-called Harrison Resolution of June 27, 1934,¹¹ suspended payments to Germany under the Settlements of War Claims Act of 1928, as amended,¹² because the debt funding agreement between the United States and Germany of June 23, 1930, concerning the payment upon awards of the Mixed Claims Commission,¹³ no longer was executed by Germany. Relying on this foreign exchange legislation, Germany furthermore refused to continue the service on bond obligations payable in the United States and the transfer of royalties while insisting on full payment and transfer of foreign royalties to their own nationals. Germany also refused to permit other, even comparatively minor, payments, namely the transfer of amounts due on

30 Mich. L. Rev. 1165, (1937) 31 *ibid.* 1200; Domke, (1936) 63 *Journal Dr. Int. (Clunet)* 1135. Cf. *St. Louis Union Trust Co., Trustee, v. Stoffregen*, N. Y. L. J. November 23, 1942, p. 1577.

¹⁰ As to the Japanese foreign exchange legislation of 1941, see C.C.H.W.L.S. F.S. ||70480.

¹¹ 48 Stat. 1267.

¹² 45 Stat. 254.

¹³ See Final Report of H. H. Martin, Acting Agent of the United States (1941) p. 94; Borchard, *Introduction to Gathings, International Law and American Treatment of Alien Enemy Property* (1941) p. xi.

inheritance claims of American citizens to the estate of persons deceased in Germany, which situation led to diplomatic protests in a correspondence from 1939 up to August, 1940.¹⁴ On the other hand, through recent statutory provisions of Oregon¹⁵ and of California¹⁶ the rights of aliens residing abroad to take property or the proceeds thereof in the state, by succession or testamentary disposition, were made dependent upon the existence of a reciprocal right.¹⁷

The element of economic warfare, predominant in foreign currency legislation, was openly denounced by the Government of the United States before this country became a belligerent. This was done in *Werfel v. Zivnostenska Bank*,¹⁸ where the plaintiff attached funds of the defendant Czechoslovakian Bank in New York and sued to recover the equivalent in dollars of a deposit she had made in Prague in 1936. Summary judgment for plaintiff¹⁹ was reversed, and the complaint dismissed, by the Appellate Division of the New York Supreme Court²⁰ on the ground that the foreign exchange decrees of the de facto government in Czechoslovakia, invoked by the defendant as prohibitions against payment abroad, "are not confiscatory in their nature at all, but are regulatory of foreign exchange transactions only to approximately the same degree as

¹⁴ Referred to in Hackworth, *Digest of International Law*, vol. III (1942) p. 667. Cf. *Horn v. Vasan*, 263 App. Div. 669 (April 17, 1942).

¹⁵ Laws of Oregon 1937, c. 399; cf. *In re Braun's Estate*, 90 Pacific Reporter (2d) 484 (1934), where the Supreme Court of Oregon held that German non-resident aliens had to prove that Germany granted a reciprocal right to American citizens.

¹⁶ California Probate Code, sec. 259, added by Stats. 1941, c. 895 §1.

¹⁷ Sec. 259.2 provides that "if such reciprocal rights are not found to exist and if no heirs other than such [non-resident] aliens are found eligible to take such property, the property shall be disposed of as escheated property."

¹⁸ 287 N. Y. 91, 38 N. E. (2d) 382 (November 27, 1941).

¹⁹ 174 Misc. 67, 20 N. Y. S. (2d) 24 (May 22, 1940).

²⁰ 260 App. Div. 747, 23 N. Y. S. (2d) 1001 (First Dep't, December 20, 1940).

existed under the old Czechoslovakian Government, and such as exist to common knowledge in the United States today in so far as certain belligerent countries are concerned." But this judgment was in turn reversed by the New York Court of Appeals²¹ on the ground that summary judgment was improper because of the existence of conflicting issues of facts; such issues include the question "in what respect may such [foreign] law have been rendered inoperative by reason of events happening subsequent to the making of the contract."

In this case, a Memorandum was filed for the United States as *amicus curiae* regarding the effect to be given in the courts of this country to the decrees of a foreign *de facto* government. The Memorandum directed the attention of the Court of Appeals to the fact that the *de facto* administration of Bohemia and Moravia by Germany was "a representation inconsistent with the exercise of dominion in fact by the government of Czechoslovakia, which we continued to recognize, within the territory of Bohemia and Moravia." The Memorandum also contained the following statement: "It is clear that the exchange decrees of Germany here involved are in conflict with the policy underlying the refusal of the Executive Department of the United States to accord Germany recognition as the *de jure* government in the territory of Czechoslovakia. The very purpose of such decree is to facilitate the confiscation of the foreign exchange of Czechoslovakia and its nationals, and thus to implement the aggression condemned by our Government. See Ellis, German Exchange Control, 54 Quar. J. Econ. (Supp.) 1, 167-168. The fact, stressed by the court below, that foreign exchange restrictions are now commonplace, is without relevance. The question here is whether such

²¹ *Supra* n. 18.

decrees should be given effect when used as an instrument of aggression condemned by this Government. The respondent's suggestion that domestic policy should be ignored because there are no contacts between the transaction in question and the local forum, is without substance. The Executive Department, charged with the conduct of our foreign relations, has condemned all arbitrary force abroad as a threat to world peace and has determined that the disturbance of world peace is a grave threat to our own security. Surely the courts of this country cannot ignore the conclusion of the political department and determine independently that Germany's aggression abroad and acts in aid thereof are of no interest to this country."

From this statement of the Government, issued before the United States' declaration of war, as well as from the reversal in the *Werfel* case, it appears that measures of economic warfare, as contained in the legislation of occupied or controlled territories, are by no means to be recognized in the courts of this country.²² In state courts this conclusion may be supplemented and supported by the doctrine that foreign policy as determined by the federal political department supersedes any public policy of the States, as recently held in *United States v. Pink*²³ and recognized by the New York Court of Appeals in the *Anderson* case.²⁴

Nothing more clearly reveals the character of foreign exchange legislation as a measure of economic warfare than the standpoint adopted by German war legislation itself. The German Trading with the Enemy Act²⁵ provides that licenses for payment in Germany under the Trading with the Enemy Act are not necessary when a

²² Freutel, *supra* n. 1, at p. 58.

²³ 315 U. S. 203 (February 2, 1942); cf. Chapter XXI, n. 35.

²⁴ Chapter XXI, n. 42.

²⁵ Reichsgesetzblatt 1940 I, 191, as amended, Sec. 10.

license has been granted otherwise, namely, under foreign exchange provisions. Furthermore, German authors²⁶ maintain that German law does not know any general prohibition of trading with the enemy, although the principal Act of January 15, 1940, sec. 5 (1), expressly provides that any payments to enemies abroad, even indirectly, are prohibited. They construe this provision as a prohibition directed solely against payments (*Zahlungsverbot*) and not against trading (*Handelsverbot*). Actually, however, the various decrees of the Reich Minister of Economics emphasize the far-reaching importance of that statutory prohibition,²⁷ insofar as the German Trading with the Enemy Act has not adopted the test of enemies in the territorial sense, but regards as enemies all nationals of enemy states regardless of their domicile, and all enemy-controlled corporations, even those established in neutral countries.²⁸ Sec. 5 (1) of the German Trading with the Enemy Act is not confined to a prohibition of payments to enemy countries such as existed under German Proclamations during the First World War.²⁹ Now no payment can be made "directly or indirectly on behalf of enemies abroad," not even to enemy nationals in neutral countries—enemies within the meaning of sec. 3 (1) of the German Trading with the Enemy Act. But sec. 9 provides for a general prohibition of disposal of enemy property in Germany, unless licensed under the German Foreign Exchange Law.³⁰ Under that rule, payments had been permitted without license to residents of Germany (*Deviseninlaender*); in

²⁶ Hefermehl, *Das feindliche Vermoegen*, (1940) 10 Deutsches Recht 1217, 1220; Kegel-Rupp-Zweigert, *Die Einwirkung des Krieges auf Vertraege* (Berlin 1941) p. 3, 23.

²⁷ Circulars of the German Foreign Exchange Control Agencies, *Devisen-Archiv* 1940, col. 144, referred to in C.C.H.W.L.S.F.S. ¶66055.

²⁸ Cf. Korth, *Zahlungen des Auslaenders*, (1940) 10 Deutsches Recht 952.

²⁹ See Gathings, *supra* n. 13, at p. 52.

³⁰ Reichsgesetzblatt 1938 I, 1733.

other words, for purposes of foreign exchange control, individuals and corporations were treated as residents and not as foreigners irrespective of their nationality, whereas even German nationals domiciled abroad were treated as foreigners (*Devisenauslaender*), in connection with any transaction involving foreign exchange.

In the foreign exchange restrictions introduced at the beginning of this war by the United Kingdom³¹ and France,³² whose laws did not previously provide for any such control, the furtherance of the concept of economic warfare is notably absent. In a rather conservative manner, the measures then adopted in these countries tended rather to prohibit undesirable capital exports than to wage economic war against Germany, their only military adversary at the time. Moreover, the new statutes in both countries expressly provided for the performance of obligations of domestic debtors to be discharged abroad insofar as they were concerned with prewar obligations. This attitude of British and French wartime legislation on foreign funds control deserves emphasis because it indicates that foreign exchange restrictions need not *per se* be a weapon of economic warfare.

Foreign funds control in the United States contrasts with the British and French statutes. Desiring to prevent the invader of European countries from exploiting conquered assets abroad, it was necessary to resort to a weapon of economic warfare such as that created in the freezing regulations. This weapon was first used as an instrument

³¹ See Mann, *Exchange Restrictions in England*, (1940) 3 Modern L. Rev. 202; cf. now The Regulation of Payments (Consolidation) Order, 1943, January 25, 1943, S. R. & O. No. 119.

³² Decrees of September 9, 1939, Journ. Off. p. 11266, 11271, April 24, May 20, as modified June 23, 1940, Journ. Off. p. 3206, 3774, 3977, 4462B; Act of February 8, 1941, modified May 3 and 5, 1941, Journ. Off. p. 855, 1903, 2180.

to counteract looting practices and only later became an aggressive weapon of economic warfare.

Germany, in her carefully designed policy of exploiting invaded countries, may not have been prepared for this countermeasure of the freezing regulations. She may not have assumed that the United States, then not at war with Germany, would find ways and means to protect the interests of owners of such assets who had put their faith in the security and integrity of this country.

Regard to their "confidence in our strength, integrity and sense of fairness"³³ does not, of course, entail immunity of property located in this country from measures which are deemed useful now and may be deemed indispensable later. In this connection a statement by the Department of State in 1933,³⁴ in reply to an American citizen in New York, may be mentioned. While regretting that he was prevented by German foreign exchange restrictions from receiving interest payments on a trust fund in Berlin, it said: "It must be remembered that investments or funds within the jurisdiction of a foreign country are subject to the laws of that country. In the absence of specific treaty provisions to the contrary, there is no way in which a private person may secure immunity from the local law for his investments or property held within the jurisdiction of a particular state."

In spite of the freezing regulations of this country, the corresponding measures established by the British Commonwealth, and the special legislation of the governments-in-exile (see Chapter XXI), all of which aimed at preventing Axis powers from benefiting abroad by their conquests, further measures were effectuated to exploit and

³³ Brief of United States of America as *amicus curiae*, p. 5, in the Polish Relief case, *supra*, Chapter XIX, n. 51.

³⁴ Hackworth, *Digest of International Law* vol. II (1941) p. 71.

loot the invaded countries. Additional counter-measures were thereupon taken in this country under the Trading with the Enemy Act and the regulations issued thereunder, namely,

- 1) Restrictions on the movement of securities of looted countries into this country;
- 2) Restrictions on the free importation of currency, especially American dollars from abroad;
- 3) Counter-measures against the possibility of a black market in frozen dollars funds.

Even at the inception of the freezing regulations on April 10, 1940, it became evident that the German invaders would not be content merely to liquidate the assets abroad of the invaded countries. Efforts, therefore, would have to be made to prevent securities within the invaded countries from being disposed of by the conqueror. Though Exec. Order No. 8389 was deemed to cover securities, it appeared doubtful whether the Trading with the Enemy Act, as amended, upon which the Order was based, granted sufficient authority for an extension of control to securities. By General Ruling No. 2³⁵ the Act was immediately interpreted to give such authority. This interpretation was confirmed by Congressional amendment of sec. 5 (b) of the Trading with the Enemy Act, of May 7, 1940.³⁶ Furthermore, General Ruling No. 3³⁷ prohibited any dealings in securities registered in the name of a national of a blocked country. This was done in order to prevent any disposition of such securities in this country, with the legal appearance of a "legitimate" title, which the invader was believed trying to obtain by either compulsion, duress, or fraud. In order to prevent

³⁵ April 19, 1940, 5 Fed. Reg. 1474 (1940).

³⁶ 54 Stat. 179.

³⁷ 5 Fed. Reg. 2133 (1940), as amended, June 17, 1940, *ibid.* 2284.

the unlawful use of bearer securities, General Ruling No. 5³⁸ provided for the deposit in a Federal Reserve Bank of any securities entering this country, not only from blocked countries but from whatever place or origin.³⁹

These measures were supplemented⁴⁰ by a licensing system under a certification, Form TFEL-2, which is to be attached to securities showing such securities to be free from any blocked interest. Successful application of these measures was facilitated by the European practice of requiring tax stamps to be attached to all securities held and sold in these occupied countries. The United States was thus enabled to prohibit any dealing in such securities as bore tax stamps or evidence that stamps had been attached. With the promptness usual in the prosecution of economic war, the Germans in the occupied Netherlands as a counter-measure ordered all securities which did not bear any tax stamps to be reported; the purpose obviously was to use these securities for liquidation abroad.

When the Japanese invaded the Philippine Islands, similar measures were adopted through General Ruling No. 10 of January 10, 1942,⁴¹ to prevent the enemy invader from liquidating looted securities in occupied territory.

Another problem arising in this connection was how to prevent the Axis powers from utilizing foreign currency which they found in the conquered territories. Such currency, especially American dollars, could easily be used through neutral channels for the financing of subversive

³⁸ June 6, 1940, 5 Fed. Reg. 2159 (1940), as amended May 19, 1942, 7 Fed. Reg. 3770 (1942).

³⁹ General Ruling No. 6, August 8, 1940, 5 Fed. Reg. 2807 (1940); see General License No. 29, as amended November 6, 1942, 7 Fed. Reg. 9119 (1942); Public Circular No. 21, 8 Fed. Reg. 845 (1943).

⁴⁰ Administration of the Wartime Financial and Property Controls of the United States Government (Treasury Department, December, 1942) p. 22.

⁴¹ 7 Fed. Reg. 305 (1941).

activities in this hemisphere. Therefore, General Ruling No. 6A⁴² and General Ruling No. 5, as amended,⁴³ subjected the importation of currency into the United States to severe restrictions. Corresponding measures were taken by other American Republics in order to make possible a common defense of this Hemisphere against the use of currency presumed to be looted.⁴⁴

Among the most important legal consequences of the regulations issued under the Trading with the Enemy Act, as amended, was their extraterritorial operation. Thus the acquisition by any person in the United States of any interest in any security is prohibited, if circumstances indicate that the security was located outside the United States.⁴⁵ Looted securities could not be purchased by residents of this country in neutral countries and there be retained for the benefit of the purchaser. Transactions which occurred not only within the territory of the United States, but also abroad to the detriment of this country were purported to be covered by General Ruling No. 12 of April 21, 1942.⁴⁶ This ruling made null and void any assignment or transfer of blocked funds, unless properly authorized by license of the Secretary of the Treasury. Sec. 3 of General Ruling No. 12 provides that an appropriate license, either before or after a transfer, completely validates the transfer and renders it enforceable "to the same extent as it would be valid or enforceable but for the provisions of

⁴² March 13, 1942, 7 Fed. Reg. 2083 (1942).

⁴³ Cf. Fed. Res. Bank of New York, Circulars No. 2434, May 19, 1942; Nos. 2449 and 2455, June 18 and 29, 1942; Nos. 2495 and 2553, September 2 and November 25, 1942.

⁴⁴ Chile, September 1, 1942 (*El Mercurio*, Santiago, September 2, 1942); Costa Rica, September 13, 1942 (*La Gaceta*, September 17, 1942); Ecuador, August 12, 1942 (*Registro Oficial*, August 17, 1942); El Salvador, October 22, 1942 (*Diario Oficial*, October 27, 1942). As to the special regulations with Mexico, see General Ruling No. 14, August 14, 1942, 7 Fed. Reg. 6417 (1942), General License No. 85, April 13, 1943, 8 Fed. Reg. 4877 (1943).

⁴⁵ Administration, *supra* n. 40, at p. 23.

⁴⁶ 7 Fed. Reg. 2991 (1942).

Sec. 5 (b) of the Trading with the Enemy Act, as amended, and orders, regulations, instructions, and rulings thereunder." In other words, if an assignment was invalid regardless of the freezing regulations, because of its not being properly executed, or because it did not comply with the legal rules applicable to assignments of claims with a situs abroad,⁴⁷ the license of the Treasury Department does not intend to remedy such invalidity.

Its far-reaching importance was especially emphasized in the Brief of the Government as *amicus curiae* in the *Polish Relief* case,⁴⁸ where the constitutionality of Exec. Order No. 8389, as amended, was examined, with special reference to the Gold Clause cases of 1935⁴⁹ and the Multiple Currency cases of 1939.⁵⁰

Invalidation of any assignments of claims to blocked assets, unless later authorized by a license of the Treasury Department, was particularly imperative in order to destroy any black market for blocked assets in neutral countries. It may be assumed that Axis authorities would otherwise be able to acquire important claims to assets in this country by using duress or various means of "legal" acquisition in the invaded countries to have such claims transferred to persons under their control. To trace these "legal" practices in all their complicated details, along the lines of the municipal law of the invaded countries, is one of the important tasks in any effort at a post-war settlement of legal questions of international character.⁵¹ A careful

⁴⁷ Cf. Note, *Extraterritorial Effect of Foreign Decrees and Seizures*, (1940) 22 U. of Pa. L. Rev. 983.

⁴⁸ Brief, *supra* n. 33, at p. 15. As to related questions, namely the extraterritorial operation of the British regulations, see Howard, *The Defence (Finance) Regulations*, 1939 (1942) p. 3.

⁴⁹ *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240; *Nortz v. United States*, *ibid.* 317; *Perry v. United States*, *ibid.* 330.

⁵⁰ *Guaranty Trust Co. v. Henwood*, 307 U. S. 247; *Bethlehem Steel Co. v. Zurich Ins. Co.*, *ibid.* 265.

⁵¹ Cf., as an example for the judicial review of the German looting practice

legal documentation and economic analysis⁵² of what happened in the industrial and financial life of territories controlled and occupied by Axis powers cannot be undertaken too early.

The Treasury Department is fully aware of the purposes and operations of black market trading in blocked assets.⁵³ "This neutral black market operation should be designed to give the Axis immediate returns on blocked assets even though the Axis could not get such assets out from under our freezing regulations. In this case the assets would be assigned or otherwise transferred to neutral speculators at heavy discount in order that the Axis could obtain credit now to buy goods and services in neutral countries and thus assist the war effort. Of course some of these black market operations would be for the obvious purpose of lining the pockets of Axis officialdom as insurance against the day when the Axis is crushed. Neutral speculators would either hold such assignments with the intent of salvaging on them after the war or in the hope of being able to squeeze the blocked assets through the freezing control by one trick or another."

A further problem arises out of the existence of so-called "Dutch Certificates" of American corporations. Shares of these corporations are deposited with a Dutch trust company which issued certificates and exercised the rights arising out of the American shares on behalf of the holders of the Dutch certificates. The American shares

in the First World War, *Societe Anonyme de Charbonnage Frederic Henri v. Etat Allemand*, Mixed French-German Tribunal, September 30, 1921, (1922) 1 Recueil des Decisions des Tribunaux Arbitraux Mixtes 422.

⁵² See Reveille, *The Spoil of Europe. The Nazi Technique in Political and Economic Conquest* (New York 1941); Hediger, *Nazi Exploitation of Occupied Europe*, (1942) 18 Foreign Policy Reports 66, *Nazi Economic Imperialism*, *ibid.* 138; The Penetration of German Capital in Europe, Statement No. V of the United Nations Information Committee in London (December 30, 1942).

⁵³ Fed. Res. Bank of New York, Circular 2420, April 21, 1942.

are generally held in this country, in a banking account in the name of the Dutch trustee. After the invasion of the Netherlands the German occupying authorities prevented all Dutch corporations from making any transfer of stock or disbursement of dividends to persons entitled thereto, especially when such persons were not residing in the occupied territory. American holders of Dutch certificates were thus prevented from enjoying any right, but the proof of non-enemy ownership of such certificates under Form TFEL of the Treasury Department facilitates proceedings to have the Dutch certificates exchanged for American certificates and payment of dividends made to such holders.⁵⁴

Out of the application of General Ruling No. 12 controversies may arise in the future if and when claims concerning blocked accounts in this country are to be settled. Such disputes may result from assignments which are claimed to be fictitiously dated prior to the effective date of Exec. Order No. 8389, as amended, or which are refused recognition because no apparent notice was given to the debtor. Though General Ruling No. 12A, February 9, 1943,⁵⁵ facilitates transfers which do not by misrepresentation or fraud violate the purposes of the freezing regulations, precautions are necessary to prevent blocked assets in this country from being used later, at the end of the war, for Axis interests which may then be disguised in neutral claims and business interests.

General Ruling No. 12 poses the question whether and to what extent the Trading with the Enemy legislation and the orders issued thereunder, especially the freezing regulations, may operate extraterritorially.

The Government in its Brief in the *Polish Relief* case

⁵⁴ Cf. *Steinhart v. American Enka Corporation, Kuhn, Loeb & Co., and Nederlandsch Administratie-en Trustkantoor*, N. Y. Supreme Court, County, No. 29798—1940.

⁵⁵ 8 Fed. Reg. 1833 (1943).

refers (at p. 27) to the words "any person within the United States" in sec. 5 (b) of the Trading with the Enemy Acts, as intending "only to indicate that procedurally the powers of the President would be directed against persons subject to the jurisdiction of the United States." This interpretation may also be supported by *Uebersee Finanz-Korporation A. G. v. Rosen*.⁵⁶ Here, a Swiss corporation doing no business in the United States, unsuccessfully challenged the denial of a license to export gold from this country. It was held that the Presidential power to prohibit the "export" of gold, under sec. 5 (b) of the Trading with the Enemy Act, as amended, by any person within the United States "justified the denial of a license inasmuch as such 'foreign owner' would be obliged either to come here in order to obtain delivery of his gold or to act through an agent 'within' the United States."⁵⁷ The Government in its aforementioned Brief added (at p. 28) that "any transfer of blocked property made outside the United States could be effectual only when implemented by action of a person 'within the jurisdiction of the United States.'"⁵⁸ It may further be assumed that any unlicensed transfer of title abroad of blocked property would fall under the "evasion clause," sec. 1 F of Exec. Order No. 8389, as a transaction having the purpose or effect of evading the prohibitions of the Order in the United States.⁵⁹

This restriction, "within the jurisdiction of the United States," does not at all hinder the Administration from preventing detrimental effects of transactions made abroad. Said the Treasury Department:⁶⁰ "Persons outside the

⁵⁶ 83 F. (2d) 225 (C. C. A. 2d, 1936), *cert. den.* 298 U. S. 679 (1936).

⁵⁷ Cf. *British American Tobacco Co. v. Federal Reserve Bank*, 104 F. (2d) 652, 105 F. (2d) 935, *cert. den.* 308 U. S. 600 (1939).

⁵⁸ For fuller discussion see Freutel, *supra* n. 1, at p. 67.

⁵⁹ As to the detection of cloaking transactions, see Administration, *supra* n. 40, at p. 19.

⁶⁰ *Ibid.* p. 7.

United States who have accounts or other property within the United States may have similar enforcement measures applied against their property. While it is not possible directly to control the actions of individuals outside of the United States, it is possible to penalize them heavily for activities considered to be a hindrance to the prosecution of the war by refusing to license the use of their funds or the operation of their properties in this country, and, in extreme cases, by vesting title to such property in the Government of the United States. Such persons may be declared to be enemy nationals. They are then excluded from the privilege of trading with the United States or even of receiving communications from persons in the United States with respect to their interests here."⁶¹

Nor is the restriction of General Ruling No. 12 as to assignments abroad altogether new. In *Schryver v. Sutherland*,⁶² a similar provision of sec. 7 (b) of the Trading with the Enemy Act, invalidating assignments of enemy property located in this country, was applied to an assignment which had been made in Amsterdam, then neutral territory, by German stockholders in an American corporation. In *Spitz v. Secretary of State of Canada*,⁶³ a case arising out of transactions in the last war but decided during this one, shares of a Canadian corporation were purchased in Amsterdam from a German bank by the claimant, a Czechoslovakian carrying on business in Switzerland. The Secretary of State of Canada, as Custodian of

⁶¹ The prohibition of the German foreign exchange legislation against (unlicensed) assignments was disregarded in decisions of the Swiss Federal Court, as 61 BGE II 242, 62 BGE II 108 (1936), commented on by Domke, (1938) 3 *Giurisprudenza Comparata di Diritto Internazionale Privato* 365.

⁶² 19 F. (2d) 688 (App. D. C. 1927), cert. den. 48 S. Ct. 84 (1927).

⁶³ (1939) 2 Dom. L. Rep. 546; (1939) Exchequer Court Rep. 162 (Canada Exchequer Court, February 20, 1939); Note, Annual Digest and Reports of Public International Law Cases Years 1938-1940 (1942) Case No. 210.

Alien Enemy Property, claimed possession or title to the shares, invoking Order 6 of the Canadian Consolidated Orders Respecting Trading with the Enemy, 1916, which prohibited any transfer by or on behalf of an enemy. Said the court: "There can be little room for doubt but that the purpose of the Trading with the Enemy Acts, enacted throughout the British Empire, and the United States, was to interdict all intercourses, commercial and non-commercial, with all enemy nationals, and to prohibit the doing of acts tending to the financial benefit of such nationals, and judicial decisions during the war show that the guiding principle was the destruction of the credit and trade of the enemy, to prevent his power of resistance being increased, and to ensure that the property of the enemy, tangible and intangible, through governmental agencies, could not be used as the basis of credit in foreign countries by the enemy owner, or by his Government. . . . One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment, and the conditions prevailing at the time.' In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside." As to the specific question of the extraterritorial operation of the Canadian Order, the court said: "The Order, I have no doubt, when drafted had clearly in mind the case where the transfer would be made outside of Canada, and probably that was in mind more than anything else, as it would be the thing most likely to occur in the circumstances of the time."

While freezing regulations may have a restricted extraterritorial effect as to assignments abroad, they apply only to funds within the United States. This is the decisive factor distinguishing this kind of legislation from foreign exchange restriction as introduced by other countries, es-

pecially Germany. An American author,⁶⁴ however, recently expressed the fear that the freezing regulations might be urged as a defense to an action before a foreign court, to the detriment of American interests. "A blocked national whose funds in an American bank are frozen might sue the bank in a foreign court for its refusal to make payment from blocked funds. Or an American firm might be sued for failure to transfer funds to a blocked country under a contract entered into before the freezing orders were issued."

But such a contingency seems wholly improbable. Recognition of the war legislation of the United States will hardly be denied by a country allied with the United States in the common effort against the enemy, even if the courts of that country, like the English courts,⁶⁵ ordinarily refuse to recognize the effect abroad of foreign laws imposing foreign exchange restrictions. An example of this attitude may already be found in the English case of *Lorentzen v. Lyddon & Co.*,⁶⁶ where an order of the Norwegian government-in-exile was recognized in its effect on assets located in England.

As to neutral countries, the same author suggests that Swiss courts may refuse to recognize the freezing regulations, thus failing to distinguish between American and German exchange legislation. He gives this example at p. 62: "A New York bank, with whom frozen funds are deposited, has a branch in Switzerland. Nazi authorities induce the French owner of a frozen deposit to assign his rights to a Swiss citizen strawman and the latter, after an unsuccessful demand for payment, attaches Swiss assets of the bank and sues it in a Swiss court. The Swiss court refuses to recog-

⁶⁴ Freutel, *supra* n. 1, at p. 60.

⁶⁵ *Supra* n. 4.

⁶⁶ Discussed in Chapter XXI, n. 49.

nize the Order as an excuse for nonpayment, duress in connection with the assignment to the plaintiff cannot be proved, and therefore, judgment is rendered for the plaintiff who then obtains satisfaction out of the attached assets. The amount recovered directly or indirectly contributes to the Nazi war effort."

It is true that the Swiss courts vigorously refused to apply any foreign legislation which imposed restrictions upon payments to be made abroad and it is in Switzerland, to a greater degree than elsewhere, that the courts have recognized the character of such measures as economic weapons. For instance, in the case of the guarantee of German corporations for a loan of the Osram corporation⁶⁷ the Swiss Federal Court said, invoking Swiss public policy to deny application abroad to the German gold clause legislation: "Here the operation of *ordre public* . . . begins to produce results in a new and until now hardly apparent direction: it constitutes an instrument for the economic defense of the country, born of the necessities of the moment and directed against measures of force taken unilaterally by a foreign state to protect her own economic interests to the detriment of those of other nations."

But though this doctrine was repeatedly upheld by Swiss courts during this war with regard to German⁶⁸ and Hungarian⁶⁹ foreign exchange legislation, even in cases where no further contacts with the forum existed, it must be borne in mind that funds of American banks in Switzerland cannot, for most purposes, be attached. The Swiss

⁶⁷ *Journaliag v. Siemens & Halske Aktiengesellschaft*, February 1, 1938, 64 BGE II 88 (quoting the present writer).

⁶⁸ *de Beer v. Universale Rueckversicherungs A. G.*, Appellate Court (Obergericht) Zuerich, September 13, 1940), 1941 *Blaetter fuer Zuercherische Rechtsprechung* No. 65 p. 165, Court of Cassation (Kassationsgericht) Zuerich, March 12, 1941, *ibid.* p. 173.

⁶⁹ *Commercial Court (Handelsgericht) Zuerich*, December 20, 1940, (1941) 38 *Schweiz. Juristenzeitung* 33.

executive, the Federal Council, by a decree of October 24, 1939,⁷⁰ prohibited any attachment of assets located in Switzerland unless the creditor is domiciled in Switzerland and the claim has not been transferred to him with the purpose of evading the prohibition of the decree (*zum Zwecke der Umgehung*). Sec. 2 of the decree further provided that any attachment of property of foreign states which is otherwise possible under Swiss law⁷¹ shall henceforth be void unless previously agreed to by the Swiss Federal Council.

This measure of the Swiss Government, taken under a decree of August 30, 1939, relating to Measures for the Protection of the Country and for the Maintenance of the Neutrality,⁷² may serve to dissipate fears that the freezing regulations of this country may be circumvented under the protection of Swiss courts. The measure corresponds in some respects to a ruling that the Government of the United States recently issued under the authority of sec. 5 (b) of the Trading with the Enemy Act, as amended, by the First War Powers Act, 1941.

General Ruling No. 15 of February 4, 1943,⁷³ bars all legal and other proceedings which might interfere with the free and unrestricted use and operation of Mexican railroad equipment within the United States. This measure is intended to remove the bottleneck in the transportation of materials from Mexico to this country due to the Mexican Government's fears of possible seizures of railroad equipment by creditors. The immunity of all Mexican railroad property within this country from any claims, unless legal proceedings are licensed, is justified as a war-

⁷⁰ Eidgenoessische Gesetzessammlung, vol. 55, p. 1296.

⁷¹ Cf. Kohli, *Die Schuldbeitreibung gegen fremde Staaten*, (1932) 68 *Zeitschrift des Bernischen Juristenvereins* 49, 97.

⁷² Eidgenoessische Gesetzessammlung, vol. 55, p. 769.

⁷³ 8 Fed. Reg. 1674 (1943).

time measure. It was pointed out⁷⁴ "that since this property would not otherwise be brought into the United States, the general ruling works no hardship on American creditors." This measure prohibits not only attachments (like the Swiss decree) but any "judicial process against or with respect to Mexican railroad property." Also, as a measure of war against the common enemies of this country and Mexico, it affects not only foreign creditors (see sec. 1 of the Swiss decree), but all others as well.

In discussing the extraterritorial effect of foreign exchange restrictions it is important to determine what legal character may be attributed to such measures. In any event, measures taken in enemy countries, or in territories occupied or controlled by the enemy, cannot be recognized at all in other countries, especially in cases where these restrictions look toward their application abroad. The element of economic warfare which is disguised in foreign exchange measures, as brought out in the Memorandum of this Government as *amicus curiae* in the *Werfel* case, before the United States entered the war, becomes even more pronounced in cases where the influence of occupation authorities is apparent in the decrees of European countries.

This is especially true of the French measures imposing restrictions on assets abroad, insofar as values located in this country are concerned. When France at the beginning of this war, in September, 1939, enacted legislation which prohibited capital exports and put restrictions on foreign currency movements,⁷⁵ she was fully aware of the usefulness of her nationals' assets abroad for the prosecution of the war. For that reason she did not withdraw such assets, which helps to explain why French assets in this country

⁷⁴ Fed. Res. Bank of New York Circular 2581, February 4, 1943.

⁷⁵ *Supra* n. 32.

now frozen are especially large. A recent estimate⁷⁶ of blocked French funds in this country, in public and private ownership, amounted to \$1,594,000,000.

France, in concluding the armistice with Germany on June 22, 1940, may not have anticipated that one provision in the Armistice Convention could aid the conqueror to benefit not only from assets in metropolitan France, but from assets abroad as well. Sec. 17 of the Convention⁷⁷ provided that the French (Vichy) Government was obliged to prevent any transfer of economic assets (*Wirtschaftliche Werte und Vorräte*) from the occupied to the non-occupied territory or *abroad*.

Property situated in the zone then occupied could not be disposed of without the consent of the German authorities. These authorities by special measures blocked all accounts listed in the bank books, without regard to whether the assets were in the occupied territory or not. The question whether the Armistice Convention and the regulations issued by the German authorities applied to assets located in the then unoccupied zone was widely discussed before French courts when refugees from the occupied zone, especially from Alsace and Lorraine, tried to obtain these assets.⁷⁸ What is more interesting and directly related to the subject matter of this book is the contention of the German authorities that all assets of French banks having their principal place of business in the occupied zone were blocked even when such assets were located in the United States, deposited here with American banking institutions on behalf of the French banks. The Vichy authorities, long before the complete occupation of continental France, followed these "suggestions" of the Ger-

⁷⁶ Krock, *The Frozen Wealth of France*, N. Y. Times, February 3, 1943.

⁷⁷ Cf. Domke, *Problems of French Jurisprudence 1939-1941*, (1942) 36 Am. J. Int. L. 2, at p. 34.

⁷⁸ *Ibid.* p. 35, n. 41-43.

man authorities in assuming that the situs of assets is the domicile of the French bank, then in occupied France, and hence subject to the provision of sec. 17 of the Armistice Convention which prevented the transfer abroad of assets from the occupied territory. In other words, French banks were ordered to instruct American banking institutions, and banks in other countries as well where important French assets were located, such as Switzerland and the Argentine, that they were not to deliver securities to customers even when those customers resided in these countries and could prove their proprietary rights to the securities.^{78a}

It is not always easy to discover measures of economic warfare in the alleged restrictions of French law. The fact that all assets of French banks in this country are frozen and that securities belonging even to residents of this country cannot be withdrawn without appropriate license of the Treasury Department, has no relation to the pretended requirement of a *French* authorization for such withdrawal.⁷⁹

In *Bercholz v. Guaranty Trust Co. of New York*⁸⁰ the plaintiff demanded delivery of certain securities admittedly belonging to him and in the defendant's possession. The defendant contended that they were "technically at least, located in its office in Vichy, France," and subject to certain French decrees forbidding their transfer without authorization of the French Exchange Office. As in the *Werfel* case,⁸¹ the court denied motion for summary judgment on the ground that foreign law must be proved. But

^{78a} Cf., generally, Domke, *Basic Questions of Conflict of Laws Before the French Cour de Cassation, 1938-1941*, (1943) 5 U. of Toronto L. J. 95, 98.

⁷⁹ Cf. *Stern v. Newton*, 39 N. Y. S. (2d) 593 (February 5, 1943), and cases cited Chapter XIV, n. 64.

⁸⁰ N. Y. L. J. January 13, 1943, p. 238; March 3, 1943, p. 849.

⁸¹ *Supra* n. 18; cf. *Farhi v. Guaranty Trust Co. of New York*, N. Y. L. J. February 27, 1943, p. 794.

in *Schnabel v. Rothschild Frères*,⁸² where defendant invoked the laws of the French Republic preventing them from paying the sums due to plaintiff, the court granted motion for summary judgment and said: "The defendant has on deposit in a bank in this city sufficient funds to pay plaintiff. At the time of the transaction and at the time the funds were deposited here there were no restrictive laws and such restrictive laws cannot be held to apply."

So, too, in *Beretz v. French American Banking Corporation, Comptoir National d'Escompte de Paris, Interpleader*,⁸³ where the New York bank made no claim to securities held in custody accounts and claimed by "refugee" residents of this country as their property, summary judgment was granted to recover such property. In this case the French bank contended first, that delivery of the securities was impossible because of the French decrees prohibiting exportation of capital, and, later, that securities located in the United States could not be delivered to the owners, since no permission (of the French authorities) could be obtained.

Similar Belgian restrictions were considered in *Rubensohn v. Guaranty Trust Company of New York*.⁸⁴ There, Belgian decrees forbade the Brussels branch of the defendant to instruct or authorize any delivery of securities belonging to the plaintiff without authorization of the Belgian authorities. The court held in favor of the plaintiff: "The claim that these securities may not be transferred without authorization from the government in control of Belgium is insufficient to affect plaintiff's rights. The fact is that these securities had already been delivered to the defendant in New York and are now in its possession." In

⁸² N. Y. L. J. January 13, 1942, p. 174.

⁸³ N. Y. L. J. October 20, 1942, p. 1099.

⁸⁴ N. Y. L. J. May 6, 1942, p. 1920.

Oczwarow v. Banque de Crédit Commercial, S. A.,⁸⁵ the parties had agreed that withdrawals from a banking account should be made only at the office of the defendant in Antwerp, Belgium. However, prior to the occupation of Belgium by Germany, such a withdrawal in favor of persons outside Belgium could only be made with a license of the Belgian Government, and after the occupation the funds were blocked by an ordinance of the occupying power. As the plaintiff had attached sufficient funds belonging to the Belgian bank now in deposit with a New York bank and issues were presented which required a trial, the court held that "the interests of justice require the granting of defendant's application for a stay."⁸⁶

On a similar provision of the Swiss law, to the effect that a Swiss bank cannot deliver securities located in New York without authorization of the Swiss Government, it was said in *International Investment Co. S. A. v. Swiss Bank Corporation*:⁸⁷ "As our courts do not give effect to the penal laws or decrees of foreign states or countries, the defense is insufficient."⁸⁸

In the early stage of the freezing regulations the blocking of accounts gave rise to another legal question, namely, whether payment into a blocked account is to be regarded as sufficient performance of a contract. This question was decided in the affirmative in *Herzfeld v. National City Bank of New York*.⁸⁹ The contract in this instance related to shipments of rugs from Belgium. The New York bank was charged with the delivery of the shipping documents

⁸⁵ N. Y. L. J. June 1, 1942, p. 2323.

⁸⁶ Cf. *van der Veen v. Amsterdamsche Bank*, 178 Misc. 668, 35 N. Y. S. (2d) 945 (June 22, 1942), *aff'd* 262 App. Div. 989 (October 3, 1942).

⁸⁷ N. Y. L. J. August 15, 1942, p. 355.

⁸⁸ See *Bollack v. Societe Generale*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (March 27, 1942).

⁸⁹ N. Y. L. J. January 10, 1941, p. 143 (Municipal Ct., City of New York, December 20, 1940).

against payment in Belgian currency. When the shipments arrived in New York on May 22, 1940, Belgium had been declared a foreign blocked country since May 10, 1940.⁹⁰ The question was whether the offer by the plaintiff of Belgian currency together with a license permitting the payment into the account of the Belgian creditor was a sufficient tender of payment to entitle the plaintiff to obtain possession of the documents. The defendant referred to cases where German obligors who had undertaken to pay dollars in the United States, especially for the service of their dollar loans, unsuccessfully asserted as a defense in the courts of this country that the German Foreign Exchange Law directed them to pay the amount due in Reichsmarks into a blocked account with the Conversion Office for German Foreign Debts.⁹¹ The court distinguished these cases on the ground that "there was a refusal to pay the kind of currency prescribed by the contract, and the excuse offered for such refusal was held to be without merits. Here there was tender of payment of the kind of currency called for by the contract, and by the demand of the defendant on the plaintiff in accordance with its instructions from the vendor." The court further said: "It is only with respect to the use of such Belgian currency after it has been paid to the defendant as the agent of the Belgian national that any restrictions can be said to be imposed. The payment in Belgian francs, as called for by the contract, is neither prohibited nor restricted. It is expressly permitted by the license."

The legal effects and international consequences of blocking assets of foreign creditors have not yet been reviewed, so far as is known. There is little likelihood that

⁹⁰ 5 Fed. Reg. 1696 (1940).

⁹¹ Cf. *Deutsch v. Gutehoffnungshuette*, 168 Misc. 872, 6 N. Y. S. (2d) 319 (1938); *Barnes v. United Steel Works Corp'n*, 11 N. Y. S. (2d) 161 (1939), commented on by Domke, (1939) 6 *Nouv. Revue Dr. Int. Pr.* 281.

such questions will be considered in courts during the war. This is due not only to the difficulty of communications, but also to the fact that so many Axis-controlled or occupied countries have been declared enemy territory in the Trading with the Enemy Acts and regulations issued thereunder of the countries at war with the Axis. But litigation of this kind will certainly arise at the end of the war. Even if it is assumed that many basic issues will be settled by international agreements, many problems will remain to be discussed concerning claims between individuals and corporations, in national courts, international or mixed tribunals, or arbitral proceedings.

Such questions may become important even now when assets are available to creditors of their owners, by special license under the freezing regulations, or later under a general international settlement of payments. Assets of blocked nationals may then serve for the performance of obligations which arose out of actions in European countries and in European currencies. What amounts in dollars are to be paid in this country for claims which arose at different times and in various countries? The question of recomputing devaluated European currencies, especially those intentionally affected by the costs of military occupation, poses problems for parties in this country. English courts discussed this question during this war in *Graumann v. Treitel*,⁹² a case concerning an agreement by German nationals, made in Berlin, to pay Reichsmarks in Berlin. Both parties later emigrated to England and the creditor subsequently succeeded before the English courts in having the amount due in Reichsmarks in Berlin computed in Pounds sterling at the official rate of exchange, although the Reichsmarks due in Berlin had a much lower value

⁹² (1940) 2 All E. R. 188, 162 T. L. R. 383 (K. B., March 1, 1940); critical Note by Kahn-Freund, (1940) 4 Modern L. Rev. 148.

because of the restrictions upon their use. The decision was followed by the same court in *Ginsberg v. Canadian Pacific Steamships, Ltd.*⁹³

In this country,⁹⁴ the question was dealt with in similar fashion in cases concerning assets of debtors which were blocked under the freezing regulations. The rate of exchange for debts once contracted in Czechoslovakian or Austrian crowns was computed at the old official rate of exchange in *Buxbaum v. Assicurazioni Generali* and *Kaplan v. Assicurazioni Generali*,⁹⁵ concerning life insurance policies,⁹⁶ and in *Sabl v. Laenderbank*,⁹⁷ concerning salary claims.

It may be recalled that the numerous lawsuits in New York in which refugees claimed the dollar amounts of ship passages which could not be used by the prospective passengers due to wartime conditions,⁹⁸ bear no direct relation to the question here discussed under the freezing regulations. Although the computation of foreign currency in dollars is also considered in these suits, the principal question concerns the applicability abroad of foreign exchange measures as part of the peace-time legislation under which such contracts were concluded.⁹⁹

War measures taken under the Trading with the Enemy Act have restricted or prohibited the importation of dollar notes into this country, unless authorized by special license. This does not at all change the attitude which courts have

⁹³ 66 Lloyd's List L. R. 206 (K. B., March 18, 1940).

⁹⁴ Cf. *Katz v. Fischel*, 21 N. Y. S. (2d) 572 (First Dep't, June 28, 1940); *Schwab v. Kirby*, 21 N. Y. S. (2d) 991 (July 16, 1940).

⁹⁵ 34 N. Y. S. (2d) 115, 480 (March 31, 1942), aff'd without opinion 264 App. Div. 855 (June 23, 1942); as to values of foreign moneys, see 8 Fed. Reg. 589 (1943).

⁹⁶ Cf. *Warisch v. Basler Lebens-Versicherungs-Gesellschaft in Basel, Kleve v. Basler*, N. Y. L. J. August 6 and 19, p. 285, 379.

⁹⁷ 34 N. Y. S. (2d) 764 (March 5, 1942).

⁹⁸ See the cases cited by Freutel, *supra* n. 1, at p. 52, n. 93-99.

⁹⁹ Cf. Moore, *Conflict of Laws: Foreign Exchange: Blocked Marks*, (1942) 27 Corn. L. Q. 267.

taken with regard to bank notes, the circulation of which abroad is possible only at a lower rate. The entirely different value of a national currency, at home and abroad, is a phenomenon often caused by foreign exchange regulations and only accentuated by the prohibition to import banknotes.¹⁰⁰ While in countries with long practice of foreign exchange restrictions such a prohibition served to foster the national currency, the foreign exchange control of the United States is obviously of a very different character, namely, to prevent the Axis powers from utilizing foreign banknotes looted in invaded countries. Any other protection of the American currency is not intended or contemplated by such prohibition of importation.

At any rate, even formerly, legal consequences abroad of the different value of banknotes were not recognized.¹⁰¹ Thus, French courts¹⁰² allowed debts payable in Germany or Italy to be discharged with banknotes which could be acquired abroad at a considerable discount of the nominal value; and even a German court¹⁰³ refused to discriminate

¹⁰⁰ Legal questions arising out of such use of banknotes abroad are discussed by Domke, *Quelques questions de la pratique du droit monetaire prive*, (1938) 4 *Etudes Pratique de Droit Commercial* 298, 305, and *Le Controle des Changes en Matiere de Conflict de Lois*, (1939) 25 *Rev. Trim. Inst. Belge de Droit Compare* 1, 9; see, generally, Freund, *Blocked Currencies*, (1940) 4 *Modern L. Rev.* 148; Ciano, *The Pre-War "Black" Market for Foreign Bank Notes*, (1941) 8 *Economica* (London) 378.

¹⁰¹ This question has no bearing upon another regarding foreign holders of banknotes who claimed the revaluation of German banknotes because of the change of German currency laws; see *Salzmann v. Deutsche Reichsbank*, Supreme Court, June 2, 1939, *Nederlandsche Jurisprudentie* 1939, n. 920; *Bull. Inst. Jur. Int.* 1941 p. 55, no. 10948; *Vaghi v. Deutsche Reichsbank*, Court of Cassation, February 28, 1939, (1939) 91 *Giurisprudenza Italiana* I, 1 p. 446; transl. in *Annual Digest and Reports of Public International Law Cases, Years 1938-1940* (1942), Case No. 56, p. 153.

¹⁰² Cf. the decisions cited by Domke, *supra* n. 1, at p. 61; *Romboutz v. Soc. Zeiss-Ikon*, Civil Court of the Seine, March 10, 1939, *Rec. Gaz. Pal.* 1939 I, 925; *Bodenheimer v. Levy-Falk*, Appellate Court of Colmar, December 9, 1938, (1939) 20 *Rev. Jur. Alsace-Lorraine* 207. Cf. *Pymont Ltd. v. Schott*, (1939) A. C. 145, (1938) 4 *All E. R.* 713 (P. C., December 1, 1938), commented on by Menard, (1939) 34 *Revue Critique Dr. Int.* 294.

¹⁰³ Court of Appeal Karlsruhe, September 26, 1940, (1941) 11 *Deutsches Recht* p. 209 n. 16, commented on by Hensel.

against German banknotes which were used in Holland for the performance of an obligation payable in Reichsmarks.

Recently the Privy Council (Judicial Committee) in *Marrache v. Ashton*, *Marrache v. Onos*,¹⁰⁴ was confronted with a related question, namely, the performance of a contractual obligation to deliver Spanish pesetas in Gibraltar. A decree of the Spanish Government of November 24, 1938, made it "an offense of monetary contraband" to export from or import into Spain *inter alia* Bank of Spain peseta notes. In reversing a decision of the Supreme Court of Gibraltar of April 4, 1940, the Privy Council applied the rate of exchange prevailing at the Gibraltar market for Spanish peseta notes, which were legal tender in Spain but a commodity in a British possession. The Spanish embargo legislation¹⁰⁵ was thus held inoperative outside of the enacting country.

Still less will the American measures of economic warfare under the Trading with the Enemy Act, designed to prevent an influx of looted currency into this country and other American republics, have any discriminatory effect upon the use of dollar notes abroad. This would seem obvious in cases before American courts which are bound by the public policy of this country as expressed in federal measures. Nor could any discriminatory character of wartime measures legally influence the settlement of monetary questions later, before courts of other countries and before international tribunals.

The tendency manifest in many regulations and their

¹⁰⁴ 59 T. L. R. 142 (January 22, 1943).

¹⁰⁵ As to the Anglo-Spanish currency scheme, payments into the "Centro Fund" in Spain earmarked for English creditors, and the insurance against failure to receive payments from this fund, see *Meacock and the Northern Assurance Company, Ltd. v. Bryant & Co.*, (1942) 74 Lloyd's L. L. Rep. 53 (K. B., November 4, 1942).

application to litigations between individuals shows a shift from private law and conflict of laws to international law, guided by public policy as based on legislative authority, namely, the Trading with the Enemy Act, as amended.

21. Administration of National Assets Abroad by Governments-in-Exile.

TO COMPLETE the economic exploitation of invaded countries, the Axis powers, long before the outbreak of hostilities, prepared to use the assets abroad of these countries as one of the devices of economic warfare.

To prevent the benefits of such assets from reaching the invaders was the first purpose of the freezing regulations, which at the same time protected the real owners against any unlawful use of their property abroad. American banking institutions were also protected from possible adverse claims, which was all the more important, since the looting measures of the occupying authorities were couched in legal forms not immediately recognizable as measures of economic exploitation.

More and more these protective measures were developed to counterattack the Axis exploitation which took advantage of assets of the invaded countries. Indeed, the counter-measures were not restricted to the freezing regulations as enacted in this country. Other countries, too, prevented enemy exploitation of assets abroad.

In the United Kingdom, the occupied European countries were declared enemy countries, within the meaning of sec. 5 (1) of the Trading with the Enemy Act, "as under the sovereignty or in the occupation of a power with whom His Majesty was at war" as early as April 12, 1940 (Denmark); May 20, 1940 (Norway, the Netherlands, and Luxemburg); and May 31, 1940 (Belgium). Similarly, in Canada, resources of the Netherlands, Belgium and Lux-

emburg were "placed under protective custody," May 11, 1940.¹

In addition to the counter-measures by these countries under their own Trading with the Enemy Acts, and the freezing regulations of the United States before its entrance into this war, the governments-in-exile themselves aimed by legislative measures to prevent the occupying power from benefiting by assets which nationals of their countries have all over the world. The Trading with the Enemy Acts issued later by the governments-in-exile² could not prevent the use of looted securities by the invaders. Extraordinary measures appeared necessary to prevent the foreign resources of owners, individuals and corporations which remained domiciled in the occupied territory, from being used by the enemy. It must be borne in mind that numerous countries, especially where assets of Dutch, Belgian, and Norwegian individuals and corporations were located, had no freezing or similar regulations at all. It was, therefore, a very useful and necessary protective step taken especially by the Dutch and Norwegian governments, to vest title to assets located abroad of nationals in occupied territory in the exiled governments themselves.

Thus, the Royal Netherlands Government by a decree of May 24, 1940,³ provided that title to claims, under which term is included funds on deposit, stocks, bonds, and other securities belonging to individuals and corporations domiciled in the occupied Dutch territory and which are located outside of the Realm in Europe, shall be vested in the "State of the Netherlands as represented by the Royal

¹ P. C. 1936, Proclamations and Orders in Council, vol. 2 (1940) p. 86.

² Chapter I, n. 40, 41. See Note, *Protective Expropriatory Decrees of the Governments in Exile—Their Application in the United States*, (1941) 41 Col. L. Rev. 1072.

³ *Nederlandsche Staatscourant A*, May 30, 1940, No. 151; transl. Fed. Res. Bank of New York, Circular 2091, July 2, 1940.

Netherlands Government, temporarily resident in London and exercising its functions there." Article 1 (3) provides that the proprietary rights so acquired "shall only be exercised for the conservation of the rights of the former owner." Said the Dutch government-in-exile in a note of March 5, 1942, regarding the Preservation of Assets by the Netherlands Government:⁴ "Immediately continuing its struggle for freedom on the friendly British shore, the Government of the Netherlands lost no time in claiming title for the duration of the war to all balances and other property held abroad by its nationals and corporations exposed to enemy duress." The expression "for the duration" refers to article 5 of the decree, which provides: "Three months after the present emergency conditions shall in our judgment have ceased to exist restitution shall be made of the claims mentioned in article 1 to the former owners."

This Dutch decree vesting property outside the occupied territory in the government-in-exile applies to property belonging not only to Netherlands nationals, but to all "natural and legal persons domiciled in the Kingdom of the Netherlands." Article 2 of the decree, which exempts from the transfer of title the property of "Netherlands subjects or of subjects of powers not at war with the Kingdom" who on May 15, 1940, were domiciled outside of the occupied territory, has been interpreted⁵ "to avoid misunderstanding" to the effect "that these persons are persons who according to the law of the Netherlands are 'Nederlandsche onderdanen.'"⁶ However, this official interpretation refers only to the exemption of Dutch nationals in article 2 (1a). It does not alter, but on the contrary by implication confirms, the application of the vesting

⁴ Congr. Rec., Sen., March 18, 1942, p. 2744.

⁵ As to companies which had transferred their principal place of business to other territories of the Kingdom, see Chapter XIII.

⁶ *Nederlandsche Staatscourant A*, June 10, 1940, No. 152.

decree to claims of *all* individuals and corporations domiciled in the occupied territory of the Netherlands.

Furthermore, banks and brokers in this country who had received urgent and insistent requests from the occupied European territory for detailed statements and data concerning accounts which were held here for individuals and corporations domiciled in occupied territory were requested by the Dutch legation⁷ to refrain from complying with such requests for information.

The Norwegian government-in-exile took measures which in the same way aimed at preventing the invaders from using assets located abroad. That government, while still in Norwegian territory, was granted the power by special resolution of the Storting (Parliament) at Elverum on April 9, 1940, to issue all resolutions required to safeguard the interest of the state until such time as the Storting could be convoked again.⁸ Even before the government left Norway on June 7, 1940, and while the fight with the invaders was carried on in different parts of Norwegian territory, a decree was issued, April 22, 1940, relating to the monetary system and the Bank of Norway.⁹ Article 11 provided that holdings abroad of individuals and banks domiciled in areas occupied by military forces of the enemy were vested in the Bank of Norway on behalf of the state. The original holders would be entitled to compensation in Norwegian currency within three months after the liberation of the occupied territory. This measure not only prevented the enemy from benefiting by the assets abroad; it also empowered the government to use these assets for the successful prosecution of the war in the common struggle against the invader.

⁷ N. Y. Herald Tribune, January 29, 1941.

⁸ *Legislation in Exile: Norway*, (1942) 24 Jour. Comp. Leg. Int. L. 125.

⁹ Norsk Lovtidend No. 1, 1940, p. 21, transl. C.C.H.W.L.S.F.S. ||67704, as amended June 7, 1940, Norsk Lovtidend No. 2, 1940, p. 54.

A further measure, aimed at counteracting the looting of the invaded country by the German authorities, was enacted as early as May 18, 1940,¹⁰ in Trondjem, then unoccupied Norwegian territory. By this Provisional Order all vessels, having their port of registration in Norway, that were outside the occupied Norwegian territory and belonged to owners domiciled within said area, were declared requisitioned by the government, to whom the rights of ownership were simultaneously transferred. Sec. 4 provides that a Director of Shipping, as "curator," exercises the right of ownership to the exclusion of former owners of Norwegian ships to all assets outside the occupied territory. Article 5 of this decree provides: "Compensation for what has been taken over by the Government by virtue of the provisional order in council of April 22, 1940, or which is taken over by virtue of the present order in council shall be fixed in accordance with Norwegian law."

The Belgian government-in-exile also enacted measures which aimed to prevent the looting of assets abroad. It did not vest title to such assets in the government itself, as did the Dutch government-in-exile generally, and the Norwegian Government by the two orders in council mentioned above. Instead, by decree of February 27, 1941,¹¹ it created a Belgian Trading Committee (*Office Belge de Gestion et de Liquidation*). This committee administers assets or the proceeds thereof to which Belgian individuals and companies are entitled. Such assets, having been seized by foreign governments during this war, were meanwhile transferred to the Belgian government-in-exile. In a similar way "Commissions" instituted by the Trading with the Enemy Act of the Dutch government-in-exile of June 7,

¹⁰ Norsk Lovtidend No. 2, 1940, p. 40, transl. C.C.H.W.L.S.F.S. ||65449.

¹¹ Moniteur Belge, 1941, No. 10, May 6, 1941, p. 100.

1940,¹² exercise the rights in which individuals and corporations in the occupied territory are interested.

It cannot be stressed too often that these measures were necessary with respect to countries where freezing regulations were not enacted. Such countries as Switzerland, Sweden, Turkey, and some Latin American Republics (before their entrance into this war) might have been exposed, in many regards, to pressure by Axis influence in cases where assets located therein and belonging to owners in occupied territories were intended to be used in favor of the invaders. The enactments of the governments-in-exile whereby title to assets abroad was vested in themselves may have greatly helped debtors and banking institutions not to yield to such pressure. At least legal barriers were erected which created conflicting interests.¹³

The necessity of counter-measures against the economic war waged by the Axis powers renders such legislation as that of the governments-in-exile not only useful but highly justified. It concerns primarily their own nationals who remained in occupied territory; yet it does not apply to property of such nationals within the occupied territory but only to their property abroad, where no possibility exists for the occupying power to seize it without help from the country where such property is located. It protects the interests of the owners now in occupied territory to whom such property will be restored or compensation be paid.

Here we do not deal with the economic importance these measures may have. Neither do we deal with some conflicting interests which may arise at the end of the war when questions of public international law will come up.

¹² Staatsblad No. A 6, sec. 12(5), not modifying the provisions of the decree of May 24, 1940.

¹³ No court decisions of neutral countries other than the Swedish *Rigmore* case, *infra* n. 51, are known.

These decrees of the governments-in-exile involve also questions of private law and of conflict of laws that are of far-reaching interest. Such questions will not only come up at the time of any later settlement of international payments. Even now rights of individuals and corporations outside the occupied territories are affected by these measures. Such persons and corporations claim to be the proprietary owners of securities held under the name of banks in the occupied territory in deposit with banks in this country. Also creditors of individuals and corporations which are carrying on business in occupied territory try to attach and utilize assets of such corporations to which the governments-in-exile claim title. Here questions arise as to whether and to what extent the decrees of governments-in-exile preclude such claimants from any further prosecution of their rights.

There can be no doubt that these governments are the only legal representatives of the invaded nations whose final freedom they act to restore.¹⁴ Such a view by implication results from the fact that other nations refuse recognition to the occupation of countries by armed forces and to the measures of the occupying authorities, as far as such measures attempt to have effect abroad. Several decisions rendered during the war, both before and after the entrance of the United States into the conflict, which do not recognize any authority of the occupying powers in the invaded countries, are mentioned in Chapter XIV, n. 64, and XX, n. 80-88.

More affirmatively, these governments-in-exile have been recognized by diplomatic declarations as the only sovereign representatives of their countries. Thus, the

¹⁴ Brown, *Sovereignty in Exile*, (1941) 35 Am. J. Int. L. 666; Oppenheimer, *Governments and Authorities in Exile*, (1942) 36 *ibid.* 568; Landheer, *The Legal Status of the Netherlands*, (1943) 41 Mich. L. Rev. 644.

Government of the United States declared that it "continues to recognize as the Government of the Kingdom of the Netherlands the Royal Netherlands Government."¹⁵ Similarly in England, the Attorney General stated in the *Amand* case¹⁶ that the British Government recognizes the "Netherlands Queen and her government as exclusively competent to perform the legislative and administrative and other functions appertaining to the Sovereign and Government of the Netherlands," in the same way as the Norwegian Government is recognized as "the *de jure* government of the entire Kingdom of Norway" and that no other government is recognized "as either the *de jure* or the *de facto* government of Norway or any part thereof."¹⁷

This recognition of governments-in-exile as the representative of a foreign sovereign state is a political question which is to be determined by the Executive Branch of the Government and is not subject to judicial inquiry.¹⁸ However, it was said in *Sullivan v. State of Sao Paulo*:¹⁹ "The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, which no executive department of the government is constitutionally or practically equipped to discharge. . . . No executive action can deprive the court of jurisdiction—or even constitute evidence of rights in the property—except in so far as such rights depend on the settlement of 'political' questions, as on issues of sovereignty of a party or his assignor."

¹⁵ Letter from the Secretary of State to the Secretary of the Treasury, June 27, 1940, Fed. Res. Bank of New York, Circular No. 2091; see "Suggestion of Interest of the United States," *infra* n. 44. On the recognition of the Belgian, Greek, and Yugoslavian governments-in-exile, cf. the *Lubrafol*, *Moraitis*, and *Fields* cases, Chapter XIV, n. 40c, e; IV, n. 17; *infra* n. 26.

¹⁶ (1942) 1 All E. R. 236, at p. 240; *infra* n. 29.

¹⁷ *Lorentzen v. Lyddon & Co., Ltd.*, (1942) 58 T. L. R. 178; see *infra* n. 49.

¹⁸ *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137. For cases see Hackworth, *Digest of International Law*, vol. 1 (1940) p. 165.

¹⁹ 122 Fed. (2d) 355, 357 (C. C. A. 2d, August 4, 1941); see Notes, (1942) 15 So. Calif. L. Rev. 258, (1942) 41 Mich. L. Rev. 911.

Though such decrees may not be questioned in foreign courts, say, when property located in the country of the enacting government is concerned,²⁰ the question is presented in a different way in cases where property within the jurisdiction of the foreign forum is to be dealt with.

It is beyond the scope of this book to discuss at length such problems of international law as whether the constitutionality of foreign decrees may be questioned.²¹ Professor McNair²² is of the opinion, with respect to such decrees of governments-in-exile, that it will always be the task of courts to decide on the effects of acts of foreign sovereigns, even in countries as England, where the constitutionality of British Acts is not to be discussed in the courts. Says Professor McNair: "That it is both the right and duty of an English Court to inform itself, by evidence, as on a question of fact, as to the meaning and effect of a foreign statute or decree or judgment emanating from the Legislature, Executive or a Court, is abundantly clear."²³

It may well be that governments-in-exile cannot afford to subject such enactments to all the ordinary provisions of their constitutional law, because of the extraordinary war-time conditions in which they find themselves. This question does not arise with regard to the Norwegian decrees, which were authorized by a special resolution of the Norwegian Parliament (Storting at Elverum on April 9, 1940). It may arise, however, with regard to the Dutch decree of May 24, 1940, enacted without the concurrence of the legislative bodies (Generalstaaten), which was not available to the government-in-exile in London. The ex-

²⁰ *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N. Y. 474, 14 N. E. (2d) 798 (1938).

²¹ Cf. Nielsen, *International Law Applied to Reclamations* (1933) p. 533.

²² *Municipal Effects of Belligerent Occupation*, (1941) 51 L. Q. Rev. 33, 69.

²³ Cf. Drucker, *The Legislation of Allied Powers in the United Kingdom*, in *Czechoslovak Yearbook of International Law* (London 1942) p. 45.

isting emergency must be taken to allow relaxation of certain formal requirements for the very reason for which the decrees are issued, namely, for the common successful prosecution of the war, in order to reestablish the rule of law and order in the countries for which these governments are acting.²⁴

It is with a view to the various constitutional problems confronting the governments-in-exile that the (British) Allied Powers (Maritime Courts) Act, 1941,²⁵ sec. 17 (4) provides as follows (*italics supplied*): "References in this Act to the law of any power shall be construed as references to any such law for the time being in force by virtue of *any* Act, order, proclamation, or other legislative instrument whatsoever of the government of that power, whether passed, issued, or made before or after the commencement of this Act, and, in the case of a power the government of which is for the time being constituted in the United Kingdom or in any territory to which this Act can be extended by Order-in-Council, whether before or after that government was so constituted."

In this country, a similar view was recently taken in *Fields v. Predionica i Tkanica A. D.*²⁶ The case arose from the requisition of the vessel *Bosiljka* and its cargo by the Yugoslav government-in-exile, which requisition took place at the time of the invasion of Yugoslavia by Germany and Italy on April 6, 1941. The vessel was seized in a Brazilian port in order to prevent the goods from falling into enemy hands. It was doubtful if the requisition met some of the statutory requirements under certain provi-

²⁴ See the citations in Oppenheimer, *supra* n. 14, at p. 579, concerning Belgian cases on the constitutionality of Belgian decrees in the First World War.

²⁵ 4 & 5 Geo. 6, c. 21, May 22, 1941.

²⁶ 35 N. Y. S. (2d) 408 (September 8, 1942), *rev'd* 265 App. Div. 132, 37 N. Y. S. (2d) 874 (First Dep't, November 13, 1942); *leave to appeal denied* 265 App. Div. 1000 (January 29, 1943).

sions of Yugoslav law,²⁷ assuming that those provisions were intended to govern not only such requisitions as took place within the territorial limits of Yugoslavia but also those in foreign countries. Said the court: "It is to be remembered further that at the time of the present requisition the Royal Yugoslav Government was in flight, and, thus, it was difficult, if not impossible, for some of the statutory requirements to be met." In any event, the court assumed that the Yugoslav statute did not deprive the Yugoslav government-in-exile which intervened in this action, "of its inherent prerogative to requisition a vessel flying its flag, with its cargo, in order to prevent them from falling into the hands of the enemy." As a valid requisition had taken place, the court held the cargo to be free from attachment by the rule of comity applicable to the property of a friendly nation.

It may be mentioned that in all lawsuits where governments-in-exile try to defend the right vested in them by special legislation or requisition, they do not claim immunity from suit as a sovereign, but appear specially in order to maintain their claim of state property.²⁸

Another problem of international law that need only be touched upon here concerns the recognition of decrees of governments-in-exile. This question arose both in England²⁹ and in Canada³⁰ with regard to the conscription of

²⁷ Requisition Law of December 28, 1939. Cf. on the effect of ship requisitions by the Belgian government-in-exile on the validity of a charter, *Mitsubishi Shoji Kaisha, Ltd. v. Societe Purfina Maritime*, C. C. A. Ninth Circ., December 10, 1942, 1943 Am. Mar. Cas. 299.

²⁸ See Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals*, (1940) 40 Col. L. Rev. 453.

²⁹ *In re Amand*, (1941) 2 K. B. 239 (May 23, 1941); (1942) 1 K. B. 445 (January 30, 1942); *Amand v. Secretary of State for Home Affairs*, (1942) 2 K. B. 26 (C. A., March 19, 1942), *aff'd* (1943) A. C. 147 (H. L., August 6, 1942). Cf. Mann, *The Sacrosanctity of the Foreign Act of State*, (1943) 59 L. Q. Rev. 42, 44.

³⁰ *In re de Bruijn, de Romeijnsen*, (1942) 1 Dom. L. Rep. 249 (Br. Columbia Sup. Ct., December 19, 1941).

Dutch nationals who voluntarily submitted to conscription by their government-in-exile³¹ but later absented themselves without leave. Their habeas corpus application for discharge from custody as deserters were dismissed on the ground that the Dutch nationals had contravened orders issued by the British government under the Allied Forces Act, 1940, which legalized the exercise by the Dutch authorities of powers under their own law.³² The express reference to the authorization by the law of the forum seems all the more remarkable since conscription of Dutch nationals by their government-in-exile concerns the personal relation of the sovereign to his nationals and at the same time serves English and Canadian interests in fighting the common enemy. Nevertheless, an English author³³ commenting on these decisions remarks that they affect the personal status, in which cases the municipal law of the country (United Kingdom or Canada) has been applied. "But different consideration would appear to apply to property in this country."

In cases involving property outside the territory of the enacting government, a preliminary question of statutory construction may often arise, namely, whether the statute is at all intended to be applied abroad. This question, recently discussed in *United States v. Pink*³⁴ with regard to application of Russian confiscatory legislation to assets located in this country, need not be raised here. For the decrees of the governments-in-exile are intended to be

³¹ Cf. King, *Jurisdiction Over Friendly Foreign Armed Forces*, (1942) 36 Am. J. Int. L. 539, Jessup, *Norwegian Maritime Courts in England*, *ibid.* 653, Hartmann, *Conscription in the Allied Armies*, (1942) 5 Modern L. Rev. 256; Wigmore, *The Extraterritoriality of the U. S. Armed Forces Abroad*, (1943) 29 Am. Bar Ass. J. 121.

³² On the Canadian situation, see Note, (1942) 20 Can. B. Rev. 167.

³³ Howard, *The Defence (Finance) Regulations*, 1939 (1942) p. 18.

³⁴ 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 459 (February 2, 1942); (1942) 36 Am. J. Int. L. 309.

applied abroad exclusively, that is in countries other than the occupied European territory over which these governments retain their sovereignty even though in exile. That the decrees are to be applied extraterritorially in accordance with their intention does not follow from the majority opinion in the *Pink* case.³⁵ Here the recognition of Russian expropriation decrees in the State of New York was held to result from special circumstances. By the so-called Litvinov Agreement of November 16, 1933,³⁶ certain claims of the Russian Government were assigned to the Government of the United States, in order to partially compensate for losses inflicted upon Americans. The recognition of the nationalization of Russian property even with regard to assets abroad and the assignment by way of international compact was expressly declared to be in the interest of the United States.³⁷

In the case of the decrees of the governments-in-exile, there is no agreement, no treaty providing for the application abroad, and no assignment. On the other hand, however, these decrees are construed by the courts as having no confiscatory effect that would exclude their application in foreign countries unless a treaty provided for extraterritorial application.

As a matter of principle, the extraterritorial application of foreign decrees which are not confiscatory³⁸ or

³⁵ See (critically) Borchard, *Extraterritorial Confiscations*, (1942) 36 Am. J. Int. L. 275, and Book Review (1942) 42 Col. L. Rev. 887, 890; Jessup, *The Litvinov Assignment and the Pink Case*, (1942) 36 Am. J. Int. L. 282, and the numerous notes in legal periodicals: (1942) 42 Col. L. Rev. 834; 55 Harv. L. Rev. 864; 51 Yale L. J. 848; 30 Georgetown L. J. 663; 90 U. of Pa. L. Rev. 741.

³⁶ (1934) 28 Am. J. Int. L. Supp. 1.

³⁷ The *Pink* case has been distinguished in *Bollack v. Societe Generale*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (March 27, 1942), leave to appeal denied, 264 App. Div. 767, 35 N. Y. S. (2d) 717 (May 22, 1942).

³⁸ See generally, Kunz, *The Mexican Expropriation* (1940); Herz, *Expropriation of Foreign Property*, (1940) 34 Am. J. Int. L. 242; Preuss, *State Immunity and the Requisition of Ships During the Spanish Civil War*, (1941) 35

penal³⁹ in character or otherwise violative of the public policy of the forum⁴⁰ is beyond dispute.

Here, the decree that takes over the property of nationals of an occupied country is not addressed to its own nationals in occupied territory, with whom even communication is impossible because of the German occupation. It is directed solely to third persons such as debtors who hold assets in behalf of the owners now in occupied territory, for the very purpose of protecting the interests of the owners by preventing any use of such assets for the benefit of the occupying powers.

On the general question of recognition of such decrees, the only previous case in point seems to be the *Occupation of Cavalla* case.⁴¹ Here a decree issued during the First World War by the Greek government-in-exile, to apply to Greek territory then under enemy occupation, was later declared void by the Greek Court of Thrace. Cavalla, a Greek town in Eastern Macedonia, was occupied during the First World War by the Bulgarian Army. A decree of October 25, 1916, issued by the provisional Greek Government, prohibited the sale of property in the region of Cavalla. The court held such sales valid, thus denying any effect to a decree which its own government had issued when in exile. While military occupation did not result in extending the legislation of the occupying power to the occupied territory, the law in force in that territory con-

ibid. 263, (1942) 36 *ibid.* 37; and for recent cases decided during this war: Domke, *Problems of International Law in French Jurisprudence 1939-1941*, (1942) 36 *Am. J. Int. L.* 23, 24-29 (*Malopolska* case, *Potasas Ibericas* case).

³⁹ Cf. Annotation, *Extraterritorial Effect of Confiscation of Property and Nationalization of Corporations* (1942) 139 *A. L. R.* 1209; Re, *The Extraterritorial Effect of Confiscatory Decrees*, (1942) 17 *St. John's L. Rev.* 20.

⁴⁰ See Nussbaum, *General Principles of International Private Law* (1943) p. 110.

⁴¹ 41 *Themis* 417; *Annual Digest of Public International Law Cases 1929-1930*, (ed. by Lauterpacht, 1935), Case No. 292, p. 496.

tinued to be valid during the occupation and could not be changed by legislative measures of the government-in-exile. The decree of that government "had no force in the town of Cavalla, seeing that according to the rules of international law the enforcement of legislative measures promulgated by the lawful sovereign was rendered materially impossible in consequence of the occupation. The lawful sovereign could not use compulsion in order to enforce obedience. Such compulsion was a vital element of the law. The occupation created an insuperable obstacle to its application." Though this Greek decree was also intended for the protection of Greek nationals in occupied territory, it was issued with sole regard to property located in such territory. The present Dutch and Norwegian decrees, on the contrary, are intended to apply exclusively in countries other than the occupied territories.

Such extraterritorial application of the Dutch decree was recognized in New York in *Anderson v. N. V. Transandine Handels Maatschappij*.⁴² There one Martin Tietz, a citizen of the European principality of Liechtenstein who resided in Cuba, made an assignment for collection only to the plaintiff, a resident of New York, of a claim against a Dutch corporation carrying on business in occupied Dutch territory. It was alleged that the defendant corporation had wrongfully converted certain securities and moneys of the assignor. To recover damages for the conversion an action was brought following attachment of bank deposits belonging to the defendant within the State of New York.

The Dutch government-in-exile, appearing specially, intervened for the purpose of establishing the effect of its decree of May 24, 1940, upon assets within the State of New York, contending that by that decree the property of

⁴² 28 N. Y. S. (2d) 547 (May 22, 1941); Note, (1941) 19 N.Y.U.L.Q. Rev. 71.

the Dutch corporation was vested in the State of the Netherlands.

The decree was held applicable as being not confiscatory but conservatory, especially in view of its art. 5, which provides for the later restitution to the former owners.⁴³

While this case was pending before the New York Court of Appeals, the United States entered the war and became a signatory to the declaration of the United Nations of January 1, 1942. "Suggestion of the Interest of the United States," on the question of the effect on assets within the United States of the decree of May 24, 1940, was filed by the United States Attorney, and inserted verbatim in the opinion of the Court of Appeals, July 29, 1942.⁴⁴ The fundamental point of this "Suggestion" seems to be the following statement by the Secretary of State on the policy of the United States: "It is the policy of the United States that effect shall be given within the territory of the United States to that Decree insofar as it is intended to prevent any person from securing an interest in, or control over, assets of nationals of the Netherlands located in the United States on account of claims arising outside of the United States in territory now or at any time under the jurisdiction of the Netherlands Government, for the benefit of persons who are not at the time of their assertion citizens or residents of the United States."

The decision of the New York Supreme Court of May 22, 1941, limited the recognition of the Dutch decree in this country to a case where no local creditors were affected. The plaintiff expressly declared⁴⁵ that he would treat the attachment "as though the action had been com-

⁴³ 263 App. Div. 705, 31 N. Y. S. (2d) 194 (November 14, 1941), aff'g without opinion.

⁴⁴ 289 N. Y. 9, 43 N. E. (2d) 502 (July 29, 1942); (1942) 36 Am. J. Int. L. 701; Comment by Ulrich, (1943) 41 Mich. L. Rev. 706.

⁴⁵ Appellant's Brief, Supreme Court, Appellate Division, p. 4.

menced and the attachment obtained by the plaintiff's assignor and as though the plaintiff's rights were no greater than those of his assignor."

Though the Department of State in its "Suggestion" asked for application of the Dutch decree only with regard to persons who are not "citizens or residents of the United States," the Court of Appeals did not expressly confine its decision to non-local creditors and unanimously recognized the application of the decree in the State of New York.⁴⁶ Said the Court of Appeals: "Under its (the decree's) terms the State (of the Netherlands) becomes in effect a trustee for its subjects of their property which might otherwise be without protection and perhaps subject to seizure by a ruthless enemy."

The decision of the New York Supreme Court of May 22, 1941, was followed, and the application of the Dutch decree to assets in this country accordingly recognized, in *Duesterberg v. Ladewig*⁴⁷ and in *Gruenebaum v. N. V. Oxyde, Maatschappij voor Ertsen en Metalen*.⁴⁸ The decision also greatly influenced the opinion in an English case. In *Lorentzen v. Lyddon & Co., Ltd.*,⁴⁹ the plaintiff, appointed as curator for a Norwegian shipowner carrying on business in occupied Norway, sued as assignee of the Norwegian government-in-exile which had vested in itself a claim of the shipowner against an English corporation by virtue of the Norwegian Order in Council of May 18, 1940. It was argued that the Norwegian order could not

⁴⁶ Cf. Kuhn, *The Effect of State Department Declaration of Foreign Policy Upon Private Litigation—The Netherlands Vesting Orders*, (1942) 36 Am. J. Int. L. 651.

⁴⁷ N. Y. L. J. January 15, 1942, p. 215.

⁴⁸ N. Y. L. J. August 27, 1941, p. 439, aff'd N. Y. L. J. October 17, 1942, p. 1062.

⁴⁹ 58 T. L. R. 178, 111 L. J. K. B. 327, (1942) 71 Lloyd's L. L. Rep. 197, (K. B., December 19, 1941); Note, (1942) 24 J. Comp. Leg. & Int. L. 131.

operate to transfer any chose in action situated in England. Referring to the decision of the New York Supreme Court in the *Anderson* case concerning the Dutch decree of May 24, 1940, the English court said: "Public policy certainly demands that effect should be given to this decree. To suggest that the English courts have no power to give effect to this decree seems to me to be almost shocking." The court said: "It is not confiscatory," since it provided for a compensation to be fixed in accordance with Norwegian law, and it was also referred to the principle of comity of nations which demands such recognition.⁵⁰

The Norwegian decree was also given effect by the Supreme Court of Sweden in the *Rigmore* case,⁵¹ March 17, 1942. A motor tanker owned by a Norwegian company carrying on business in (occupied) Oslo was taken over, while in the Swedish port of Gothenburg, by the Norwegian government-in-exile, by virtue of its Order in Council of May 18, 1940. The government chartered the vessel for public use to the British Government, which took possession and control of the vessel. The former owner sued to obtain possession of the vessel and prevent its departure from Swedish waters. The Swedish Supreme Court rejected the claim of the Norwegian company on the ground of the sovereign immunity of the British Government from legal proceedings. But it incidentally recognized the extraterritorial validity of the Norwegian decree as to vessels outside occupied areas of Norway, namely in foreign (Swedish) waters.

Thus, the application of the decrees of the Dutch and Norwegian governments-in-exile has been recognized not

⁵⁰ The appeal was recently dismissed by consent; cf. (critically) Mann, *Extraterritorial Effect of Confiscatory Legislation*, (1942) 5 Modern L. Rev. 262; *Lorentzen v. White Shipping Company, Ltd.*, 74 Lloyd's L. L. Rep. 161 (K. B., January 11, 1943).

⁵¹ Transl. (1943) 37 Am. J. Int. L. 141.

only by the courts of England and of Sweden but by those of this country as well.

In the United States, moreover, the operation of the two foreign decrees as to property located here is also recognized by administrative regulation, namely, General Ruling No. 12.⁵² This General Ruling interprets Exec. Order No. 8389, as amended, to exclude from its operation transfers pursuant to the Dutch decree of May 24, 1940, and the Norwegian decree of May 18, 1940. Sec. 5 (e) of the Ruling excludes these transfers among other transfers by operation of law, such as rights of dower, courtesy and community property, and devolution upon death. While the operation of the Dutch and Norwegian decrees as to the transfer of title to assets in this country is recognized, these same decrees, as applied by the courts of this country, are not⁵³ "today part of the American legislation, for General Ruling No. 12 expressly interprets these Dutch decrees as part of the American legislation." Nothing else has been decided than that the transfer of title to the governments-in-exile by virtue of the foreign decrees could take place without license of the United States Treasury Department. This disposed of the question whether the vesting of title to these assets in the governments-in-exile was an assignment subject to license or a transfer by operation of law. The sole effect of the administrative regulation was to exclude from the operation of Executive Order No. 8389, as amended, certain transfers which might otherwise require a license from the Treasury Department. The legal consequences of the Dutch and Norwegian decrees, and especially the question as to whether the title claimed thereunder is good against any local creditors, were not and

⁵² April 21, 1942, 7 Fed. Reg. 2991 (1942).

⁵³ Stiefel, *Sources of Material on Foreign War Laws and Regulations Affecting American Interests*, (1942) 3 The Legist 3, 10.

could not have been decided by General Ruling No. 12.

If extraterritorial operation of these decrees is recognized in principle because they are conservatory rather than confiscatory in character as to the owner of the assets, the questions arises how to resolve conflicts with rights of local creditors of the original owners. In the English case of *Lorentzen v. Lyddon & Co., Ltd.*, regarding the Norwegian decree, the question of a conflicting creditor did not arise. The curator sued for damages against the contractual debtor on the contract. In the *Anderson* case, the plaintiff was not regarded as a resident American citizen, but was expressly treated as if his rights would not be greater than those of his non-resident assignor. Similarly, in the Swedish *Rigmore* case the rights of the former owner *only* were in question.

But even in a case where rights of creditors were not discussed, in *Estate of Emanuel Kahn*,⁵⁴ the *Anderson* decision was recently distinguished. Here the decedent, a Dutch national, through the intermediary of a Dutch bank, the Twentsche Bank, The Hague, held securities in deposit with the Guaranty Trust Company of New York. He died intestate at the Hague, occupied Dutch territory, on June 30, 1941, and was survived by two daughters as his only distributees. One of the daughters left Holland in July, 1940, and became a resident in New Jersey, the other daughter remained a non-resident of the United States. As the first daughter took out her first papers in 1941, "the evidence conclusively shows her legitimate purpose and the absence of the slightest indication of any intent to benefit the enemies of the Netherlands or of our country." In this case the Public Administrator of the County of New York initiated a discovery proceeding against the New

⁵⁴ 38 N. Y. S. (2d) 839 (November 21, 1942).

York bank for the purpose of directing it to deliver securities and moneys in deposit, upon the ground that such properties were owned by the decedent and deliverable and payable to the petitioner as the legal representative of the estate. Thereupon the Dutch government-in-exile intervened, claiming title, on the basis of its decree of May 24, 1940, to assets belonging to its nationals—property of its corporate national, the Twentsche Bank, or of its individual national, Emanuel Kahn, as vested in the State of the Netherlands. But on the suggestion of the surrogate, who indicated that the *Anderson* case was not controlling, the Dutch government-in-exile withdrew its claim and consented to the administration of the estate by the Public Administrator.⁵⁵

The court distinguished the *Kahn* case from the *Anderson* case where the right of living persons or corporations only were involved. "Here, the rights of the local representative of the decedent's estate and of the beneficiaries are required to be considered. . . . The property would apparently be held for the benefit of his distributees and creditors." The court further pointed out that the terms of the Dutch decree "brought into conflict a different rule of the public policy of our state, as confirmed by the United States Supreme Court, that is, the rule that in the administration of estates embracing property within our jurisdiction, the local law is superior to rights created under treaties or edicts of foreign governments where the decedent is one of its nationals. (*D'Adamo's Estate*, 212 N. Y. 214, 106 N. E. 81, L. R. A. 1915 D, 373; *Rocca v. Thompson*, 223 U. S. 317, 32 S. Ct. 207, 56 L. Ed. 453). That public policy must be deemed to be based upon the

⁵⁵ The court stated: "This consent to the administration of the estate under the laws of our state is a highly commendable act of courtesy and cooperation."

necessity of protecting the rights of domestic creditors, next of kin and legatees of estates."

As to the recognition in the *Anderson* decision of the public policy suggested by the intervention of the United States Government, the court in the *Kahn* case pointed out, "The expression of policy of the State Department of our Government, which is set forth in the opinion in the *Anderson* case, appears to give recognition to the protection of the rights not only of our citizens but also of residents of this country regardless of citizenship." As the Dutch government-in-exile, in consenting to the administration by the Public Administrator, reserved its right to claim title to any moneys distributable to one of its nationals as next of kin or otherwise, the court stated that this claim will be determined in the accounting proceeding where will likewise be determined "any rights of the Alien Property Custodian to payment of the moneys found due to the foreign distributee."

The question of the international aspects of administration of assets abroad by governments-in-exile has not been conclusively settled by the cases decided here, in England, and in Sweden. To be sure, the rationale of these decisions favorable to the governments-in-exile may also prevail in other cases that may come up later, and for other decrees of foreign governments which may be issued in the further development of this war. Thus, the question of the confiscatory character of such measures does not arise with regard to the owner in occupied territory to whom restitution or compensation is promised. Vesting of title in the governments-in-exile serves the purpose of protecting the interest of the owner, who may be exposed to many illegal practices of the occupying authorities. Such measures of the occupying authorities could not possibly be counterattacked in countries where no freezing regula-

tions or other financial registration measures exist, had the governments-in-exile failed to vest title to the assets in themselves.

So the owner may be protected. Moreover, as a national of his own country he may and must share the economic and financial risks of the war into which his country has been plunged. But what of the position of creditors outside the occupied territories?

Generally, among these creditors there may be some whose claims arose out of transactions abroad. Again, some may be nationals of the respective country now occupied by the enemy. But all creditors of the former owner may be without security or guaranty that the assets when restored to the former owner, or the compensation later offered to him, will be used for the discharge of the obligation of the former owner toward them. "There creditors, even though they be not enemies of the Netherlands or resident in enemy territory, must perforce await the restoration of the assets to the debtors. Even when the property is returned to the Dutch national, the creditors may be unable to obtain satisfaction of their claims. They are given no security and no priority over obligations which the debtors may incur since the invasion as a result of their continuance in business in occupied territory."⁵⁶

Certainly, the governments-in-exile could not and ought not to provide in their decrees for satisfaction or protection of creditors of the former owners. No example may be found in the German decree of November 25, 1941, which denationalized German Jews abroad and expropriated their property.⁵⁷ This decree, confiscating the property of denationalized Jews in favor of the German Reich (sec. 3), provides in sec. 5 for a restricted liability of the

⁵⁶ Appellant's Brief, in the *Anderson* case, Court of Appeals, p. 10.

⁵⁷ See Chapter VI, n. 7.

Reich. The Reich assumes liability for debts "only to the amount of the sales value of assets which are found within the jurisdiction of the German Reich" and not "for those debts whose fulfillment by the Reich would be contrary to national sentiment." It cannot be seriously contended that such a provision affords sufficient legal guarantee to creditors of the confiscated property.⁵⁸

It must be borne in mind that the effects even of confiscatory measures will not be questioned by foreign courts if the property is located within the expropriating country. But here the question arises with regard to creditors who reside outside the occupied territory, the inhabitants of which are to be protected from deprivation of their assets abroad by the invader.

It may be recalled that the "Suggestion of the Interest of the United States" in the *Anderson* case restricted recognition of the Dutch decree to cases where it prevented interests in Dutch assets from being secured "for the benefit of persons who are not at the time of their assertion citizens or residents of the United States." In *Estate of Emanuel Kahn* this suggestion was regarded as a protection of an alien resident in this country who had declared his intention to become a citizen of the United States. In the *Anderson* case the Court of Appeals did not expressly follow the Suggestion of the Government to restrict recognition of the Dutch decree to non-local creditors. But, on the other hand, it had to decide only the question of a foreign creditor as presented to it. *Supra* n. 45. In any event, the expression of the policy of the Government of the United States may allow a re-examination of the question concerning the circumstances under which the local creditors may

⁵⁸ On judiciary review, see Kirchheimer, *The Legal Order of National Socialism*, (1941) 9 *Studies in Philosophy and Social Science* 456, 469.

be protected. Said Professor Jessup,⁵⁹ before the opinion of the Court of Appeals was rendered: "Our courts have not yet decided whether such decrees will be given effect as against our own citizens who may assert an adverse title. The facts that the decrees in question are not confiscatory and are not abhorrent to the policy of the forum are not decisive."

The presence of many refugees from Europe, creditors of persons and corporations domiciled in European countries with frozen assets here, renders these new questions important to the courts and the bar of this country.

Rights of creditors were recently taken into account by the Government of the United States, in connection with the moratorium on obligations of Philippine corporations held in the United States.

Under General Ruling No. 10a⁶⁰ of August 12, 1942, issued under Exec. Order No. 8389, as amended, Executive Order No. 9193, sec. 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, no Philippine company may make any payments in this country on its obligations and no person may enforce any claim or obligation against such company, unless an appropriate license by the Treasury Department is first obtained. The reason for this action, as explained in a Press Release,⁶¹ was that the freezing of all assets in the United States of Philippine companies fully and properly protected the interests of all parties involved. "Since no one knows or could know, the present condition or value of property in the Philippines, it is, at the present time, impossible to deal fairly with the respective rights of stockholders, bondholders and other creditors." On the other

⁵⁹ *The Litvinov Assignment and the Pink Case*, (1942) 36 Am. J. Int. L. 282, 288.

⁶⁰ August 12, 1942, 7 Fed. Reg. 6383 (1942).

⁶¹ Fed. Res. Bank of New York, Circular No. 2479.

hand, Philippine companies would not be permitted to avoid paying their obligations, under license, where funds are available, and the Treasury Department "expects Philippine companies to furnish their creditors upon demand with information concerning their present ability to pay their obligations."⁶²

This remarkable step on the part of the Government of this country clearly shows that freezing regulations and other restrictions imposed upon the assets of debtors in the common interest, for the prosecution of the war and the protection of the owners of the assets, ought not to be used to impair the rights of creditors.

Special attention may be drawn to some circumstances attending conflicts of interests which arose out of the vesting measures of the Dutch government-in-exile. These circumstances are of concern not only with regard to rights of creditors, but to the position of the Government of this country, and may become more important in any future settlement of international payments.

It is known that German companies used foreign holding corporations, especially in the Netherlands and in Switzerland, as trustees and stakeholders for their account in order to hide the real interest and ownership which these German companies had in other (foreign) corporations. It was believed that such anonymity of title and stockholdership was resorted to primarily in order to evade provisions of German municipal law, especially with regard to foreign exchange restrictions and corporation taxes. But it has become more and more evident that these measures primarily serve a very different purpose, namely, to facilitate German control of industrial, economic and

⁶² On the protection of creditors of Philippine corporations, see *Chase Nat. Bank of the City of New York v. Manila Electric Co.*, N. Y. L. J. February 20, 1943, p. 706.

financial interests abroad, especially in this hemisphere. Said the United States Treasury Department recently:⁶³ "For almost fifteen years the Axis business interests have been taking comprehensive steps to insulate themselves against any seizure or other control of assets based upon the concept of 'legal title' in the enemy, such as was used during the last war. Such a concept as a basis of control is now outmoded. The technical 'legal title' to some of the most dangerous of the Axis-influenced enterprises may be Swiss, Dutch, Swedish or American." These measures directly connected with the preparation and prosecution of economic warfare by the Axis powers, have not been investigated fully as regards the effects of their legal technique, but their economic character is becoming more and more obvious.

An example, illustrative of the questions dealt with in this chapter, may be found in the case of the *General Aniline and Film Corporation*, which organization is one of the largest manufacturers of dyestuffs in this country. Incorporated in 1929, under the laws of the State of Delaware, this corporation was legally owned by Swiss and Dutch holding corporations. From 1929 to 1942 the German Dye Trust, I. G. Farben Industrie, used this American firm as its principal tool in this country, yet legal ownership of the American corporation was never held in the name of the German trust. After investigation "developed evidence that General Aniline & Film was being used by the German Government,"⁶⁴ 97% of the outstanding shares were vested in the Government of the United States on February 16, 1942. By Vesting Order No. 1,⁶⁵ issued by the Secretary of the Treasury, at a time prior

⁶³ Administration of the Wartime Financial and Property Controls of the United States Government (Treasury Dep't, December, 1942) p. 29.

⁶⁴ *Ibid.* p. 36.

⁶⁵ 7 Fed. Reg. 1046 (1942).

to the establishment of the Office of the Alien Property Custodian, the Secretary declared the majority of the shares, as "property of nationals of a foreign country designated in Executive Order No. 8389, as amended," vested in the Secretary of the Treasury "to be held, used, administered, liquidated, sold or otherwise dealt with, in the interest of and for the benefit of the United States."

This was done although the shares were held by Dutch and Swiss corporations. While the basis of the Secretary's finding was not disclosed at that time, it has now been revealed that the reason for the vesting order was that the stock was controlled or owned by German interests.

As has been noted, the Dutch decree of May 24, 1940, applied to any assets abroad belonging to corporations domiciled in occupied territory and thus included the Dutch shareholders. Accordingly, the Dutch government-in-exile claimed to be the owner of such shares of the American corporation as were registered in the names of three Dutch companies domiciled in occupied territory, on the ground that title to them was vested in the State of the Netherlands. In a suit before the Delaware Court of Chancery for an order to compel the election of directors of General Aniline and Film Corporation, the Dutch government-in-exile intervened. Its counsel suggested⁶⁶ that "it might be in a position to claim control on the American corporation through assuming custody of the assets of its nationals who have large blocks of shares."

Vesting Order No. 1 does not solve the problem of the immunity from interference of a foreign state's property, where assets are located in the United States. Sec. 301 of the First War Powers Act, 1941 provides for the taking over of property even of friendly governments. Referring

⁶⁶ N. Y. Times, October 12, 1941; December 11, 1941.

to this situation, it was pointed out:⁶⁷ "The claim of the Netherlands State is not likely to be pressed under existing circumstances, but it may lead to extensive discussion and possible arbitration after the return of normal conditions."

On two further occasions, the Alien Property Custodian vested in himself property of Dutch corporations which were carrying on business in occupied Dutch territory. That property, which by operation of law was vested in the Dutch government-in-exile, could be taken over whether it was regarded as property of the Dutch corporations, now vested in the Dutch government, or, as appears more likely, as property of German dummies. Thus, by Vesting Order 435, December 4, 1942,⁶⁸ certain securities of N. V. Handelsmaatschappij "Waldorf," a corporation having its place of business in Amsterdam in the occupied Netherlands, were vested in the Alien Property Custodian, as property of a person "controlled by or acting for or on behalf of or as a cloak for a designated enemy country (Germany)." These securities, deposited with the Chase National Bank for the account of "Waldorf," had been attached under a judgment of the New York Supreme Court, in *Sobernheim v. Waldorf*, and were then in *custodia legis*. Under the factual circumstances, the Alien Property Custodian determined: ". . . such property is encompassed within the purview of sec. 2 (f) of Executive Order No. 9095, as amended." It does not appear that the Dutch government-in-exile intervened in the proceedings to claim title to assets of the Dutch corporation by virtue of its decree of May 24, 1940. Similar circumstances, involving German real ownership of such assets, attended a

⁶⁷ Turlington, *Vesting Orders Under the First War Powers Act, 1941*, (1942) 36 Am. J. Int. L. 460, 465.

⁶⁸ 7 Fed. Reg. 10403 (1942).

recent Vesting Order 512 of January 23, 1943,⁶⁹ where shares of the Domestic Fuel Corporation, New York, were vested in the Alien Property Custodian, as property owned by N. V. Vulvaan, Rotterdam, "which is owned or controlled by members of the Thyssen family, nationals of Germany."

However, in these orders the owners are designated nationals of a foreign country, which term certainly does not include the government-in-exile. Such a government is not a national of a foreign country because it is excluded from such determination by General Ruling No. 11, as amended, which in sec. 2 (a) (ii) classifies as "enemy nationals" the governments of any (other) blocked country "having its seat within enemy territory." The governments-in-exile have their seat temporarily in London. Similarly, the government-in-exile is not included in the term "foreign country" within the meaning of sec. 5D (ii) of Exec. Order No. 8389, as amended, to which provision the Vesting Orders are expressly referring. The Vesting Orders seem to be based on the actual German ownership of Dutch corporations, hiding behind the Dutch legal title, determination of which ownership is made by the Alien Property Custodian.⁷⁰

The question of the relation of the decrees of the governments-in-exile to the Trading with the Enemy Acts of other countries has not yet been considered by the courts.

Assets which belong to individuals or corporations in enemy-occupied territories such as the Netherlands and Norway, that is, to enemies within the meaning of the Trading with the Enemy Acts, cannot be disposed of without a license from the appropriate authority. Before the

⁶⁹ 8 Fed. Reg. 1154 (1943).

⁷⁰ Cf. Vesting Order 907, February 15, 1943, 8 Fed. Reg. 2453 (1943).

entrance of the United States into this war, such assets were blocked, as property of nationals of a foreign country; Norway since April 10, 1940; the Netherlands since May 20, 1940. These dates preceded both the Norwegian decree of April 22, 1940, and the Dutch decree of May 24, 1940.

As General Ruling No. 12 expressly provides that the vesting of title to assets in the two governments-in-exile is by operation of law and hence not subject to a license, the question whether these decrees are compatible with the United States Trading with the Enemy Act does not arise.

English authors⁷¹ have raised the question whether any application in Great Britain of the decrees of the Dutch and Norwegian governments-in-exile would be compatible with the British Trading with the Enemy Act, sec. 4, according to which any assignment of a chose in action on behalf of an enemy would be ineffective, unless made with an appropriate license, and would not "confer any rights or remedies against any party to the instrument."

There is as yet no British regulation corresponding to that of General Ruling No. 12 of the United States Treasury Department, whereby the vesting of title to assets in these two governments-in-exile is interpreted as being made by operation of law. Though the English authors themselves are doubtful whether sec. 4 of the British Trading with the Enemy Act applies only to assignments *inter partes*, "there still remains the obligation of paying to the Custodian any money which would, but for the existence of a state of war, be payable to or for the benefit of an enemy. Moreover, only the receipt of the Custodian would be a good discharge to the debtor resident."⁷² A similar

⁷¹ Blum and Rosenbaum, *The Law Relating to Trading with the Enemy* (London 1940) p. 176.

⁷² Trading with the Enemy (Custodian) Order, 1939, art. 3(IV).

provision is contained in other Trading with the Enemy Acts, such as those of Canada,⁷³ and of this country. Sec. 5 (b) (2) of the Trading with the Enemy Act, as amended by sec. 301 of the First War Powers Act, 1941, provides that any payment made to or for the account of the United States, pursuant to the regulations shall be "a full acquittance and discharge of all purposes of the obligation of the person making the same."

It may be that this question will not become an actual one because as yet the governments-in-exile have not set up offices which could compete with the British Custodian of Enemy Property or the Alien Property Custodian in this country.⁷⁴ Though the decrees of the governments-in-exile transferred property from the former owner, the governments did not reduce title to possession. They only prevent other person from taking any interest in the assets "blocked" by their vesting decrees, or, as the New York Court of Appeals in the *Anderson* case had pointed out: "The effect of that (Dutch) decree is not merely to 'freeze' the property of the debtor. It divests the debtor of all title to the property."

Another English author,⁷⁵ referring to the *Anderson* case, says: "It seems clear that under English law foreign legislation as to property outside the jurisdiction of a Government recognized by His Majesty which is of a confiscatory nature is not recognized as effective to transfer proprietary rights, at any rate if the property is in this

⁷³ Sec. 35(3) of the Consolidated Regulations Respecting Trading with the Enemy (1939) provides that the receipt of the Custodian for any money paid to him "shall be a good discharge to the person paying the same."

⁷⁴ Cf. the General Ruling of the Royal Netherlands Legation, Washington, D. C., dated May 22, 1941, revoking all general rulings previously made, regarding the payment of amounts representing income or capital payment with respect to securities in the name of persons or corporation affected by the Dutch decree of May 24, 1940.

⁷⁵ Howard, *The Defence (Finance) Regulations*, 1939 (1942) p. 18.

country. Still less would it be recognized if the law is inconsistent with any Statute of the United Kingdom (e. g., the Trading with the Enemy Act) dealing with such rights."

Meanwhile, a certain change in the attitude of the courts in this country may be observed. The New York Supreme Court, which at Special Term had rendered the *Anderson* decision, granted summary judgment in *N. V. Transandine Handelsmaatschappij v. Massachusetts Bonding & Insurance Corp'n*⁷⁶ for recovery on bonds issued by the defendant surety company for the warrant of attachment in the *Anderson* case. The court distinguished the right in the property upon which levy was made in the *Anderson* case, and which was vested in the government-in-exile, from the ownership of the causes of action created by the defendant surety company's bonds, arising in this jurisdiction and "never intended to be covered by the decree of the Royal Netherlands Government." Said the court: "It is significant that the Department of State, in a formulation of its policy regarding recognition of the decree of the Royal Netherlands Government, excluded, for the time being at any rate, those claims arising within the United States (see *Anderson v. Transandine*, 289 N. Y. 9, 15-17). Here, the claims of local creditors still remain unsatisfied (cf. *United States v. Pink*, 315 U. S. 203, 225-226)." The court said further: "To disregard the interests of these local claimants would be opposed to the public policy of the State of New York and would certainly not foster the purpose for which the Royal Netherlands Government promulgated its decree. It would result in the extension of a doctrine with relentless disregard of consequences to 'a dryly logical extreme.'"

In two other cases, even the representation of the Dutch

⁷⁶ N. Y. L. J. March 3, 1943, p. 848.

government-in-exile seems to have its attitude changed. In *Valk v. Reilly Tar & Chemical Corp'n*⁷⁷ a statement was submitted that the Netherlands Government waives in favor of the plaintiff such title as it may have under the decree of May 24, 1940. In *Matter of Breitung*,⁷⁸ payment of the balance of a certain fund to the agent of the Dutch government-in-exile, the Netherland Shipping and Trading Committee, was allowed only against the execution and delivery by it of an indemnity agreement "against any liability resulting from such turn over of the balance to the fund."

A further question is whether one may attach the claim of the former owner of the assets now vested in the governments-in-exile, such as a claim of restitution (Dutch decree, art. 3) or compensation (Norwegian order, art. 5). The possibility of serving process upon a foreign government may not be decisive inasmuch as the governments-in-exile did not claim immunity from proceedings by reason of their sovereignty, but appeared to assert their rights to assets vested in them. They may consider themselves trustees for the owners in occupied territory to whom they promised restitution or compensation. The decisive point is rather the legal character of such a statement of the government-in-exile, as a declaration of its intention how to deal later with property of persons in territory temporarily occupied by the enemy. It has been shown in Chapter III that nationals resident in enemy territory or, in the case of the Netherlands, in territory occupied by the (German) enemy, are expressly exempted from the determination as enemies, under the Trading with the Enemy Act of the Dutch government-in-exile. Therefore, under the now existing legislation of these countries,

⁷⁷ N. Y. L. J. March 10, 1943, p. 953.

⁷⁸ N. Y. L. J. March 15, 1943, p. 1029.

a confiscation of property of its own nationals would not occur as this property would not be considered as belonging to enemies. But, on the other hand, the government is not definitely bound with regard to its own nationals; on the contrary, the return of the property now vested in the governments-in-exile or the payment of a compensation is a matter of grace and not a right of the national against his own sovereign. This point of view, generally recognized in international law, was stressed in *Lamont v. Travelers Ins. Co.*,⁷⁹ where a contract of a sovereign that its property shall be applied on a particular debt was said "to amount to nothing more than an engagement of honor."⁸⁰ From this angle, the relationship of the national to his own sovereign may not be controlled by the courts of a foreign country. Therefore these questions will hardly be decided by the national courts of a foreign country, even incidentally if and when multiple claims to the vested property are raised later in such a foreign jurisdiction.⁸¹

In this connection a remark by Professor McNair⁸² may be interesting, with a view to later international settlements that may arise from the vesting of title to assets abroad in governments-in-exile: "It is believed that a State can validly bind itself by treaty to transfer to another State property of any kind belonging to its nationals, whether that property be situate within the territory of the transferor State or not. Undoubtedly a State can compulsorily acquire the property of its nationals, with or without compensation, and it is not surprising that inter-

⁷⁹ 281 N. Y. 362, 24 N. E. (2d) 81 (1939).

⁸⁰ See the *Fields* case, *supra* n. 26.

⁸¹ Thus, f. i., the Belgian decree of February 27, 1941, *supra* n. 11, provides in sec. 17 the exclusive competence of Belgian courts when no longer under enemy control (*cessera d'être au pouvoir de l'ennemi*) for any litigation regarding the Belgian Trading Committee.

⁸² *The Effect of Peace Treaties Upon Private Rights*, (1941) 7 Cambridge L. J. 377, 388.

national law should regard it as capable of alienating that property by treaty. This power seems to be based upon the ownership of its nationals rather than upon the physical situation of the property within the State's territory. If the property transferred is located within the territory of the transferor State or the transferee State there is no difficulty. If it is located within the territory of a third State, and the private owner is recalcitrant and declines to hand it over, and the Courts of that State at the suit of the transferee State refuse (as is probable) to compel him, the difficulty is insurmountable, but that fact does not necessarily prove that such property is legally inalienable by the transferor State."

It may be suggested that at some future date a machinery can be created in order to assure the creditors whose claims cannot now be satisfied, under the authority of the *Anderson* case in this country, the *Lorentzen* case in England, or the *Rigmore* case in Sweden.

In any event, notices of the retransfer or the compensation must be given to creditors who would otherwise have no means of knowing thereof. It may further be suggested that the jurisdiction once established in this country by reason of the location of the debtor's assets here, may well be retained in order to facilitate subsequent proceedings.

The factual situations and the collection of legal materials of this chapter are presented to suggest further discussions of questions of public international law and of conflict of laws which are bound to arise in the future, particularly with regard to the settlement of international payments at the end of this war.

The court decisions in belligerent countries which deal with questions of Trading with the Enemy law during this war indicate that the legal aspects of economic warfare

have been adequately handled by the new legislative enactments and executive regulations thereunder. However, the tendency to leave many questions to final determination by administrative agencies is apparent. In view of the necessity of adapting the regulations to the continuously changing aspects of economic warfare, this shift from judicial decisions to administrative adjudication may be said to aid in the attainment of war purposes.

On the other hand, World War II calls for new forms and new systems of legal and economic settlement. Professor McNair⁸³ has pointed out that "the dislocation of commercial intercourse which results from a modern war on a large scale is so enormous that it is virtually impossible to clear up the debris by resort to the normal legal machinery, and it will usually be found to be essential that the peace treaty should create its own code for the purpose."

A study of the principles underlying the Trading with the Enemy legislation of the different countries and the manner in which such legislation has been applied and construed by the courts may help to clarify the development of the law of Trading with the Enemy, as a prerequisite of any final international settlement of the questions involved.

⁸³ *Ibid.*, at p. 395.

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United States of America

APPENDIX A

TRADING WITH THE ENEMY ACT

Public Law No. 91, 65th Congress, October 6, 1917, c. 106,
40 Stat. 411

The amendments prior to the beginning of World War II are printed in the text below. Since September, 1939, the Act was amended by Public Resolution No. 69, 76th Congress, May 7, 1940, 54 Stat. 179, amending subdivision (b) of sec. 5 of the Act of October 6, 1917, as amended; the first sentence of such subdivision was further amended by sec. 301 of Title III of the First War Powers Act, 1941, Public Law No. 354, 77th Congress-1st Session, December 18, 1941, c. 593, 55 Stat. 838.

AN ACT TO DEFINE, REGULATE, AND PUNISH TRADING WITH THE ENEMY, AND FOR OTHER PURPOSES

Sec. 1. This Act shall be known as the "Trading with the Enemy Act."

Sec. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if

he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person" as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation of body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the

laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

Sec. 3. That it shall be unlawful—

(a) For any person in the United States, except with a license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

(b) For any person, except with the licence of the President, to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry to transport or attempt to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen.

(c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper,

picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: *Provided, however,* That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regulations, and with such exemptions, as shall be prescribed by the President.

(d) Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall be punished as provided in section sixteen of this Act.

Sec. 4 (a) Every enemy or ally of enemy insurance or reinsurance company, and every enemy or ally of enemy, doing business within the United States through an agency or branch office, or otherwise, may, within thirty days after the passage of this Act, apply to the President for a license to continue to do business; and, within thirty days after such application, the President may enter an order either granting or refusing to grant such license. The license, if granted, may be temporary or otherwise, and for such period of time, and may contain such provisions and conditions regulating the business, agencies, managers and trustees and the control and disposition of the funds of the company, or of such enemy or ally of enemy, as the President shall deem necessary for the safety of the United States; and any license granted hereunder may be revoked or re-granted or renewed in such manner and at such times as the President shall determine: *Provided, however,* That reasonable notice of his intent to refuse to grant a license or to revoke a license granted to any reinsurance company shall be given by him to all insurance companies incorporated within the United States and known to the President to be doing business with such reinsurance company: *Provided further,* That

no insurance company, organized within the United States, shall be obligated to continue any existing contract, entered into prior to the beginning of the war, with any enemy or ally of enemy insurance or reinsurance company, but any such company may abrogate and cancel any such contract by serving thirty days' notice in writing upon the President of its election to abrogate such contract.

For a period of thirty days after the passage of this Act, and further pending the entry of such order by the President, after application made by any enemy or ally of enemy insurance or reinsurance company, within such thirty days as above provided, the provisions of the President's proclamation of April sixth, nineteen hundred and seventeen, relative to agencies in the United States of certain insurance companies, as modified by the provisions of the President's proclamation of July thirteenth, nineteen hundred and seventeen, relative to marine and war-risk insurance, shall remain in full force and effect so far as it applies to such German insurance companies, and the conditions of said proclamation of April sixth, nineteen hundred and seventeen, as modified by said proclamation of July thirteenth, nineteen hundred and seventeen, shall also during said period of thirty days after the passage of this Act, and pending the order of the President as herein provided, apply to any enemy or ally of enemy insurance or reinsurance company, anything in this Act to the contrary notwithstanding. It shall be unlawful for any enemy or ally of enemy insurance or reinsurance company, to whom license is granted, to transmit out of the United States any funds belonging to or held for the benefit of such company or to use any such funds as the basis for the establishment directly or indirectly of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy.

For a period of thirty days after the passage of this Act, and further pending the entry of such order by the President, after application made within such thirty days by any enemy or ally of enemy, other than an insurance or reinsurance company as above provided, it shall be lawful for such enemy or ally of enemy to continue to do business in this country and for any person to trade with, to, from, for, on account of, on behalf of or for the benefit of such enemy or ally of enemy, anything in this Act to the contrary notwithstanding: *Provided, however,* That the provisions of sections three and sixteen hereof shall apply to any act or attempted act of transmission or transfer of money or other property out of the United States and to the use or attempted use

of such money or property as the basis for the establishment of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy.

If no license is applied for within thirty days after the passage of this Act, or if a license shall be refused to any enemy or ally of enemy, whether insurance or reinsurance company or any other person, making application, or if any license granted shall be revoked by the President, the provisions of sections three and sixteen hereof shall forthwith apply to all trade or to any attempt to trade with, to, from, for, by, on account of, or on behalf of, or for the benefit of such company or other person: *Provided, however,* That after such refusal or revocation, anything in this Act to the contrary notwithstanding, it shall be lawful for a policyholder or for an insurance company, not an enemy or ally of enemy, holding insurance or having effected reinsurance in or with such enemy or ally of enemy insurance or reinsurance company, to receive payment of, and for such enemy or ally of enemy insurance or reinsurance company to pay any premium, return premium, claim, money, security, or other property due or which may become due on or in respect to such insurance or reinsurance in force at the date of such refusal or revocation of license; and nothing in this Act shall vitiate or nullify then existing policies or contracts of insurance or reinsurance, or the conditions thereof; and any such policyholder or insurance company, not an enemy or ally of enemy, having any claim to or upon money or other property of the enemy or ally of enemy insurance or reinsurance company in the custody or control of the alien property custodian, hereinafter provided for, or the Treasurer of the United States, may make application for the payment thereof and may institute suit as provided in section nine hereof.

(b) That, during the present war, no enemy, or ally of enemy, and no partnership of which he is a member or was a member at the beginning of the war, shall for any purpose assume or use any name other than that by which such enemy or partnership was ordinarily known at the beginning of the war, except under license from the President.

Whenever, during the present war, in the opinion of the President the public safety or public interest requires, the President may prohibit any or all foreign insurance companies from doing business in the United States, or the President may license such company or companies to do business upon such terms as he may deem proper.

Sec. 5 (a) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.

If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him.

(b)¹(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising of any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

¹ As amended by section 301 of Title III of the First War Powers Act, 1941, December 18, 1941, c. 593, 55 Stat. 838.

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and 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 in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this

subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. (*End of the amended text, see note 1*).

Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

Sec. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed \$5,000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: *Provided, however,* That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: *Provided further,* That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

Sec. 7 (a) That every corporation incorporated within the

United States, and every unincorporated association, or company, or trustee, or trustees within the United States, issuing shares or certificates representing beneficial interests, shall, under such rules and regulations as the President may prescribe and, within sixty days after the passage of this Act, and at such other times thereafter as the President may require, transmit to the alien property custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with which the United States is at war, or resident within the territory, or a subject or citizen residing outside of the United States, or any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest.

The President may also require a similar list to be transmitted of all stock or shares owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy, or in which any such person had any interest; and he may also require a list to be transmitted of all cases in which said corporation, association, company, or trustee has reasonable cause to believe that the stock or shares on February third, nineteen hundred and seventeen, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another: *Provided, however,* That the name of any such officer, director, or stockholder shall be stricken permanently or temporarily from such list by the alien property custodian when he shall be satisfied that he is not such enemy or ally of enemy.

Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the alien-property custodian by written statement under

oath containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen: *Provided*, That the name of any person shall be stricken from the said report by the alien-property custodian, either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy. The President may extend the time for filing the lists or reports required by this section for an additional period not exceeding ninety days.

(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof: *Provided*, That nothing in this Act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by an enemy or ally of enemy where, prior to the beginning of the war and not in contemplation thereof, the interest of such enemy

or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and no enemy or ally of enemy will be benefited by such carrying out, completion, or performance otherwise than by release from obligation thereunder.

Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: *Provided*, That such payment shall not be made without the license of the President, general or special, as provided in this Act.

Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: *Provided, however*, That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further*, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be prima facie defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation. In any prosecution under section sixteen hereof, proof of receipt of notice from the President to the effect that he has reasonable cause to believe that any person is an enemy or ally of enemy shall be prima facie evidence that the person receiving such notice has reasonable cause to believe such other person to be an enemy or ally of enemy within the meaning of section three hereof.

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to

or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, 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; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

Any requirement made pursuant to this Act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing, registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds

received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

(d) If not required to pay, convey, transfer, assign, or deliver under the provisions of subsection (c) hereof, any person not an enemy or ally of enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy not holding a license granted by the President hereunder, any money or other property, or to whom any obligation or form of liability to such enemy or ally of enemy is presented for payment, may, at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the alien property custodian said money or other property under such rules and regulations as the President shall prescribe.

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee. The President shall issue to every person so appointed a certificate of the appointment and authority of such person, and such certificate shall be received in evidence in all courts within the United States. Whenever any such certificate of authority shall be offered to any registrar, clerk, or other recording officer, Federal or otherwise, within the United States, such officer shall record the same in like manner as a power of attorney, and such record or a duly certified copy thereof shall be received in evidence in all courts of the United States or other courts within the United States.

Sec. 8 (a) That any person not an enemy or ally of enemy

holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: *Provided*, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the passage of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

(b) That any contract entered into prior to the beginning of the war between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery, during or after any war in which a present enemy or ally of enemy nation has been or is now engaged, of anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation by serving thirty days' notice in writing upon the alien property custodian of his or its election to abrogate such contract.

(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and con-

taining any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

Sec. 9 (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the pay-

ment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city; or

(2) A woman who, at the time of her marriage, was a subject or citizen of a nation which has remained neutral in the war, or of a nation which was associated with the United States in the prosecution of said war, and who, prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917; or

(3) A woman who at the time of her marriage was a citizen of the United States, and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman, either directly or indirectly, from any subject or citizen of Germany or Austria-Hungary subsequent to January 1, 1917; or who was a daughter of a resident citizen of the United States and herself a resident or former resident thereof, or the

minor daughter or daughters of such woman, she being deceased;
or

(3A) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or not a citizen or subject of any nation, state or free city, and that the money or other property concerned was acquired by such individual while a bona fide resident of the United States, and that such individual, on January 1, 1926, and at the time of the return of the money or other property, shall be a bona fide resident of the United States; or

(3B) Any individual who at such time was not a subject or citizen of Germany, Austria, Hungary, or Austria-Hungary, and who is now a citizen or subject of a neutral or allied country: *Provided, however,* That nothing contained herein shall be construed as limiting or abrogating any existing rights of an individual under the provisions of this Act; or

(4) A citizen or subject of Germany or Austria or Hungary or Austria-Hungary and was at the time of the severance of diplomatic relations between the United States and such nations, respectively, accredited to the United States as a diplomatic or consular officer of any such nation, or the wife or minor child of such officer, and that the money or other property concerned was within the territory of the United States by reason of the service of such officer in such capacity; or

(5) A citizen or subject of Germany or Austria-Hungary, who by virtue of the provisions of sections 4067, 4068, 4069, and 4070 of the Revised Statutes, and of the proclamations and regulations thereunder, was transferred, after arrest, into the custody of the War Department of the United States for detention during the war and is at the time of the return of his money or other property hereunder living within the United States; or

(6) A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder; or

(7) The Government of Bulgaria or Turkey, or any political or municipal subdivision thereof; or

(8) The Government of Germany or Austria or Hungary or Austria-Hungary, and that the money or other property concerned was the diplomatic or consular property of such Government; or

(9) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or who is not a citizen or subject of any nation, State, or free city, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of \$10,000, or although exceeding in value the sum of \$10,000 is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of \$10,000; *Provided*, That an individual shall not be entitled, under this paragraph, to the return of any money or other property owned by a partnership, association, unincorporated body of individuals, or corporation at the time it was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him hereunder; or

(10) A partnership, association, other unincorporated body of individuals, or corporation, and that it is not otherwise entitled to the return of its money or other property, or any part thereof, under this section, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of \$10,000, or although exceeding in value the sum of \$10,000, is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of \$10,000; or

(11) A partnership, association, or other unincorporated body of individuals, having its principal place of business within any country other than Germany, Austria, Hungary, or Austria-Hungary, or a corporation, organized or incorporated within any country other than Germany, Austria, Hungary, or Austria-Hungary, and that the control of, or more than 50 per centum of the interests or voting power in, any such partnership, association, other unincorporated body of individuals, or corporation, was at such time, and is at the time of the return of any money or other property, vested in citizens or subjects of nations, States, or free cities other than Germany, Austria, Hungary, or Austria-Hungary: *Provided, however*, That this subsection shall not affect any rights which any citizen or subject may have under paragraph (1) of this subsection; or

(12) A partnership, association, or other unincorporated body of individuals, or a corporation, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property, and has filed the written consent provided for in subsection (m); or

13) A partnership, association, or other unincorporated body

of individuals, having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m) has been filed; or

(14) An individual who at such time was a citizen or subject of Germany or who, at the time of the return of any money or other property, is a citizen or subject of Germany or is not a citizen or subject of any nation, State, or free city, and that the written consent provided for in subsection (m) has been filed; or

(15) The Austro-Hungarian Bank, except that the money or other property thereof shall be returned only to the liquidators thereof; or

(16) An individual, partnership, association, or other unincorporated body of individuals, or a corporation, and that the written consent provided for in subsection (m) has been filed, and that no suit or proceeding against the United States or any agency thereof is pending in respect of such return, and that such individual has filed a written waiver renouncing on behalf of himself, his heirs, successors, and assigns any claim based upon the fact that at the time of such return he was in fact entitled to such return under any other provision of this Act; or

(17) A partnership, association, or other unincorporated body of individuals, or a corporation, and was entirely owned at such time by citizens of Austria and is so owned at the time of the return of its money or other property; or

(18) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within Austria, or a corporation organized or incorporated within Austria; or

(19) An individual who at such time was a citizen of Austria or who, at the time of the return of any money or other property, is a citizen of Austria; or

(20) A partnership, association, or other unincorporated body of individuals, or a corporation, and was entirely owned at such time by citizens of Hungary and is so owned at the time of the return of its money or other property; or

(21) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within Hungary, or a corporation organized or incorporated within Hungary; or

(22) An individual who at such time was a citizen of Hungary

or who, at the time of the return of any money or other property, is a citizen of Hungary;—

Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian: *Provided*, That no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary, (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be concluded in pursuance of the treaties of peace aforesaid between any nation, State, or free city (of the one part) whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part). For the purposes of this section any citizen or subject of a State or free city which at the time of the proposed return of money or other property of such citizen or subject hereunder forms a part of the territory of any one of the following nations: Germany, Austria, or Hungary, shall be deemed to be a citizen or subject of such nation. And the receipt of the said owner or of the person by whom said money or other property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said money or other property, or compensation or damages arising from the capture of such money or other property by the President or the Alien Property Custodian: *Provided*

further, however, That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

(d) Whenever an individual, deceased, would have been entitled, if living, to the return of any money or other property without filing the written consent provided for in subsection (m), then his legal representative may proceed for the return of such money or other property in the same manner as such individual might proceed if living, and such money or other property may be returned to such legal representative without requiring the appointment of an administrator, or an ancillary administrator, by a court in the United States, or to any such ancillary administrator, for distribution directly to the persons entitled thereto. Return in accordance with the provisions of this subsection may be made in any case where an application or court proceeding by any legal representative, under the provisions of this subsection before its amendment by the Settlement of War Claims Act of 1928, is pending and undetermined at the time of the enactment of such Act. All bonds or other security given under the provisions of this subsection before such amendment shall be canceled or released and all sureties thereon discharged.

(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States: *Provided*, That any arrangement made by a foreign nation for the release of money and other property of American citizens and certified by the Secretary of State to the Attorney General as fair and the most advantageous arrangement obtainable shall be regarded as meeting this requirement; nor in any event shall a debt be allowed

under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928.

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

(g) Whenever an individual, deceased, would have been entitled, if living, to the return of any money or other property upon filing the written consent provided for in subsection (m), then his legal representative may proceed for the return of such money or other property in the same manner as such individual might proceed if living, and such money or other property may be returned, upon filing the written consent provided for in subsection (m), to such legal representative without requiring the appointment of an administrator, or an ancillary administrator, by a court in the United States, or to any such ancillary administrator, for distribution to the persons entitled thereto. This subsection shall not be construed as extinguishing or diminishing any right which any citizen of the United States may have had under this subsection prior to its amendment by the Settlement of War Claims Act of 1928 to receive in full his interest in the property of any individual dying before such amendment.

(h) The aggregate value of the money or other property returned under paragraphs (9) and (10) of subsection (b) to any one person, irrespective of the number of trusts involved, shall in no case exceed \$10,000.

(i) For the purposes of paragraphs (9) and (10) of subsection (b) of this section accumulated net income, dividends, interest, annuities, and other earnings, shall be considered as part of the principal.

(j) The Alien Property Custodian is authorized and directed to return to the person entitled thereto, whether or not an enemy or ally of enemy and regardless of the value, any patent, trademark, print, label, copyright, or right therein or claim thereto, which was conveyed, transferred, assigned, or delivered to the Alien Property Custodian, or seized by him, and which has not

been sold, licensed, or otherwise disposed of under the provisions of this Act, and to return any such patent, trade-mark, print, label, copyright, or right therein or claim thereto, which has been licensed, except that any patent, trade-mark, print, label, copyright or right therein or claim thereto, which is returned by the Alien Property Custodian and which has been licensed, or in respect of which any contract has been entered into, or which is subject to any lien or encumbrance, shall be returned subject to the license, contract, lien, or encumbrance.

(k) Except as provided in section 27, paragraphs (12) to (22), both inclusive, of subsection (b) of this section shall apply to the proceeds received from the sale, license, or other disposition of any patent, trade-mark, print, label, copyright, or right therein or claim thereto, conveyed, transferred, assigned, or delivered to the Alien Property Custodian, or seized by him.

(l) This section shall apply to royalties paid to the Alien Property Custodian, in accordance with a judgment or decree in a suit brought under subsection (f) of section 10; but shall not apply to any other money paid to the Alien Property Custodian under section 10.

(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return) as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25. Such amount shall be deducted from the money to be returned to such person, so far as possible, and the balance shall be deducted from the proceeds of the sale of so much of the property as may be necessary, unless such person pays the balance to the Alien Property Custodian, except that no property shall be so sold prior to the expiration of six years from the date of the enactment of the Settlement of War Claims Act of 1928 without the consent of the person entitled thereto. The amounts so deducted shall be returned to the persons entitled thereto as provided in subsection (f) of section 25. The sale of any such property shall be made in accordance with the provisions of section 12, except that the provisions of such section relating to sales or resales to, or for the benefit of, citizens of the United States shall not be applicable. If such aggregate value of the money or other property to be

returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) is less than \$2,000, then the written consent shall not be required and the money or other property shall be returned in full without the temporary retention and investment of 20 per centum thereof.

(n) In the case of property consisting of stock or other interest in any corporation, association, company, or trust, or of bonded or other indebtedness thereof, evidenced by certificates of stock or by bonds or by other certificates of interest therein or indebtedness thereof, or consisting of dividends or interest or other accruals thereon, certificate or bond or other certificate of interest (but not the actual certificate or bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, if the President determines that the owner thereof or of any interest therein has acquired such ownership by assignment, transfer, or sale of such certificate or bond or other certificate of interest or indebtedness (it being the intent of this subsection that such assignment, transfer, or sale shall not be deemed invalid hereunder by reason of such conveyance, transfer, assignment, delivery, or payment to the Alien Property Custodian or seizure by him) and that the written consent provided for in subsection (m) has been filed, then the President may make in respect of such property an order of the same character, upon the same conditions, and with the same effect, as in cases provided for in subsection (b), including the benefits of subsection (c).

(o) The provisions of paragraph (12), (13), (14), (17), (18), (19), (20), (21), or (22) of subsection (b), or of subsection (m) or (n) of this section, and (except to the extent therein provided) the provisions of paragraph (16) of subsection (b), shall not be construed as diminishing or extinguishing any right under any other provision of this Act in force immediately prior to the enactment of the Settlement of War Claims Act of 1928.

(p) The Alien Property Custodian shall transfer the money or other property in the trust of any partnership, association, or other unincorporated body of individuals, or corporation, the existence of which has terminated, to trusts in the names of the persons (including the German Government and members of the former ruling family) who have succeeded to its claim or interest; and the provisions of subsection (a) of this section relating to the collection of a debt (by order of the President or of a court) out of money or other property held by the Alien Property Custodian or the Treasurer of the United States shall be applicable

to the debts of such successor and any such debt may be collected out of the money or other property in any of such trusts if not returnable under subsection (a) of this section. Subject to the above provisions as to the collection of debts, each such successor (except the German Government and members of the former ruling family) may proceed for the return of the amount so transferred to his trust, in the same manner as such partnership, association, or other unincorporated body of individuals, or corporation might proceed if still in existence. If such partnership, association, or other unincorporated body of individuals, or corporation would have been entitled to the return of its money or other property only upon filing the written consent provided for in subsection (m), then the successor shall be entitled to the return under this subsection only upon filing such written consent.

(q) The return of money or other property under paragraph (15), (17), (18), (19), (20), (21), or (22) of subsection (b) (relating to the return to Austrian and Hungarian nationals) shall be subject to the limitations imposed by subsections (d) and (e) of section 7 of the Settlement of War Claims Act of 1928.

Sec. 10. That nothing contained in this Act shall be held to make unlawful any of the following Acts:

(a) An enemy, or ally of enemy, may file and prosecute in the United States an application for letters patent, or for registration of trade-mark, print, label, or copyright, and may pay any fees therefor in accordance with and as required by the provisions of existing law and fees for attorneys or agents for filing and prosecuting such applications. Any such enemy, or ally of enemy, who is unable during war, or within six months thereafter, on account of conditions arising out of war, to file any such application, or to pay any official fee, or to take any action required by law within the period prescribed by law, may be granted an extension of nine months beyond the expiration of said period, provided the nation of which the said applicant is a citizen, subject, or corporation shall extend substantially similar privileges to citizens and corporations of the United States.

(b) Any citizen of the United States, or any corporation organized within the United States, may, when duly authorized by the President, pay to an enemy or ally of enemy any tax, annuity, or fee which may be required by the laws of such enemy or ally of enemy nation in relation to patents and trade-marks, prints, labels, and copyrights; and any such citizen or corporation may file and prosecute an application for letters patent or for registration of trade-mark, print, label, or copyright in the country of

an enemy, or of an ally of enemy after first submitting such application to the President and receiving license so to file and prosecute, and to pay the fees required by law and customary agents' fees, the maximum amount of which in each case shall be subject to the control of the President.

(c) Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufacture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label, or copyrighted matter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding \$100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof.

(d) The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to

the licensee as established by the President; and sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said license and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (f) of this section, or upon the direction of the alien property custodian.

(e) Unless surrendered or terminated as provided in this Act, any license granted hereunder shall continue during the term fixed in the license or in the absence of any such limitation during the term of the patent, trade-mark, print, label, or copyright registration under which it is granted. Upon violations by the licensee of any of the provisions of this Act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him.

(f) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter: *Provided, however,* That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: *Provided further,* That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him

on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable.

In the case of any such patent, trade-mark, print, label, or copyright, conveyed, assigned, transferred, or delivered to the Alien Property Custodian or seized by him, any suit brought under this subsection, within the time limited therein, shall be considered as having been brought by the owner within the meaning of this subsection, in so far as such suit relates to royalties for the period prior to the sale by the Alien Property Custodian of such patent, trade-mark, print, label, or copyright, if brought either by the Alien Property Custodian or by the person who was the owner thereof immediately prior to the date such patent, trade-mark, print, label, or copyright was seized or otherwise acquired by the Alien Property Custodian.

(g) Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: *Provided*, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts.

(h) All powers of attorney heretofore or hereafter granted by an enemy or ally of enemy to any person within the United States, in so far as they may be requisite to the performance of acts authorized in subsections (a) and (g) of this section, shall be valid.

(i) Whenever the publication of an invention by the granting of a patent may, in the opinion of the President, be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until

the end of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner of Patents that, in violation of said order, said invention has been published or that an application for a patent therefor has been filed in any other country, by the inventor or his assigns or legal representatives, without the consent or approval of the commissioner or under a license of the President.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the President above referred to shall tender his invention to the Government of the United States for its use, he shall, if he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government.

Sec. 11. Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation any article or articles mentioned in such proclamation except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: *Provided, however*, That no preference shall be given to the ports of one State over those of another.

Sec. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depository, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depository or depositaries, located and doing business in the United States. The alien prop-

erty custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights of powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided*, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than \$10,000, or

imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further,* That the Treasurer of the United States, on order of the alien property custodian, shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

Sec. 13. That, during the present war, in addition to the facts required by sections forty-one hundred and ninety-seven, forty-one hundred and ninety-eight, and forty-two hundred of the Revised Statutes, as amended by the Act of June fifteenth, nineteen hundred and seventeen, to be set out in the master's and shipper's manifests before clearance will be issued to vessels bound to foreign ports, the master or person in charge of any vessel, before departure of such vessel from port, shall deliver to the collector of

customs of the district wherein such vessel is located a statement duly verified by oath that the cargo is not shipped or to be delivered in violation of this Act, and the owners, shippers, or consignors of the cargo of such vessels shall in like manner deliver to the collector like statement under oath as to the cargo or the parts thereof laden or shipped by them, respectively, which statement shall contain also the names and addresses of the actual consignees of the cargo, or if the shipment is made to a bank or other broker, factor, or agent, the names and addresses of the persons who are the actual consignees on whose account the shipment is made. The master or person in control of the vessel shall, on reaching port of destination of any of the cargo, deliver a copy of the manifest and of the said master's, owner's, shipper's, or consignor's statement to the American consular officer of the district in which the cargo is unladen.

Sec. 14. That, during the present war, whenever there is reasonable cause to believe that the manifest or the additional statements under oath required by the preceding section are false or that any vessel, domestic or foreign, is about to carry out of the United States any property to or for the account or benefit of an enemy, or ally of enemy, or any property or person whose export, taking out, or transport will be in violation of law, the collector of customs for the district in which such vessel is located is hereby authorized and empowered, subject to review by the President to refuse clearance to any such vessel, domestic or foreign, for which clearance is required by law, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, to forbid the departure of such vessel from the port, and it shall thereupon be unlawful for such vessel to depart.

The collector of customs shall, during the present war, in each case report to the President the amount of gold or silver coin or bullion or other moneys of the United States contained in any cargo intended for export. Such report shall include the names and addresses of the consignors and consignees, together with any facts known to the collector with reference to such shipment and particularly those which may indicate that such gold or silver coin or bullion or moneys of the United States may be intended for delivery or may be delivered, directly or indirectly, to an enemy or an ally of enemy.

Sec. 15. That the sum of \$450,000 is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, to be used in the discretion of the President for the

purpose of carrying out the provisions of this Act during the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for the payment of salaries of all persons employed under this Act, together with the necessary expenses for transportation, subsistence, rental of quarters in the District of Columbia, books of reference, periodicals, stationery, typewriters and exchanges thereof, miscellaneous supplies, printing to be done at the Government Printing Office, and all other necessary expenses not included in the foregoing.

Sec. 16. That whoever shall willfully violate any of the provisions of this Act or any license, rule or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisoned, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

Sec. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

Sec. 18. That the several courts of first instance in the Philippine Islands and the district court of the Canal Zone shall have jurisdiction of offenses under this Act committed within their respective districts, and concurrent jurisdiction with the district courts of the United States of offenses under this Act committed upon the high seas and of conspiracies to commit such offenses as defined by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, and the provisions of such section for the purpose of this Act are hereby extended to the Philippine Islands and to the Canal Zone.

Sec. 19. That ten days after the approval of this Act and until

the end of the war, it shall be unlawful for any person, firm, corporation, or association, to print, publish, or circulate, or cause to be printed, published, or circulated in any foreign language, any news item, editorial or other printed matter, respecting the Government of the United States, or of any nation engaged in the present war, its policies, international relations, the state or conduct of the war, or any matter relating thereto: *Provided*, That this section shall not apply to any print, newspaper, or publication where the publisher or distributor thereof, on or before offering the same for mailing, or in any manner distributing it to the public, has filed with the postmaster at the place of publication, in the form of an affidavit, a true and complete translation of the entire article containing such matter proposed to be published in such print, newspaper, or publication, and has caused to be printed, in plain type in the English language, at the head of each such item, editorial, or other matter, on each copy of such print, newspaper, or publication, the words "True translation filed with the postmaster at on (naming the post office where the translation was filed, and the date of filing thereof) as required by the Act of (here giving the date of this Act) .

Any print, newspaper, or publication in any foreign language which does not conform to the provisions of this section is hereby declared to be nonmailable, and it shall be unlawful for any person, firm, corporation, or association, to transport, carry, or otherwise publish or distribute the same, or to transport, carry or otherwise publish or distribute any matter which is made nonmailable by the provisions of the Act relating to espionage, approved June fifteenth, nineteen hundred and seventeen: *Provided further*, That upon evidence satisfactory to him that any print, newspaper, or publication, printed in a foreign language may be printed, published, and distributed free from the foregoing restrictions and conditions without detriment to the United States in the conduct of the present war, the President may cause to be issued to the printers or publishers of such print, newspaper, or publication, a permit to print, publish, and circulate the issue or issues of their print, newspaper, or publication, free from such restrictions and requirements, such permits to be subject to revocation at his discretion. And the Postmaster General shall cause copies of all such permits and revocations of permits to be furnished to the postmaster of the post office serving the place from which the print, newspaper, or publication, granted the permit is to emanate. All matter printed, published, and distributed under permits shall bear at the head thereof in plain type in the English

language, the words, "Published and distributed under permit authorized by the Act of (here giving date of this Act), on file at the post office of (giving name of office)."

Any person who shall make an affidavit containing any false statement in connection with the translation provided for in this section shall be guilty of the crime of perjury and subject to the punishment provided therefor by section one hundred and twenty-five of the Act of March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States," and any person, firm, corporation, or association, violating any other requirement of this section shall, on conviction thereof, be punished by a fine of not more than \$500, or by imprisonment of not more than one year, or, in the discretion of the court, may be both fined and imprisoned.

Sec. 20. That no money or other property shall be paid, conveyed, transferred, assigned, or delivered under this Act to any agent, attorney at law or in fact, or representative of any person entitled thereto, unless satisfactory evidence is furnished the President or the court, as the case may be, that the fee of such agent, attorney at law or in fact, or representative for services in connection therewith does not exceed 3 per centum of the value of such money or other property; but nothing in this section shall be construed as fixing such fees at 3 per centum of the value of such money or other property, such 3 per centum being fixed only as the maximum fee that may be allowed or accepted for such services. Any person accepting any fee in excess of such 3 per centum shall, upon conviction thereof, be punished as provided in section 16 hereof.

Sec. 21. That the claim of any naturalized American citizen under the provisions of this Act shall not be denied on the ground of any presumption of expatriation which has arisen against him, under the second sentence of section 2 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907, if he shall give satisfactory evidence to the President, or the court, as the case may be, of his uninterrupted loyalty to the United States during his absence, and that he has returned to the United States, or that he, although desiring to return, has been prevented from so returning by circumstances beyond his control.

Sec. 22. No person shall be entitled to the return of any property or money under any provision of this Act, or any amendment of this Act, who is a fugitive from justice of the United States or any State or Territory thereof, or the District of Columbia.

Sec. 23. The Alien Property Custodian is directed to pay to the person entitled thereto, from and after March 4, 1923, the net income (including dividends, interest, annuities, and other earnings), accruing and collected thereafter, in respect of any money or property held in trust for such person by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian, under such rules and regulations as the President may prescribe.

Sec. 24. (a) The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

No claim shall be filed with the Alien Property Custodian or allowed by him or by the President of the United States, nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, and no allowance of any such claim now pending shall be made, nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, which deduction or deductions on the collection of any income do not exceed the sum of two per centum of such income or which on the return of any moneys or properties or income therefrom, do not exceed the sum of two per centum of the aggregate value thereof at the time or times as nearly as may be, of such deduction or deductions, or, for the recovery of any deduction or deductions heretofore or hereafter made by the Alien Property Custodian from money or properties or income

therefrom held by him or by the Treasurer of the United States hereunder, for any and all necessary expenses incurred and actually disbursed by the Alien Property Custodian or by any depositary for him in securing the possession, collection or control of any such money or properties or income therefrom, or in protecting or administering the same, as said general or administrative and other expenses and said aggregate value of returned money or properties or income therefrom have been heretofore or shall be hereafter determined by said Alien Property Custodian.

(b) In the case of income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, the amount thereof shall, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, be computed in the same manner (except as hereinafter in this section provided) as though the money or other property had not been seized by or paid to the Alien Property Custodian, and shall be paid, as far as practicable, in accordance with subsection (a) of this section. Pending final determination of the tax liability the Alien Property Custodian is authorized to return, in accordance with the provisions of this Act, money or other property in any trust in such amounts as may be determined, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, to be consistent with the prompt payment of the full amount of the internal-revenue taxes. Notwithstanding the expiration of any period of limitation provided by law, credit or refund of any income, war-profits, or excess-profits tax erroneously or illegally assessed or collected may be made or allowed if claim therefor was filed with the Commissioner of Internal Revenue by the Alien Property Custodian on or before February 15, 1933.

(c) So much of the net income of a taxpayer for the taxable year 1917, or any succeeding taxable year, as represents the gain derived from the sale or exchange by the Alien Property Custodian of any property conveyed, transferred, assigned, delivered, or paid to him, or seized by him, may at the option of the taxpayer be segregated from the net income and separately taxed at the rate of 30 per centum. This subsection shall be applied and the amount of net income to be so segregated shall be determined, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, as nearly as may be in the same manner as provided in section 208 of the Revenue Act of 1926 (relating to capital net gains), but without regard to the period for which the property was held by the Alien

Property Custodian before its sale or exchange, and whether or not the taxpayer is an individual.

(d) Any property sold or exchanged by the Alien Property Custodian (whether before or after the date of the enactment of the Settlement of War Claims Act of 1928) shall be considered as having been compulsorily or involuntarily converted, within the meaning of the income, excess-profits, and war-profits tax laws and regulations; and the provisions of such laws and regulations relating to such a conversion shall (under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury) apply in the case of the proceeds of such sale or exchange. For the purpose of determining whether the proceeds of such conversion have been expended within such time as will entitle the taxpayer to the benefits of such laws and regulations relating to such a conversion, the date of the return of the proceeds to the person entitled thereto shall be considered as the date of the conversion.

(e) In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

(f) The benefits of subsections (c), (d), and (e) shall be extended to the taxpayer if claim therefor is filed before the expiration of the period of limitations properly applicable thereto, or before the expiration of six months after the date of the enactment of the Settlement of War Claims Act of 1928, whichever date is the later. The benefits of subsection (d) shall also be extended to the taxpayer if claim therefor is filed before the expiration of six months after the return of the proceeds.

Sec. 25 (a) (1) The Alien Property Custodian is authorized and directed to invest, from time to time upon the request of the Secretary of the Treasury, out of the funds held by the Alien Property Custodian or by the Treasurer of the United States for the Alien Property Custodian, an amount not to exceed \$40,000,000 in the aggregate, in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of this section.

(2) When in the case of any trust written consent under subsection (m) of section 9 has been filed, an amount equal to the portion of such trust the return of which is temporarily postponed under such subsection shall be credited against the investment made under paragraph (1) of this subsection. If the total amount so credited is in excess of the amount invested under paragraph (1) of this subsection, the excess shall be invested by the Alien Property Custodian in accordance with the provisions of this subsection, without regard to the \$40,000,000 limitation in paragraph (1). If the amount invested under paragraph (1) of this subsection is in excess of the total amount so credited, such excess shall, from time to time on request of the Alien Property Custodian, be paid to him out of the funds in the German special deposit account created by section 4 of the Settlement of War Claims Act of 1928, and such payments shall have priority over any payments therefrom other than the payments under paragraph (1) of subsection (c) of such section (relating to expenses of administration).

(b) The Alien Property Custodian is authorized and directed to invest, in one or more participating certificates issued by the Secretary of the Treasury, out of the unallocated interest fund, as defined in Section 28—

(1) The sum of \$25,000,000. If, after the allocation under section 26 has been made, the amount of the unallocated interest fund allocated to the trusts described in subsection (c) of such section is found to be in excess of \$25,000,000, such excess shall be invested by the Alien Property Custodian in accordance with the provisions of this subsection. If the amount so allocated is found to be less than \$25,000,000 any participating certificate or certificates that have been issued shall be corrected accordingly; and

(2) The balance of such unallocated interest fund remaining after the investment provided for in paragraph (1) and the payment of allocated earnings in accordance with the provisions of subsection (b) of section 26 have been made.

(c) If the amount of such unallocated interest fund, remaining after the investment required by paragraph (1) of subsection (b) of this section has been made, is insufficient to pay the allocated earnings in accordance with subsection (b) of section 26, then the amount necessary to make up the deficiency shall be paid out of the funds in the German special deposit account created by section 4 of the Settlement of War Claims Act of 1928, and such payment shall have priority over any payments therefrom other than the payments under paragraph (1) of subsection (c) of such section

(relating to expenses of administration) and the payments under paragraph (2) of subsection (a) of this section.

(d) The Alien Property Custodian is authorized and directed (after the payment of debts under section 9) to transfer to the Secretary of the Treasury, for deposit in such special deposit account, all money and the proceeds of all property, including all income, dividends, interest, annuities, and earnings accumulated in respect thereof, owned by the German Government or any member of the former ruling family. All money and other property shall be held to be owned by the German Government (1) if no claim thereto has been filed with the Alien Property Custodian prior to the expiration of three years from the date of the enactment of the Settlement of War Claims Act of 1928, or (2) if any claim has been filed before the expiration of such period (whether before or after the enactment of such Act), then if the ownership thereof under any such claim is not established by a decision of the Alien Property Custodian or by suit in court instituted, under section 9, within one year after the decision of the Alien Property Custodian, or after the date of the enactment of the Settlement of War Claims Act of 1928, whichever date is later. The amounts so transferred under this subsection shall be credited upon the final payment due the United States from the German Government on account of the awards of the Mixed Claims Commission.

(e) The Secretary of the Treasury is authorized and directed to issue to the Alien Property Custodian, upon such terms and conditions and under such regulations as the Secretary of the Treasury may prescribe, one or more participating certificates, bearing interest payable annually (as nearly as may be) at the rate of 5 per centum per annum, as evidence of the investment by the Alien Property Custodian under subsection (a), and one or more non-interest bearing participating certificates, as evidence of the investment by the Alien Property Custodian under subsection (b). All such certificates shall evidence a participating interest, in accordance with, and subject to the priorities of, the provisions of section 4 of the Settlement of War Claims Act of 1928, in the funds in the German special deposit account created by such section, except that—

(1) The United States shall assume no liability, directly or indirectly, for the payment of any such certificates, or of the interest thereon, except out of funds in such special deposit account available therefor, and all such certificates shall so state on their face; and

(2) Such certificates shall not be transferable, except that the

Alien Property Custodian may transfer any such participating certificate evidencing the interest of a substantial number of the owners of the money invested, to a trustee duly appointed by such owners.

(f) Any amount of principal or interest paid to the Alien Property Custodian in accordance with the provisions of subsection (c) of section 4 of the Settlement of War Claims Act of 1928 shall be allocated pro rata among the persons filing written consents under subsection (m) of section 9 of this Act, and the amounts so allocated shall be paid to such persons. If any person to whom any amount is payable under this subsection has died (or if, in the case of a partnership, association, or other unincorporated body of individuals, or a corporation, its existence has terminated), payment shall be made to the persons determined by the Alien Property Custodian to be entitled thereto.

(g) The Alien Property Custodian is authorized and directed (after the payment of debts under section 9) to transfer to the Secretary of the Treasury, for deposit in the special deposit account (Austrian or Hungarian, as the case may be), created by section 7 of the Settlement of War Claims Act of 1928, all money and the proceeds of all property, including all income, dividends, interest, annuities, and earnings accumulated in respect thereof, owned by the Austrian Government or any corporation all the stock of which was owned by or on behalf of the Austrian Government (including the property of the Imperial Royal Tobacco Monopoly, also known under the name of K. K. Oesterreichische Tabak Regie), or owned by the Hungarian Government or by any corporation all the stock of which was owned by or on behalf of the Hungarian Government.

Sec. 26 (a) The Alien Property Custodian shall allocate among the various trusts the funds in the "unallocated interest fund" (as defined in section 28). Such allocation shall be based upon the earnings (determined by the Secretary of the Treasury) on the total amounts deposited under section 12.

(b) The Alien Property Custodian, when the allocation has been made, is authorized and directed to pay to each person entitled, in accordance with a final decision of a court of the United States or of the District of Columbia, or of an opinion of the Attorney General, to the distribution of any portion of such unallocated interest fund, the amount allocated to his trust, except as provided in subsection (c) of this section.

(c) In the case of persons entitled, under paragraph (12), (13), (14), or (16) of subsection (b) of section (9), to such return,

and in the case of persons who would be entitled to such return thereunder if all such money or property had not been returned under paragraph (9) or (10) of such subsection, and in the case of persons entitled to such return under subsection (n) of section 9, an amount equal to the aggregate amount allocated to their trusts shall be credited against the sum of \$25,000,000 invested in participating certificates under paragraph (1) of subsection (b) of section 25. If the aggregate amount so allocated is in excess of \$25,000,000, an amount equal to the excess shall be invested in the same manner. Upon the repayment of any of the amounts so invested, under the provisions of section 4 of the Settlement of War Claims Act of 1928, the amount so repaid shall be distributed pro rata among such persons, notwithstanding any receipts or releases given by them.

(d) The unallocated interest fund shall be available for carrying out the provisions of this section, including the expenses of making the allocation.

Sec. 27. The Alien Property Custodian is authorized and directed to return to the United States any consideration paid to him by the United States under any license, assignment, or sale by the Alien Property Custodian to the United States of any patent (or any right therein or claim thereto, and including an application therefor and any patent issued pursuant to any such application).

Sec. 28. As used in this Act, the term "unallocated interest fund" means the sum of (1) the earnings and profits accumulated prior to March 4, 1923, and attributable to investments, and reinvestments under section 12 by the Secretary of the Treasury, plus (2) the earnings and profits accumulated on or after March 4, 1923, in respect of the earnings and profits referred to in clause (1) of this section.

Sec. 29 (a) Where the Alien Property Custodian has made demand or requirement for the conveyance, transfer, assignment, delivery, or payment to him of any money or other property of any enemy or ally of enemy (whether or not suit or proceeding for the enforcement thereof has been begun and whether or not any judgment or decree in respect thereof has been made or entered) and where the whole or any part of such money or other property would, if conveyed, transferred, assigned, delivered, or paid to him, be returnable under any provision of this Act, the Alien Property Custodian may, in his discretion, and on such terms and conditions as he may prescribe, waive such demand or requirement, or accept in full satisfaction of such demand, require-

ment, judgment, or decree, a less amount than that demanded or required by him.

(b) The Alien Property Custodian shall not make any such waiver or compromise except with the approval of the Attorney General; nor (if any part of such money or property would be returnable only upon the filing of the written consent required by subsection (m) of section 9) unless, after compliance with the terms and conditions of such waiver or compromise, the Alien Property Custodian or the Treasurer of the United States will hold (in respect of such enemy or ally of enemy) for investment as provided in section 25, amount equal to 20 per centum of the sum of (1) the value of the money or other property held by the Alien Property Custodian or the Treasurer of the United States at the time of such waiver or compromise, plus (2) the value of the money or other property to which the Alien Property Custodian would be entitled under such demand or requirement if the waiver or compromise had not been made.

(c) Where the Alien Property Custodian has made demand or requirement for the conveyance, transfer, assignment, delivery, or payment to him of any money or other property of any enemy or ally of enemy (whether or not suit or proceeding for the enforcement thereof has been begun and whether or not any judgment or decree in respect thereof has been made or entered) and where the interest or right of such enemy or ally of enemy in such money or property has not, prior to the enactment of the Settlement of War Claims Act of 1928, vested in enjoyment, the Alien Property Custodian may, in his discretion, and on such terms and conditions as he may prescribe, waive such demand and requirement, without compliance with the requirements of subsection (b) of this section, but only with the approval of the Attorney General.

(d) Nothing in this section shall be construed as requiring the Alien Property Custodian to make any waiver or compromise authorized by this section, and the Alien Property Custodian may proceed in respect of any demand or requirement referred to in subsection (a) or (c) as if this section had not been enacted.

(e) All money or other property received by the Alien Property Custodian as a result of any action or proceeding (whether begun before or after the enactment of the Settlement of War Claims Act of 1928, and whether or not for the enforcement of a demand or requirement as above specified) shall for the purposes of this Act be considered as forming a part of the trust in respect of which such action or proceeding was brought, and shall be subject to return in the same manner and upon the same conditions as

any other money or property in such trust, except as otherwise provided in subsection (b) of this section.

Sec. 30. Any money or other property returnable under subsection (b) or (n) of section 9 shall, at any time prior to such return, be subject to attachment in accordance with the provisions of the code of law for the District of Columbia, as amended, relating to attachments in suits at law and to attachments for the enforcement of judgments at law and decrees in equity, but any writ of attachment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding credits in favor of the person entitled to such return to the extent of the value of the money or other property so returnable. Nothing in this section shall be construed as authorizing the taking of actual possession, by any officer of any court, of any money or other property held by the Alien Property Custodian or by the Treasurer of the United States.

Sec. 31. As used in this Act, the term "member of the former ruling family" means (1) any person who was at any time between April 6, 1917, and July 2, 1921, the German Emperor or the ruler of any constituent kingdom of the German Empire, or (2) the wife or any child of such person.

APPENDIX B

FIRST WAR POWERS ACT, 1941

Public Law No. 354, 77th Congress-1st Session,
December 18, 1941, c. 593, 55 Stat. 838

AN ACT TO EXPEDITE THE PROSECUTION OF THE WAR EFFORT

TITLE III TRADING WITH THE ENEMY

Sec. 301. The first sentence of subdivision (b) of section 5 of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

(Complete text of sec. 301 is to be found in the reprint of the Act, p. 391.)

Sec. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

Sec. 303. Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or Territory of the United States and bound to or from any foreign country. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer,

director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture and equipment, concerned in such violation shall be forfeited to the United States.

APPENDIX C

EXECUTIVE ORDER NO. 8389

REGULATING TRANSACTIONS IN FOREIGN EXCHANGE AND FOREIGN-OWNED PROPERTY, PROVIDING FOR THE REPORTING OF ALL FOREIGN-OWNED PROPERTY, AND RELATED MATTERS

Exec. Order No. 8389, April 10, 1940, 5 Federal Register 1400 (1940), as amended,¹ was amended by Exec. Order No. 8785, June 14, 1941, 6 Fed. Reg. 2897 (1940).

The new text printed below was further amended by Exec. Orders No. 8832, July 26, 1941, 6 Fed. Reg. 3715 (1941), No. 8963, December 9, 1941, *ibid.*, p. 6348 and No. 8998, December 26, 1941, *ibid.* p. 6785; these amendments are indicated in the notes below.

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I, Franklin D. Roosevelt, President of the United States of America, do prescribe the following:

Executive Order No. 8389 of April 10, 1940, as amended, is amended to read as follows:

Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between

¹ Sec. 2 of Public Resolution No. 69, May 7, 1940, 54 Stat. 179, provided: "Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed."

any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

Section 2. A. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise:

(1) The acquisition, disposition or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this Order or a notarial or similar seal which by its contents indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may, at any time, have been stamped, imprinted, affixed or attached thereto; and

(2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States.

B. The Secretary of the Treasury may investigate, regulate, or prohibit under such regulations, rulings, or instructions as he may prescribe, by means of licenses or otherwise, the sending, mailing, importing or otherwise bringing, directly or indirectly, into the United States, from any foreign country, of any securities or evidences thereof or the receiving or holding

in the United States of any securities or evidences thereof so brought into the United States.

Section 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the terms "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

- (a) April 8, 1940—
Norway and Denmark;
- (b) May 10, 1940—
The Netherlands, Belgium and Luxembourg;
- (c) June 17, 1940—
France (including Monaco);
- (d) July 10, 1940—
Latvia, Estonia and Lithuania;
- (e) October 9, 1940—
Rumania;
- (f) March 4, 1941—
Bulgaria;
- (g) March 13, 1941—
Hungary;
- (h) March 24, 1941—
Yugoslavia;
- (i) April 28, 1941—
Greece;
- (j) June 14, 1941—
Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, and Union of Soviet Socialist Republics;
- (k)² June 14, 1941—
China, and Japan;
- (l)³ June 14, 1941—
Thailand;
- (m)⁴ June 14, 1941—
Hong Kong.

The "effective date of this Order" with respect to any foreign country not designated in this Order shall be deemed to be June 14, 1941.

Section 4. A. The Secretary of the Treasury and/or the Attorney

² Added by Exec. Order No. 8832, July 26, 1941, 6 Fed. Reg. 3715 (1941).

³ Added by Exec. Order No. 8963, December 9, 1941, 6 Fed. Reg. 6348 (1941).

⁴ Added by Exec. Order No. 8998, December 26, 1941, 6 Fed. Reg. 6785 (1941).

General may require, by means of regulations, rulings, instructions, or otherwise, any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, from time to time and at any time or times, complete information relative to, any transaction referred to in section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, or relative to any property in which any foreign country or any national thereof has any interest of any nature whatsoever, direct or indirect, including the production of any books of account, contracts, letters, or other papers, in connection therewith, in the custody or control of such person, either before or after such transaction is completed; and the Secretary of the Treasury and/or the Attorney General may, through any agency, investigate any such transaction or act, or any violation of the provisions of this Order.

B. Every person engaging in any of the transactions referred to in sections 1 and 2 of this Order shall keep a full record of each such transaction engaged in by him, regardless of whether such transaction is effected pursuant to license or otherwise, and such record shall be available for examination for at least one year after the date of such transaction.

Section 5. A. As used in the first paragraph of section 1 of this Order "transactions [which] involve property in which any foreign country designated in this Order, or any national thereof, has * * * any interest of any nature whatsoever, direct or indirect" shall include, but not by way of limitation (i) any payment or transfer to any such foreign country or national thereof, (ii) any export or withdrawal from the United States to such foreign country, and (iii) any transfer of credit, or payment of an obligation, expressed in terms of the currency of such foreign country.

B.⁵ The term "United States" means the United States and any place subject to the jurisdiction thereof, and the term "continental United States" means the states of the United States, the District of Columbia, and the Territory of Alaska; provided, however, that for the purposes of this Order the term "United States" shall not be deemed to include any territory included within the term "foreign country" as defined in paragraph D of this section.

C. The term "person" means an individual, partnership, association, corporation, or other organization.

⁵ This paragraph B was amended, see note 4, in order not to include into the term "United States" the Philippine Islands.

D. The term "foreign country" shall include, but not by way of limitation,

(i) The state and the government thereof on the effective date of this Order as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof,

(ii) Any other government (including any political subdivision, agency, or instrumentality thereof) to the extent and only to the extent that such government exercises or claims to exercise *de jure* or *de facto* sovereignty over the area which on such effective date constituted such foreign country, and

(iii) Any territory which on or since the effective date of this order is controlled or occupied by the military, naval or police forces or other authority of such foreign country,

(iv) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any of the foregoing.

Hong Kong⁶ shall be deemed to be a foreign country within the meaning of this subdivision.

E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

⁶ See note 4.

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing, control or 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a "national" within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. Without limitation of the foregoing, the term "national" shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or broker; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate "banking institution."

G. The term "this Order," as used herein, shall mean Executive Order No. 8389 of April 10, 1940, as amended.

Section 6. Executive Order No. 8389 of April 10, 1940, as amended, shall no longer be deemed to be an amendment to or a part of Executive Order No. 6560 of January 15, 1934. Executive Order No. 6560 of January 15, 1934, and the Regulations of November 12, 1934, are hereby modified in so far as they are incon-

sistent with the provisions of this Order, and except as so modified, continue in full force and effect. Nothing herein shall be deemed to revoke any license, ruling, or instruction now in effect and issued pursuant to Executive Order No. 6560 of January 15, 1934, as amended, or pursuant to this Order; provided, however, that all such licenses, rulings, or instructions shall be subject to the provisions hereof. Any amendment, modification or revocation by or pursuant to the provisions of this Order of any orders, regulations, rulings, instructions or licenses shall not affect any act done, or any suit or proceeding had or commenced in any civil or criminal case prior to such amendment, modification or revocation, and all penalties, forfeitures and liabilities under any such orders, regulations, rulings, instructions or licenses shall continue and may be enforced as if such amendment, modification or revocation had not been made.

Section 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application or license shall be final.

Section 8. Section 5 (b) of the Act of October 6, 1917, as amended, provides in part:

“* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.”

Section 9. This Order and any regulations, rulings, licenses or instructions issued hereunder may be amended, modified or revoked at any time.

The White House,
June 14, 1941.

Franklin D. Roosevelt

APPENDIX D

REGULATIONS¹ UNDER EXECUTIVE ORDER NO. 8389, AS AMENDED²

RELATING TO TRANSACTIONS IN FOREIGN EXCHANGE AND FOREIGN-OWNED PROPERTY, THE REPORTING OF ALL FOREIGN-OWNED PROPERTY AND RELATED MATTERS

The Regulations of April 10, 1940, as amended (Sections 130.1 to 130.6), are amended to read as follows:

Section 130.1. *Authority for regulations.* These regulations are prescribed and issued under authority of Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, and Executive Order No. 8389 of April 10, 1940, as amended by Executive Order No. 8785 of June 14, 1941.

Section 130.2. *Definitions.*

(a) The term "Order" shall refer to Executive Order No. 8389 of April 10, 1940, as amended.

(b) The term "regulations" shall refer to these regulations.

(c) The terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness or obligations, financial securities commonly dealt in by bankers, brokers, and investment houses, notes, debentures, stocks, bonds, coupons, bankers' acceptances, mortgages, pledges, liens or other right in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts

¹ Code of Federal Regulations. Title 31—Money and Finance: Treasury. Chapter I—Monetary Offices, Department of the Treasury. Part 130.

² June 14, 1941; the further amendment, July 26, 1941, Amendment to Regulations under Exec. Order No. 8389, as amended, is reprinted below p. 443.

payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, et cetera.

(d) Safe deposit boxes shall be deemed to be in the "custody" not only of all persons having access thereto but also of the lessors of such boxes whether or not such lessors have access to such boxes. The foregoing shall not in any way be regarded as a limitation upon the meaning of the term "custody."

(e) For the meaning of other terms reference should be made to the definitions contained in the Order. In interpreting rulings, licenses, instructions, etc., issued pursuant to the Order and regulations, particular attention is directed to the provisions of General Ruling No. 4, as from time to time hereafter amended.

Section 130.3. *Licenses.* Applications for licenses to engage in any transaction referred to in sections 1 or 2 of the Order shall be filed in triplicate with the Federal Reserve Bank of the District or the Governor or High Commissioner of the territory or possession of the United States in which the applicant resides or has his principal place of business or principal office or agency, or if the applicant has no legal residence or principal place of business or principal office or agency in a Federal Reserve district or a territory or possession of the United States then with the Federal Reserve Bank of New York or the Federal Reserve Bank of San Francisco. Application forms may be obtained from any Federal Reserve Bank, the Governor or High Commissioner of a territory or possession of the United States, or the Secretary of the Treasury, Washington, D. C. The original of each application shall be executed under oath before an officer authorized to administer oaths, or if executed outside of the United States, before a diplomatic or consular officer of the United States. The applicant shall furnish such further information as shall be requested of him by the Secretary of the Treasury or the Federal Reserve Bank or other agency at which the application is filed. Licenses will be issued by the Secretary of the Treasury, acting directly or through any officers or agencies that he may designate, and by the Federal Reserve Banks, acting in accordance with such regulations, rulings, and instructions as the Secretary of the Treasury may from time to time prescribe, in such cases or classes of cases as the Secretary of the Treasury may determine. The Federal Reserve Bank or other agency at which an application is filed will advise the applicant of the decision respecting the application. Licenses for exports, withdrawals or imports, after having been cancelled by

the collector of customs or the postmaster through whom the exportation, withdrawal or importation was made, may be returned by such collector of customs or postmaster to the licensee. Appropriate forms for applications and licenses will be prescribed by the Secretary of the Treasury. Licensees may be required to file reports upon the consummation of the transactions. The decision of the Secretary of the Treasury with respect to an application for license shall be final.

Section 130.4. Reports of Property Interests of All Foreign Countries and Nationals Thereof.

(a) On or before July 14, 1941, reports shall be filed on Form TFR-300, duly executed under oath, containing the information called for in such form, with respect to all property subject to the jurisdiction of the United States on the opening of business on June 1, 1940, and with respect to all property subject to the jurisdiction of the United States on the opening of business on June 14, 1941, in which on the respective dates any foreign country or any national thereof had any interest of any nature whatsoever, direct or indirect, regardless of whether a report on Form TFR-300 with respect to any such property shall have previous been filed. Such reports shall be filed by:

(1) Every person in the United States, directly or indirectly holding, or having title to, or custody, control or possession of such property on either or both of the aforementioned respective dates.

(2) Every agent or representative in the United States for any foreign country or any national thereof having any information with respect to such property.

Provided, That no report on Form TFR-300 need be filed where the total value of all property interests of any foreign country or national to be reported is less than \$1,000.

Without any limitation whatsoever of the foregoing, reports on Form TFR-300, filed as required above, shall be filed by every partnership, trustee, association, corporation, or other organization organized under the laws of the United States or any state, territory, or district of the United States or having its principal place of business in the United States, with respect to any shares of its stock or any of its debentures, notes, bonds, coupons or other obligations or securities or any equity therein, in which any foreign country or any national thereof had on either or both of the aforementioned respective dates, any interest of any nature whatsoever, direct or indirect.

(b) Reports shall be executed and filed in quadruplicate with

the Federal Reserve Bank of the district or the Governor or High Commissioner of the territory or possession of the United States in which the party filing the report resides or has his principal place of business or principal office or agency, or if such party has no legal residence or principal place of business or principal office or agency in a Federal Reserve district or a territory or possession of the United States, then with the Federal Reserve Bank of New York or the Federal Reserve Bank of San Francisco. A report shall be deemed to have been filed when it is received by the proper Federal Reserve Bank or other agency or when it is properly addressed and mailed and bears a postmark dated prior to midnight of the date upon which the report is due. Each Federal Reserve Bank or other agency shall promptly forward three copies of every report filed with it to the Secretary of the Treasury.

(c) (1) All spaces in the report must be properly filled in. Reports found not to be in proper form, or lacking in essential details, shall not be deemed to have been filed in compliance with the Order.

(2) Where space in the report form does not permit full answers to questions, the information required may be set forth in supplementary papers incorporated by reference in the report and submitted therewith. Supplementary documents and papers must be referred to in the principal statement in chronological or other appropriate order and be described in such manner that they can be identified.

(d) A separate report under oath must be filed by each person required to file a report except that persons holding property jointly may file a joint report.

(e) The Secretary of the Treasury may, in his discretion, grant such extensions of time or exemptions as he deems advisable for the making of any or all of the reports required by these regulations.

(f) Report Form TFR-300 may be obtained from any Federal Reserve Bank, the Governor or High Commissioner of a territory or possession of the United States, or the Secretary of the Treasury, Washington, D. C.

Section 130.5. *Penalties.* Section 5 (b) of the Act of October 6, 1917, as amended, provides in part:

“* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or

agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both."

Section 130.6. These regulations and any rulings, licenses, or instructions issued hereunder shall not be deemed to authorize any transaction prohibited by reason of any other law, proclamation, order or regulation.

Section 130.7. *Amendment, Modification, or Revocation.* These regulations and any rulings, licenses, instructions, or forms issued hereunder may be amended, modified, or revoked at any time.

HENRY MORGENTHAU, JR.
Secretary of the Treasury.

Approved: June 14, 1941.

FRANKLIN D. ROOSEVELT

The Regulations of April 10, 1940, as amended (Sections 130.1 to 130.7), are hereby amended so that reports on Form TFR-300 shall be filed with respect to all property subject to the jurisdiction of the United States on the opening of business on July 26, 1941, as well as with respect to all property subject to the jurisdiction of the United States on the opening of business on June 1, 1940, and with respect to all property subject to the jurisdiction of the United States on the opening of business on June 14, 1941, in which on the respective dates China or Japan or any national thereof had any interest of any nature whatsoever, direct or indirect. Such reports shall be filed by the persons specified in Section 130.4 of the Regulations and in the manner prescribed in the Regulations.

E. H. FOLEY, JR.
Acting Secretary of the Treasury.

Approved: July 26, 1941.

FRANKLIN D. ROOSEVELT

APPENDIX E

GENERAL LICENSE UNDER SECTION 3 (a) OF THE TRADING WITH THE ENEMY ACT

December 13, 1941, 6 Federal Register 6420 (1941).

By virtue of and pursuant to the authority vested in me by Sections 3 and 5 of the Trading with the Enemy Act, as amended, and by virtue of all other authority vested in me, I, Franklin D. Roosevelt, President of the United States of America, do prescribe the following:

A general license is hereby granted licensing any transaction or act prohibited by Section 3(a) of the Trading with the Enemy Act, as amended, provided, however, that such transaction or act is authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise, pursuant to Executive Order No. 8389, as amended.

Franklin D. Roosevelt

The White House

December 13, 1941

H. Morgenthau, Jr.

Secretary of the Treasury

Francis Biddle

Attorney General of the United States

APPENDIX F

GENERAL RULING NO. 11¹

Under Executive Order No. 8389, as amended, Executive Order No. 9193,² Sections 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, relating to Foreign Funds Control.

March 18, 1942, 7 Federal Register 2168 (1942) .

[General Ruling No. 11 has been amended by sec. 6 of Public Circular No. 19, September 22, 1942, 7 Federal Register 7518 (1942), and by the amendment to General Ruling No. 11, November 8, 1942, 7 Federal Register 9119 (1942). These amendments are incorporated in the text printed below and indicated in the notes.]

(1) No license or other authorization now outstanding or hereafter issued, unless expressly referring to this general ruling, shall be deemed to authorize any transaction which, directly or indirectly, involves any trade or communication with an enemy national.

(2) As used in this general ruling and in any other rulings, licenses, instructions, etc.:

(a) The term "enemy national" shall mean the following:

(i) The Government of any country against which the United States has declared war (Germany, Italy, Japan, Bulgaria, Hungary, and Rumania)³ and any agent, instrumentality or representative of the foregoing Governments, or other person acting therefor, wherever situated (including the accredited representatives of other Governments to the extent, and only to the extent, that they are actually representing the interests of the Governments of Germany, Italy and Japan and Bulgaria, Hungary and Rumania); and

(ii) The government of any other blocked country having its seat within enemy territory, and any agent, instrumentality, or representative thereof, or other person acting therefor, actually situated within enemy territory; and

(iii) Any individual within enemy territory and any partnership, association, corporation or other organization

¹ Issued by the Treasury Department. ² Reprinted *infra* p. 458.

³ As amended by Paragraph (6) of Public Circular No. 19, September 22, 1942, 7 Federal Register 7518 (1942), expressly including Bulgaria, Hungary, and Rumania in the countries upon which the United States had formally declared war.

to the extent that it is actually situated within enemy territory; and

(iv) Any person whose name appears on The Proclaimed List of Certain Blocked Nationals and any other person acting therefor.

(b) The term "enemy territory" shall mean the following:

(i) The territory of Germany, Italy, Japan, Bulgaria, Hungary, and Rumania.⁴

(ii) The territory controlled or occupied by the military, naval or police forces or other authority of Germany, Italy or Japan.

The territory so controlled or occupied shall be deemed to be the territory of Albania; Austria; that portion of Belgium within continental Europe; Bulgaria; that portion of Burma occupied by Japan; that portion of China occupied by Japan; Czechoslovakia; Danzig; that portion of Denmark within continental Europe; Estonia; that portion of France within continental Europe;⁵ French Indo-China; Greece; Hong Kong; Hungary; Latvia; Lithuania; Luxembourg; British Malaya; that portion of the Netherlands within continental Europe; that portion of the Netherlands East Indies occupied by Japan; Norway; that portion of the Philippine Islands occupied by Japan; Poland; Rumania; San Marino; Thailand; that portion of the Union of Soviet Socialist Republics occupied by Germany; Yugoslavia; and any other territory controlled or occupied by Germany, Italy or Japan.

(c) The term "The Proclaimed List of Certain Blocked Nationals" shall mean "The Proclaimed List of Certain Blocked Nationals" as amended and supplemented, promulgated pursuant to the President's Proclamation of July 17, 1941.

(d) The term "trade or communication with an enemy national" shall mean the sending, taking, bringing, transportation, importation, exportation, or transmission of, or the attempt to send, take, bring, transport, import, export or transmit

(i) any letter, writing, paper, telegram, cablegram, wire-any nature whatsoever, or

less message, telephone message or other communication of

⁴ See note 3.

⁵ As amended November 8, 1942, 7 Federal Register 9119 (1942), the phrase "that portion of France within continental Europe" being substituted for the phrase "that portion of France within continental Europe occupied by Germany or Italy."

(ii) any property of any nature whatsoever, including any goods, wares, merchandise, securities, currency, stamps, coin, bullion, money, checks, drafts, proxies, powers of attorney, evidences of ownership, evidences of indebtedness, evidences of property, or contracts

directly or indirectly to or from an enemy national after March 18, 1942; *provided*,⁶ *however*, that the date November 8, 1942, shall be substituted for the date of March 18, 1942, with respect to trade and communication with those enemy nations who became enemy nationals only by reason of the amendment of this General Ruling on November 8, 1942.

(3) This general ruling shall not be deemed to affect any outstanding specific license in so far as such license expressly authorizes any transaction which involves trade or communication with any person whose name appears on The Proclaimed List of Certain Blocked Nationals.

(4) Any transaction prohibited by section 3 (a) of the Trading with the enemy Act, as amended, is licensed thereunder unless such transaction is prohibited pursuant to section 5 (b) of that Act and not licensed by the Secretary of the Treasury. In this connection, attention is directed to the General License under section 3 (a) of the Trading with the enemy Act, issued by the President on December 13, 1941.

E. H. Foley, Jr.,
Acting Secretary of the Treasury.

PUBLIC INTERPRETATION NO. 5

As to the application of General Ruling No. 11 to imports or exports insured with companies which are enemy nationals or through agents who are enemy nationals, Public Interpretation No. 5 (issued by the Treasury Department), July 31, 1942, Fed. Res. Bank of New York Circular 2469, reads as follows:

Inquiry has been made whether General Ruling No. 11 applies to imports or exports insured by insurance companies which are enemy nationals or through agents who are enemy nationals.

No Treasury license or other authorization, unless expressly referring to General Ruling No. 11 in respect to such insurance, is deemed to authorize any import (including any c.i.f. import) or export which is insured by an insurance company which is an enemy national or through an agent who is an enemy national, as defined in General Ruling No. 11.

⁶ Added by Paragraph (2) of the amendment, November 8, 1942, 7 Federal Register 9119 (1942).

APPENDIX G

GENERAL RULING NO. 12

Under Executive Order No. 8389, as amended, Sections 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, Relating to Foreign Funds Control.

April 21, 1942, 7 Federal Register 2991 (1942).

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of the Order is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable

for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: provided, however, that no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; provided, however, that the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2(1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not

treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that the "effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession; and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Provisional Decree of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President:

H. Morgenthau, Jr.,
Secretary of the Treasury.

APPENDIX H

GENERAL RULING NO. 12A

FEBRUARY 9, 1943, 8 FEDERAL REGISTER 1833 (1943) .

(1) Reference is made to transfers of property in a blocked account which are null and void, or unenforceable, by virtue of the provisions of General Ruling No. 12. Such transfers shall not be deemed to be null and void, or unenforceable, under General Ruling No. 12, as to the person with whom such blocked account was held or maintained (and as to such person only) in cases in which such person is able to establish each of the following:

(a) Such transfer did not represent a wilful violation of the Order by the person with whom such blocked account was held or maintained:

(b) The person with whom such blocked account was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer was not licensed or authorized by the Secretary of the Treasury, or if a license did purport to cover the transfer, that such license had been obtained by misrepresentation or the withholding of material facts or was otherwise fraudulently obtained: and

(c) Promptly upon discovery that such transfer was in violation of the Order, or was not licensed or authorized by the Secretary of the Treasury, or if a license did purport to cover the transfer, that such license had been obtained by misrepresentation or the withholding of material facts or was otherwise fraudulently obtained, the person with whom such blocked account was held or maintained filed with the appropriate Federal Reserve Bank a report on Form TFR-12A in triplicate setting forth in full the information called for therein, provided, however, that such report should not be regarded as evidence of compliance with subdivisions (a) and (b) of this paragraph.

(2) Except as otherwise provided by regulations, rulings, licenses, or instructions expressly referring to this general ruling, no license will be required to validate the authority of any person to act or purport to act in a transaction directly or indirectly for the benefit of or on behalf of any blocked country or any national thereof, provided, that the transaction in which such person acts

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or purports to act is licensed or authorized by the Secretary of the Treasury or is not prohibited pursuant to Section 5 (b) of the Trading with the Enemy Act, as amended.

(3) As used in this general ruling, the term "blocked account" shall have the same meaning as that prescribed in General Ruling No. 12.

Randolph Paul
Acting Secretary of the Treasury

APPENDIX I

SPECIAL REGULATION NO. 1

Under Executive Order No. 8389, April 10, 1940, as amended, and Section 5 (b) of the Trading with the Enemy Act, as amended by the First War Powers Act, 1941, Relating to Transactions in Special Blocked Property.

[Issued by the Federal Reserve Bank of San Francisco, Fiscal Agent of the United States, March 18, 1942,¹ and confirmed by the Secretary of the Treasury, 7 Federal Register 2184 (1942).]

By virtue of the authority vested in the Federal Reserve Bank of San Francisco, Fiscal Agent of the United States, pursuant to Section 5 (b) of the Trading with the Enemy Act as amended by the First War Powers Act, by virtue of the authority vested in such bank by the Commanding General of the Western Defense Command and Fourth Army, and by virtue of all other authority vested in such bank, the following special regulations are hereby prescribed:

(1) The acquisition, disposition or transfer of, or other dealing in, or exercising any right, power or privilege with respect to, any property hereafter designated as Special Blocked Property is prohibited except as authorized by license expressly referring to this regulation.

(2) Application for any such license may be filed on Form TEE-1 by any person with the nearest office of the Federal Reserve Bank of San Francisco. Such application should set forth (a) the interest, if any, of the applicant in the property; (b) the details of the transaction for which a license is requested, including the terms of any proposed settlement; (c) the manner in which the interest of the evacuee national in the property is being protected; and (d) whether or not the evacuee national is in agreement with the proposed settlement.

(3) As used in this special regulation and in any ruling, license, instruction, etc.:

¹ Federal Reserve Bank of San Francisco, Evacuee Property Department, Circular No. 1, March 18, 1942.

(a) The term "evacuee national" shall mean any Japanese, German, or Italian alien, or any person of Japanese ancestry, resident on or since December 7, 1941, in Military Area No. 1 or in specified zones in other Military Areas prescribed in or pursuant to public proclamations issued by Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army. For the purpose of this regulation all evacuee nationals are nationals of a foreign country.

(b) The term "Special Blocked Property" shall mean property in which an evacuee national has an interest and which has been designated as Special Blocked Property by the Federal Reserve Bank of San Francisco in one or more of the following ways:

(i) There is posted on or reasonably near such property an official Federal Reserve Bank of San Francisco notice that such property is Special Blocked Property.

(ii) The person holding such property or having possession or custody hereof has been notified by the Federal Reserve Bank of San Francisco that such property is Special Blocked Property.

(iii) One or more persons having an interest in such property have been notified by the Federal Reserve Bank of San Francisco that such property is Special Blocked Property.

Federal Reserve Bank of San Francisco
Fiscal Agent of the United States

By Wm. A. Day,
President.

Special Regulation No. 1 has been revoked March 16, 1943, 8 Federal Register 4237 (1943).

APPENDIX J

PRESIDENTIAL PROCLAMATION NO. 2497

AUTHORIZING A PROCLAIMED LIST OF CERTAIN BLOCKED NATIONALS AND CONTROLLING CERTAIN EXPORTS

July 17, 1941, 6 Federal Register 3555 (1941)

I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415) as amended and Section 6 of the Act of July 2, 1940 (54 Stat. 714) as amended and by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency and finding that this Proclamation is necessary in the interest of national defense, do hereby order and proclaim the following:

Section 1. The Secretary of State, acting in conjunction with the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Administrator of Export Control, and the Coordinator of Commercial and Cultural Relations Between the American Republics, shall from time to time cause to be prepared an appropriate list of—

(a) certain persons deemed to be, or to have been acting or purporting to act, directly or indirectly, for the benefit of, or under the direction of, or under the jurisdiction of, or on behalf of, or in collaboration with Germany or Italy or a national thereof; and

(b) certain persons to whom, or on whose behalf, or for whose account, the exportation directly or indirectly of any article or material exported from the United States, is deemed to be detrimental to the interest of national defense.

In similar manner and in the interest of national defense, additions to and deletions from such list shall be made from time to time. Such list and any additions thereto or deletions therefrom shall be filed pursuant to the provisions of the Federal Register Act and such list shall be known as "The Proclaimed List of Certain Blocked Nationals."

Section 2. Any person so long as his name appears in such list, shall, for the purpose of Section 5 (b) of the Act of October 6, 1917, as amended, and for the purpose of this Proclamation, be deemed to be a national of a foreign country, and shall be treated for all purposes under Executive Order No. 8389, as amended, as though he were a national of Germany or Italy. All the terms and provisions of Executive Order No. 8389, as amended, shall be applicable to any such person so long as his name appears in such list, and to any property in which any such person has or has had an interest, to the same extent that such terms and provisions are applicable to nationals of Germany or Italy, and to property in which nationals of Germany or Italy have or have had an interest.

Section 3. The exportation from the United States directly or indirectly to, or on behalf of, or for the account of any person so long as his name appears on such list of any article or material the exportation of which is prohibited or curtailed by any proclamation heretofore or hereafter issued under the authority of Section 6 of the Act of July 2, 1940, as amended, or of any other military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, is hereby prohibited under Section 6 of the Act of July 2, 1940, as amended, except (1) when authorized in each case by a license as provided for in Proclamation No. 2413 of July 2, 1940, or in Proclamation No. 2465 of March 4, 1941, as the case may be, and (2) when the Administrator of Export Control under my direction has determined that such prohibition of exportation would work an unusual hardship on American interests.

Section 4. The term "person" as used herein means an individual, partnership, association, corporation or other organization.

The term "United States" as used herein means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, the Canal Zone, and the District of Columbia and any other territory, dependency or possession of the United States.

Section 5. Nothing herein contained shall be deemed in any manner to limit or restrict the provisions of the said Executive Order No. 8389, as amended, or the authority vested thereby in the Secretary of the Treasury and the Attorney General. So far as the said Executive Order No. 8389, as amended, is concerned, "The Proclaimed List of Certain Blocked Nationals," authorized by this Proclamation, is merely a list of certain persons with respect

to whom and with respect to whose property interests the public is specifically put on notice that the provisions of such Executive Order are applicable; and the fact that any person is not named in such list shall in no wise be deemed to mean that such person is not a national of a foreign country designated in such order, within the meaning thereof, or to affect in any manner the application of such order to such person or to the property interests of such person.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this 17 day of July, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-sixth.

By the President:

Franklin D. Roosevelt

Sumner Welles,

Acting Secretary of State.

APPENDIX K

EXECUTIVE ORDER NO. 9193

AMENDING EXECUTIVE ORDER N. 9095, ESTABLISHING THE OFFICE OF ALIEN PROPERTY CUSTODIAN AND DEFINING ITS FUNCTIONS AND DUTIES AND RELATED MATTERS

March 11, 1942, 7 Federal Register 1971 (1942),
as amended by Executive Order No. 9193, July 6, 1942,
7 Federal Register 5205 (1942)

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Executive Order.

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

- (a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or

owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

- (b) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;
- (c) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;
- (d) any patent, patent application, design patent, design patent application, copyright, copyright application, trademark or trademark application or right related thereto in which any foreign country or national thereof has any interest and any property of any nature whatsoever (including, without limitation, royalties and license fees) payable or held with respect thereto, and any interest of any nature whatsoever held therein by any foreign country or national thereof;
- (e) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; and
- (f) any property of any nature whatsoever which is in the

process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

When the Alien Property Custodian determines to exercise any power and authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian.

3. Subject to the provisions of this Executive Order, all powers and authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended, are hereby delegated to the Secretary of the Treasury or any person, agency, or instrumentality designated by him; *provided, however*, that when any property or interest, not belonging to a foreign government or central bank, shall be vested by the Secretary of the Treasury, such property or interest shall be vested in, and dealt with by, the Alien Property Custodian upon the terms directed by the Secretary of the Treasury. Except as otherwise provided herein, this Executive Order shall not be deemed to modify or amend Executive Order No. 8389, as amended, or the President's Proclamation of July 17, 1941, or Executive Order No. 8839, as amended, or the regulations, rulings, licenses and other action taken thereunder, or in connection therewith.

4. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order. The Secretary of the Treasury and the Alien Property Custodian each shall make available to the other all information in his files to enable the other to discharge his functions, and shall keep each other currently informed as to investigations being conducted with respect to enemy ownership or control of business enterprises within the United States.

5. The Alien Property Custodian is authorized to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy-

occupied territory in connection with any court or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States. If, as a result of any such action or proceeding, any such person obtains, or is determined to have, an interest in any property (including money judgments), such property, less an amount equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding, shall be subject to the provisions of Executive Order No. 8389, as amended, *provided, however*, that this shall not be deemed to limit the powers of the Alien Property Custodian under section 2 of this Order; and *provided further*, that the Alien Property Custodian may vest an amount of such property equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding.

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 shall be administered by him in conformity with the provisions of this Executive Order.

7. In the exercise of the authority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

8. All records and other property (including office equipment) of the Treasury Department which are used primarily in the administration of powers and duties to be exercised by the Alien Property Custodian, and such personnel as is used primarily in the administration of such powers and duties and which was hired by the Treasury Department after September 1, 1941 (including officers whose chief duties relate to the administration of such powers and duties), as the Secretary of the Treasury and the

Alien Property Custodian shall jointly certify for transfer, shall be transferred to the Office of the Alien Property Custodian. In the event of disagreement concerning the transfer of any personnel, records, or property, the determination shall be made by the Director of the Bureau of the Budget, pursuant to the formula here prescribed. Any personnel transferred pursuant to this Executive Order shall be transferred without loss of such Civil Service status or eligibility therefor as they may have.

9. This Executive Order shall not be deemed to modify or amend Executive Order No. 8843 of August 9, 1941, and the regulations, rulings, licenses and other action taken thereunder. Any and all action heretofore taken by the Secretary of the Treasury or the Alien Property Custodian, or by any person, agency, or instrumentality designated by either of them, pursuant to sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended, or pursuant to prior Executive Orders, and any and all action heretofore taken by the Board of Governors of the Federal Reserve System pursuant to Executive Order No. 8843 of August 9, 1941, are hereby confirmed and ratified.

10. For the purpose of this Executive Order:

- (a) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national

thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5 (b) of the Trading with the enemy Act, as amended.

- (b) The term "business enterprise within the United States" shall mean any individual proprietorship, partnership, corporation or other organization primarily engaged in the conduct of a business within the United States, and any other individual proprietorship, partnership, corporation or other organization to the extent that it has an established office within the United States engaged in the conduct of business within the United States.

11. The Secretary of the Treasury or the Alien Property Custodian, as the case may be, shall, except as otherwise agreed to by the Secretary of State, consult with the Secretary of State before vesting any property or interest pursuant to this Executive Order, and the Secretary of the Treasury shall consult with the Secretary of State before issuing any Order adding any additional foreign countries to section 3 of Executive Order No. 8389, as amended.

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

13. Any regulations, rulings, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under sections 3 (a) or 5 (b) of the Trading with the enemy Act, as amended, shall be conclusively presumed to have been issued, made or taken after appropriate consultation as herein required and after appropriate certification in any case in which a certification is required pursuant to the provisions of this Executive Order.

Franklin D. Roosevelt

The White House,
July 6, 1942.

APPENDIX L

REGULATIONS RELATING TO PROPERTY VESTED IN THE ALIEN PROPERTY CUSTODIAN

U. S. CODE, TITLE 8—ALIENS AND NATIONALITY.

Chapter II—Office of the Alien Property Custodian—Part 501

March 25, 1942; 7 Federal Register 2290 (1942).

These regulations are prescribed and issued by virtue of the authority vested in the Alien Property Custodian by the President pursuant to section 5 (b) of the Trading with the enemy Act, as amended by section 301 of the First War Powers Act, 1941:

§501.1. *Receipt and disposition of claims.* The following procedure is hereby established for the receipt and disposition of claims to property vested in the Alien Property Custodian pursuant to section 5 (b) of the Trading with the enemy Act, as amended by section 301 of the First War Powers Act, 1941:

(a) Claims of property vested in the Alien Property Custodian pursuant to section 5 (b) of the Trading with the enemy Act, as amended, shall be filed with the Alien Property Custodian on Form APC-1 in triplicate. Such claims shall be filed within such time, after the vesting in the Alien Property Custodian of the property to which they relate, as the Custodian shall prescribe. Form APC-1 may be obtained from the Alien Property Custodian, Washington, D. C. The original of each claim shall be executed under oath before an officer authorized to administer oaths, or if executed outside of the United States, before a diplomatic or consular officer of the United States.

(b) There shall be a committee to be known as the Vested Property Claims Committee, to be composed of three members designated by the Alien Property Custodian. The members of the Committee shall designate one of their number to be Chairman. The Committee is empowered to hear claims respecting property vested in the Alien Property Custodian pursuant to section 5 (b) of the Trading with the enemy Act, as amended, in accordance with rules and procedures to be formulated by the Committee.

The Committee shall have all powers necessary to carry out its functions, including the power to call witnesses and to compel the production of books of accounts, records, contracts, memoranda, and other papers.

(c) The Alien Property Custodian shall transmit to the Committee claims relating to property vested in the Alien Property Custodian pursuant to section 5 (b) of the Trading with the enemy Act, as amended.

(d) Appropriate notice of hearing shall be given by the Committee at least 10 days before the time set for the hearing. This requirement of notice may be waived by any claimant.

(e) Claimants and the Alien Property Custodian shall be entitled to representation by counsel, or otherwise, before the Committee.

(f) The Committee shall have a seal which shall be affixed to all exemplifications of the records and such other documents, orders, or notices as the Committee may determine.

(g) A complete record, including a transcript of the testimony, shall be made of any hearing before the Committee. The Committee shall transmit the record, including its findings and recommendations, to the Alien Property Custodian.

(h) The Alien Property Custodian, after the examination of the record, will issue a decision and will give appropriate notice of the decision rendered. The Alien Property Custodian will take appropriate action to effectuate any decision rendered. (Sec. 5 (b), 40 Stat. 415, 966, sec. 2, 48 Stat. 1, 54 Stat. 179, Pub. Law 354, 77th Cong.; E. O. 9095, 7 F. R. 1971).

Leo T. Crowley,
Alien Property Custodian.

APPENDIX M

SPECIMEN OF A VESTING ORDER OF THE ALIEN PROPERTY CUSTODIAN

VESTING ORDER

[X] Inc.

Under the authority of the Trading with the Enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation:

1. Finding that [Y] Inc., New York, New York, is controlled by or acting for or on behalf of or as a cloak for a designated enemy country (Germany) or a person within such country, and therefore is a national of a designated enemy country (Germany);

2. Finding that said [Y] Inc. is the beneficial owner of all of the outstanding capital stock of [X] Inc., a New York corporation, New York, New York, which is a business enterprise within the United States, consisting of 10 shares of no par value common stock registered in the names of — — — as Trustees for said [Y] Inc.

3. Finding also that [X] Inc. is controlled by or acting for or on behalf of or as a cloak for a designated enemy country (Germany) or a person within such country;

4. Determining, therefore, that said [X] Inc. is a national of a designated enemy country (Germany);

5. Determining that to the extent that such nationals are persons not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of the aforesaid designated enemy country (Germany);

6. Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise; and

7. Deeming it necessary in the national interest;
hereby (i) vests in the Alien Property Custodian the shares of stock described in subparagraph 2 hereof, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and (ii) undertakes the

direction, management, supervision and control of such business enterprise to the extent deemed necessary or advisable from time to time by the undersigned.

Such property, and any or all of the proceeds thereof, shall be held in an appropriate special account or accounts, pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof or to indicate that compensation will not be paid in lieu thereof, or to vary the extent of such direction, management, supervision or control or to terminate the same, if and when it should be determined that any of such action should be taken.

Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

The term "national," "designated enemy country" and "business enterprise within the United States" as used herein shall have the meanings prescribed in section 10 of said Executive Order.

Executed at Washington, D. C., on, 1943

[SEAL]

Leo T. Crowley,
Alien Property Custodian.

United Kingdom

APPENDIX N

TRADING WITH THE ENEMY ACT, 1939

2 & 3 Geo. 6, c. 89, September 5, 1939.

[As amended up to April 1, 1943]

An Act to impose penalties for trading with the enemy, to make provision as respects the property of enemies and enemy subjects, and for purposes connected with the matters aforesaid.

Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Trading with the Enemy and matters relating thereto.

1.—(1) Any person who trades with (or attempts to trade with)¹ the enemy within the meaning of this Act shall be guilty of an offence of trading with the enemy, and shall be liable—

- (a) on conviction on indictment, to penal servitude for a term not exceeding seven years or to a fine or to both such penal servitude and a fine, or
- (b) on summary conviction, to imprisonment for a term not exceeding twelve months or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine;

and the court may in any case order that any goods or money in respect of which the offence has been committed shall be forfeited.

(2) For the purposes of this Act a person shall be deemed to have traded with the enemy—

- (a) if he has had any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy,

¹ As amended by Defence (Trading with the Enemy) Regulations, 1940, Statutory Rules & Orders 1940, No. 1092.

and, in particular, but without prejudice to the generality of the foregoing provision, if he has—

- (i) supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy, or traded in, or carried, any goods consigned to or from an enemy or destined for or coming from enemy territory, or
 - (ii) paid or transmitted any money, negotiable instrument or security for money to or for the benefit of an enemy or to a place in enemy territory, or
 - (iii) performed any obligation to, or discharged any obligation of, an enemy, whether the obligation was undertaken before or after the commencement of this Act; or
- (b) if he has done anything which, under the following provisions of this Act, is to be treated as trading with the enemy;

(and any reference in this Act to an attempt to trade with the enemy shall be construed accordingly):²

Provided that a person shall not be deemed to have traded with the enemy by reason only that he has—

- (i) done anything under an authority given generally or specially by, or by any person authorised in that behalf by, a Secretary of State, the Treasury or the Board of Trade, or
 - (ii) received payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving payment (had already been performed when the payment was received, and had been performed at a time when the person from whom the payment was received was not an enemy).³
- (3) Any reference in this section to an enemy shall be construed as including a reference to a person acting on behalf of an enemy.

(3A)⁴ In any proceedings for an offence of trading with the enemy, the fact that any document has been despatched addressed to a person in enemy territory shall, unless the contrary is proved, be evidence, as against any person who was a party to the dispatch of the document, that the person to whom the document was despatched was an enemy.

(4) A prosecution for an offence of trading with the enemy

² As amended by S. R. & O. 1940, No. 1092.

³ As amended by S. R. & O. 1941 No. 51.

⁴ Added by S. R. & O. 1940, No. 1289.

shall not be instituted in England or Northern Ireland except by, or with the consent of, the Director of Public Prosecutions or the Attorney General for Northern Ireland, as the case may be:

Provided that this subsection shall not prevent the arrest, or the issue or execution of a warrant for the arrest, of any person in respect of such an offence, or the remanding in custody or on bail, of any person charged with such an offence, notwithstanding that the necessary consent to the institution of a prosecution for the offence has not been obtained.

2.—(1) Subject to the provisions of this section, the expression “enemy” for the purposes of this Act means—

- (a) any State, or Sovereign of a State, at war with His Majesty,
- (b) any individual resident in enemy territory,
- (c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,
- (d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty, and⁵
- (e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business

but does not include any individual⁶ by reason only that he is an enemy subject.

(2) The Board of Trade may by order direct that any person specified in the order shall, for the purposes of this Act, be deemed to be, while so specified, an enemy.

3.—(1) The Board of Trade, if they think it expedient for securing compliance with section one of this Act so to do, may by written order authorise a specified person (hereafter in this section referred to as “an inspector”) to inspect any books or documents belonging to, or under the control of, a person named in the order, and to require that person and any other person to give such information in his possession with respect to any business carried on by the named person as the inspector may demand, and for the purposes aforesaid to enter on any premises used for the purposes of that business.

(2) If, on a report made by an inspector as respects any business, it appears to the Board of Trade that it is expedient, for

⁵ Added by S. R. & O. 1940, No. 1092.

⁶ As amended by S. R. & O. 1940, No. 1092, substituting the word “individual” for “person.”

securing compliance with section one of this Act, that the business should be subject to supervision, the Board may appoint a person (hereafter in this section referred to as "a supervisor") to supervise the business, with such powers as the Board may determine.

(3) If any person, without reasonable cause, fails to produce for inspection, or furnish, to an inspector or a supervisor any document or information which he is duly requested by the inspector or supervisor so to produce or furnish, that person shall be liable, on summary conviction, to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.

(4) If any person, with intent to evade the provisions of this section, destroys, mutilates or defaces any book or other document which an inspector or a supervisor is or may be authorised under this section to inspect, that person shall be liable—

- (a) on conviction on indictment, to penal servitude for a term not exceeding five years or to a fine or to both such penal servitude and a fine, or
- (b) on summary conviction, to imprisonment for a term not exceeding twelve months or to a fine not exceeding one hundred pounds or to both such imprisonment and such fine.

3A.⁷—(1) Where any business is being carried on in the United Kingdom by, or on behalf of, or under the direction of, persons all or any of whom are enemies or enemy subjects or appear to the Board of Trade to be associated with enemies, the Board of Trade may, if they think it expedient so to do, make—

- (a) an order (hereinafter in this section referred to as a "restriction order") prohibiting the carrying on the business either absolutely or except for such purposes and subject to such conditions as may be specified in the order; or
- (b) an order (hereinafter in this section referred to as a "winding up order") requiring the business to be wound up,

and the making of a restriction order as respects any business shall not prejudice the power of the Board, if they think it expedient so to do, at any subsequent date to make a winding up order as respects that business.

(2) Where an order under subsection (1) of this section is made as respects any business, the Board of Trade may, by that

⁷ Added by S. R. & O. 1940, No. 1289.

or a subsequent order, appoint a controller to control and supervise the carrying out of the order, and, in the case of a winding up order, to conduct the winding up of the business, and may confer on the controller any such powers in relation to the business as are exercisable by a liquidator in the voluntary winding up of a company in relation to the company (including power in the name of the person carrying on the business or in his own name, and by deed or otherwise, to convey or transfer any property, and power to apply to the court to determine any question arising in the carrying out of the order), and may by the order confer on the controller such other powers as the Board think necessary or convenient for the purpose of giving full effect to the order.

(3) Where a restriction order or a winding up order is made as respects any business, the distribution of any assets of the business which are distributed while the order is in force shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and the said assets of the business shall, so far as they are available for discharging unsecured debts, be applied in discharging unsecured debts due to creditors of the business who are not enemies in priority to unsecured debts due to any other creditors, and any balance, after providing for the discharge of all liabilities of the business, shall be distributed among the persons interested in the business in such manner as the Board of Trade may direct:

Provided that the provisions of this subsection shall, in their application to the distribution of any money or other property which would, in accordance with those provisions, fall to be paid or transferred to an enemy, whether as a creditor or otherwise, have effect subject to the provisions of section seven of this Act (which relates to the collection of enemy debts and the custody of enemy property) and of any order made under that section.

(4) Where any business for which a controller has been appointed under this section has assets in enemy territory, the controller shall, if in his opinion it is practicable so to do, cause an estimate to be prepared—

- (a) of the value of those assets;
- (b) of the amount of any liabilities of the business to creditors, whether secured or unsecured, who are enemies;
- (c) of the amount of the claims of persons who are enemies to participate, otherwise than as creditors of the business, in any distribution of assets of the business made while an

order under subsection (1) of this section is in force as respects the business;

and, where such an estimate is made, the said liabilities and claims shall, for the purposes of this section, be deemed to have been satisfied out of the said assets of the business in enemy territory, or to have been satisfied thereout so far as those assets will go, and only the balance (if any) shall rank for satisfaction out of the other assets of the business.

(5) Where an estimate has been prepared under the last preceding subsection, a certificate of the controller as to the value or amount of any assets, claims or liabilities to which the estimate relates shall be conclusive for the purpose of determining the amount of the assets of the business available for discharging the other liabilities of the business and for distribution amongst other persons claiming to be interested in the business:

Provided that nothing in this subsection shall affect the rights of creditors of, and other persons interested in, the business against the assets of the business in enemy territory.

(6) The Board of Trade may, on an application made by a controller appointed under this section, after considering the application and any objections which may be made by any person who appears to them to be interested, by order grant the controller a release, and an order of the Board under this subsection shall discharge the controller from all liability in respect of any act done or default made by him in the exercise and performance of his powers and duties as controller; but any such order may be revoked by the Board on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(7) If any person contravenes, or fails to comply with, the provisions of any order made under subsection (1) of this section, he shall be guilty of an offence of trading with the enemy.

(8) Where an order under subsection (1) of this section has been made as respects a business carried on by any individuals or by a company, no bankruptcy petition, or petition for sequestration or summary sequestration against the individuals, or petition for the winding up of the company, shall be presented, or resolution for the winding up of the company passed, or steps for the enforcement of the rights of any creditors of the individuals or company taken, without the consent of the Board of Trade, but where the business is carried on by a company the Board of Trade may present a petition for the winding up of the company by the court, and the making of an order under this section shall

be a ground on which the company may be wound up by the Court.

(9) Where an order is made under this section appointing a controller for any business, any remuneration of, and any costs, charges and expenses incurred by, the controller, and any other costs, charges and expenses incurred in connection with the control and supervision of the carrying out of the order, shall, to such amount as may be certified by the Board of Trade, be defrayed out of the assets of the business, and as from the date of the certificate, be charged on those assets in priority to any other charges thereon.

4.—(1) No assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action; and neither a transfer of a negotiable instrument by or on behalf of an enemy nor any subsequent transfer thereof, shall, except with the sanction of the Treasury, be effective so as to confer any rights or remedies against any party to the instrument.

(2) The preceding subsection shall apply in relation to any transfer of any coupon or other security transferable by delivery, not being a negotiable instrument, as it applies in relation to any assignment of a chose in action.

(3) If any person by payment or otherwise purports to discharge any liability from which he is relieved by this section, knowing the facts by virtue of which he is so relieved, he shall be deemed to have thereby traded with the enemy:

Provided that in any proceedings for an offence of trading with the enemy which are taken by virtue of this subsection it shall be a defence for the defendant to prove that at the time when he purported to discharge the liability in question he had reasonable grounds for believing that the liability was enforceable against him by order of a competent court, not being either a court having jurisdiction in the United Kingdom or a court⁸ having jurisdiction in enemy territory, and would be enforced against him by such an order.

(4) Where a claim in respect of a negotiable instrument or chose in action is made against any person who has reasonable cause to believe that, if he satisfied the claim, he would be thereby

⁸ As amended by S. R. & O. 1941, No. 51, substituting the words "a court having jurisdiction in enemy territory" for "a court of a State at war with His Majesty."

committing an offence of trading with the enemy, that person may pay into the High Court or Court of Session any sum which, but for the provisions of subsection (1) of this section, would be due in respect of the claim, and thereupon that sum shall, subject to rules of court, be dealt with according to any order of the court, and the payment shall for all purposes be a good discharge to that person.

(5) Nothing in this section shall apply to securities to which the next following section applies.

5.—(1) If—

- (a) any securities to which this section applies are transferred by or on behalf of an enemy, or
- (b) any such securities, being securities issued by a company within the meaning of the Companies Act, 1929, or any corresponding enactment in force in Northern Ireland, are allotted or transferred to, or for the benefit of, an enemy subject without the consent of the Board of Trade;

then, except with the sanction of the Board of Trade, the transferee or allottee shall not, by virtue of the transfer or allotment, have any rights or remedies in respect of the securities; and no body corporate by whom the securities were issued or are managed shall take any cognisance of, or otherwise act upon, any such transfer except under the authority of the Board.

(2) No share warrants, stock certificates or bonds, being warrants, certificates or bonds payable to bearer, shall be issued in respect of any securities to which this section applies, being securities registered or inscribed in the name of an enemy or of a person acting on behalf of, or for the benefit of, an enemy.

(3) Any person who contravenes the provisions of this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds or to both such imprisonment and such fine.

(4) This section applies to the following securities, that is to say, annuities, stock, shares, bonds, debentures or debenture stock registered or inscribed in any register, branch register or other book kept in the United Kingdom.

6.—(1) Purchasing enemy currency shall be treated as trading with the enemy.

(2) In this section the expression “enemy currency” means any such notes or coins as circulate as currency in any area under the sovereignty of a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power

allied with His Majesty, or any such other notes or coins as are for the time being declared by an order of the Treasury to be enemy currency.

Property of Enemies and Enemy Subjects.

7.—(1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property for England, Scotland and Northern Ireland respectively, and may by order—

- (a) require the payment to the prescribed custodian of money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, or which would, but for the provisions of section four or section five of this Act, be payable to any other person;
- (b) vest in the prescribed custodian such enemy property as may be prescribed, or provided for, and regulate, the vesting in that custodian of such enemy property as may be prescribed;
- (c) vest in the prescribed custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been, and is not required by the order to be, vested in the custodian;
- (d) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects—
 - (i) property which has been, or is required to be, vested in a custodian by or under the order,
 - (ii) property of which the right of transfer has been, or is required to be, so vested,
 - (iii) any other enemy property which has not been, and is not required to be, so vested, or
 - (iv) money which has been, or is by the order required to be, paid to a custodian;
- (e) require the payment of the prescribed fees to the custodians in respect of such matters as may be prescribed and regulate the collection of and accounting for such fees;
- (f) require any person to furnish to the custodian such returns, accounts and other information and to produce such documents, as the custodian considers necessary for the discharge of his functions under the order;

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and any such order may contain such incidental and supplementary provisions as appear to the Board of Trade to be necessary or expedient for the purposes of the order.

(2) Where any requirement or direction with respect to any money or property is addressed to any person by a custodian and accompanied by a certificate of the custodian that the money or property is money or property to which an order under this section applies, the certificate shall be evidence of the facts stated therein, and if that person complies with the requirement or direction, he shall not be liable to any action or other legal proceeding by reason only of such compliance.

(3) Where, in pursuance of an order made under this section,—

(a) any money is paid to a custodian,

(b) any property, or the right to transfer any property, is vested in a custodian, or

(c) a direction is given to any person by a custodian in relation to any property which appears to the custodian to be property to which the order applies,

neither the payment, vesting or direction nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time—

(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy subject, had died or had ceased to be an enemy or an enemy subject, or

(ii) some person who was so interested, and who was believed by the custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject.

(4) Any order under this section shall have effect notwithstanding anything in any Act passed before this Act.

(5) If any person pays any debt, or deals with any property, to which any order under this section applies, otherwise than in accordance with the provisions of the order, he shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds or to both such imprisonment and such fine; and the payment or dealing shall be void.

(6) If any person, without reasonable cause, fails to produce or furnish, in accordance with the requirements of an order under this section, any document or information which he is required under the order to produce or furnish, he shall be liable on sum-

mary conviction to a fine not exceeding ten pounds for every day on which the default continues.

(7) All fees received by any custodian by virtue of an order under this section shall be paid into the Exchequer of the United Kingdom.

(8) In this section—

- (a) the expression “enemy property” means any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject;
- (b) the expression “property” means real or personal property, and includes any estate or interest in real or personal property, any negotiable instrument, debt or other chose in action, and any other right or interest, whether in possession or not; and
- (c) the expression “prescribed” means prescribed by an order made under this section.

General and Supplementary Provisions.

8.—(1) Nothing in this Act shall affect the operation of section one of the Debts Clearing Offices and Import Restrictions Act, 1934, or of any order under that section, in so far as the said section or order relates to the payment to, and collection by, a Clearing Office of debts to which such an order applies; but—

- (a) notwithstanding anything in subsection (6) of the said section or in any such order as aforesaid, any sum received by a Clearing Office by virtue of such an order, being—
 - (i) a sum which is so received at a time when the Sovereign Power of the country with respect to which the order has been made is at war with His Majesty, or
 - (ii) a sum which has been so received before the commencement of the war between that Power and His Majesty and has not, before the commencement of that war, ceased to be in the possession or under the control of the Clearing Office,
 shall be retained by the Clearing Office, subject to any order which may be made under this Act requiring the Clearing Office to pay that sum to a custodian of enemy property, and subject to the provisions of subsections (4) and (6) of the said section with respect to overpayments made to the Clearing Office; and
- (b) any sum which a Clearing Office is required by paragraph (a) of this subsection to retain subject as aforesaid, shall,

except in so far as it represents an overpayment made to the Clearing Office, be deemed for the purposes of this Act to be money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy.

(2) There may be retained by a Clearing Office out of any sum which, by virtue of any order under this Act, is payable by that office to a custodian of enemy property such reasonable commission, not exceeding two per cent. of that sum, as the Treasury think fit; and the amount of any commission so retained by a Clearing Office shall be paid into the Exchequer of the United Kingdom.

9.—(1) If any person, for the purpose of obtaining any authority or sanction under this Act, or in giving any information for the purposes of this Act or of any order made thereunder, knowingly or recklessly makes a statement which is false in a material particular, he shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds or to both such imprisonment and such fine.

(2) Every person who wilfully obstructs any person in the exercise of any powers conferred on him by or under this Act shall be liable on summary conviction to a fine not exceeding fifty pounds.

10. Where any offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other officer of the body corporate, he, as well as the body corporate, shall be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

11.—(1) The expenses incurred for the purposes of this Act by the Board of Trade shall be defrayed out of moneys provided by Parliament.

(2) Anything required or authorised under this Act to be done by, to or before the Board of Trade may be done by, to or before the President of the Board, any secretary, under-secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board.

12. Any document stating that any authority or sanction is given under any of the provisions of this Act by a Secretary of State, the Treasury or the Board of Trade, and purporting to be signed on behalf of the Secretary of State, the Treasury or the Board of

Trade, or by a person who is empowered by this Act to do anything which may be done thereunder by the Board, shall be evidence of the facts stated in the document.

13. In the application of this Act to Scotland, "chose in action" means "right of action or incorporeal moveable," "defendant" means "person accused," and "real or personal property" means "heritable or moveable property."

14. His Majesty may by Order in Council direct that the provisions of this Act other than this section shall extend, with such exceptions, adaptations and modifications, if any, as may be prescribed by or under the Order—

- (a) to the Isle of Man or any of the Channel Islands,
- (b) to Newfoundland or any colony,
- (c) to any British protectorate,
- (d) to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Majesty, and is being exercised by His Majesty's Government in the United Kingdom, and
- (e) (to the extent of His Majesty's jurisdiction therein) to any other country or territory being a foreign country or territory in which for the time being His Majesty has jurisdiction.

15.—(1) In this Act the following expressions have the meanings hereby respectively assigned to them:—

"enemy subject" means—

(a) an individual who, not being either a British subject or a British protected person, possesses the nationality of a State at war with His Majesty, or

(b) a body of persons constituted or incorporated in, or under the laws of, any such State; and

"enemy territory" means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty.

(1A)⁹ The Board of Trade may by order direct that the provisions of this Act shall apply in relation to any area specified in the order as they apply in relation to enemy territory, and the said provisions shall apply accordingly.

(2) A certificate of a Secretary of State that any area is or was under the sovereignty of, or in the occupation of any Power, or

⁹ Added by S. R. & O. 1940, No. 1214.

as to the time at which any area became or ceased to be under such sovereignty or in such occupation shall, for the purposes of any proceedings under or arising out of this Act, be conclusive evidence of the facts stated in the certificate.

(3) In considering for the purposes of any of the provisions of this Act whether any person has been an enemy or an enemy subject, no account shall be taken of any state of affairs existing before the commencement of this Act.

(4) For the purposes of this Act, a person shall be deemed to be a director of a body corporate if he occupies in relation thereto the position of a director, by whatever name called; and, for the purposes of the provisions of this Act relating to offences by bodies corporate, a person shall be deemed to be a director of a body corporate if he is a person in accordance with whose directions or instructions the directors of that body act:

Provided that a person shall not, by reason only that the directors of a body corporate act on advice given by him in a professional capacity, be taken to be a person in accordance with whose directions or instructions those directors act.

(5) Any power conferred by the preceding provisions of this Act to make an Order in Council or an order shall be construed as including a power, exercisable in the like manner, to vary or revoke the Order in Council or order.

16. This Act shall be without prejudice to the exercise of any right of prerogative of the Crown.

17.—(1) This Act may be cited as the Trading with the Enemy Act, 1939.

(2) This Act shall, if His Majesty by Order in Council so directs, be deemed to have come into operation on such day as may be specified in the Order (a):

Provided that a person shall not, by virtue of an Order in Council under this subsection, be liable to any penalty in respect of anything done by him before the date of the passing of this Act which was not unlawful at common law.

(3) The enactments mentioned in the first and second columns of the Schedule to this Act (b) are hereby repealed to the extent specified in the third column of that Schedule:

Provided that (without prejudice to the operation of subsection (2) of section thirty-eight of the Interpretation Act, 1889) the repeal of the said enactments by this subsection shall not affect the operation of any Order in Council or rules made under section five of the Trading with the Enemy Amendment Act, 1914, and

shall not be taken to affect the operation of these enactments as applied or amended by any Order in Council made under the Treaty of Peace Act, 1919, the Treaty of Peace (Austria and Bulgaria) Act, 1920, the Treaty of Peace (Hungary) Act, 1921, or the Treaty of Peace (Turkey) Act, 1924.

SCHEDULE
ENACTMENTS REPEALED

<i>Session and Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
4 & 5 Geo. 5, c.87	The Trading with the Enemy Act, 1914	The whole Act
5 & 6 Geo. 5, c.12	The Trading with the Enemy Amendment Act, 1914	The whole Act
5 & 6 Geo. 5, c.79	The Trading with the Enemy Amendment Act, 1915	The whole Act
5 & 6 Geo. 5, c.98	The Trading with the Enemy (Extension of Powers) Act, 1915	The whole Act
5&6 Geo. 5. c.105	The Trading with the Enemy Amendment Act, 1916	The whole Act
6 & 7 Geo. 5, c.32	The Trading with the Enemy (Copyright) Act, 1916	The whole Act
6 & 7 Geo. 5, c.52	The Trading with the Enemy and Export of Prohibited Goods Act, 1916	In section one the words from "any licence" to "obtaining" when it secondly occurs; section two.
8 & 9 Geo. 5, c.31	The Trading with the Enemy (Amendment) Act, 1918	The whole Act

APPENDIX O

THE DEFENCE (TRADING WITH THE ENEMY) REGULATIONS, 1940, S. R. & O. 1940, NO. 1092, AS AMENDED

(Provisions which amended the principal Trading with the Enemy Act, 1939, are incorporated in the reprint of the Act above and indicated in the notes.)

Sec. 2. (3) Proceedings in respect of an offence of trading with the enemy alleged to have been committed by any person may be taken before the appropriate court in the United Kingdom having jurisdiction in the place where that person is for the time being.

Sec. 4. (1) The rights, powers, duties and liabilities which may be conferred and imposed by the Board of Trade on custodians of enemy property under subsection (1) of section seven of the principal Act shall, where it appears to the Board that it is expedient that any business should be carried on or continue to be carried on in or from the United Kingdom, include such rights, powers, duties and liabilities as respects the property and money mentioned in paragraph (d) of the said subsection (1) as, in the opinion of the Board, are necessary or expedient in order to enable that business so to be carried on.

(2) The power of the Board of Trade under the said subsection (1) shall include power, where a custodian dies or for any other reason ceases to hold office as such, by order to vest in his successor any property or right which was vested in the first mentioned custodian at the time of his dying or ceasing to hold office.

(3) Notwithstanding anything in the said section seven, a custodian shall, if the Treasury so directs, pay or transfer, to such persons as may be specified, in the direction—

(a) any money so specified which has been paid to the custodian as being money which, but for the existence of a state of war, would have been payable to or for the benefit of—

(i) an individual resident in any enemy territory which is not under the sovereignty of a Power with whom His

Majesty is at war, or in any area in relation to which the provisions of the principal Act apply as they apply in relation to enemy territory,

(ii) an individual or body of persons (whether corporate or unincorporate) carrying on business in any such territory or area, or

(iii) any body of persons (whether corporate or unincorporate) carrying on business in any place, and controlled by any such individual or body of persons as is mentioned in paragraph (i) or paragraph (ii) of this sub-paragraph;

(b) any property so specified, being property which, or the right of transfer of which, has been vested in the custodian as being property belonging to, or held or managed on behalf of, any such individual or body of persons as is mentioned in paragraph (i), paragraph (ii) or paragraph (iii) of sub-paragraph (a) of this paragraph.

(4) An order made under the said section seven may empower a custodian, acting under a general or special direction given by the Treasury or by the Board of Trade with the sanction of the Treasury, to reduce or remit any of the fees required to be paid to him under any such order.

Canada

APPENDIX P

CONSOLIDATED REGULATIONS RESPECTING TRADING WITH THE ENEMY (1939)

Order in Council P. C. 3959, August 21, 1940,¹ as amended by Orders in Council P. C. 5353, October 3, 1940, and P. C. 9797, December 16, 1941.

1. For the purpose of these Regulations the following expression shall be construed so that—

- (a) "Person" shall extend to and include persons and bodies of persons, incorporated (wherever incorporated) and unincorporated, such as firms, clubs, companies and municipal authorities, and, as well, trustees, executors and administrators.
- (b) "Enemy" shall extend to and include—
 - (i) Any state, or Sovereign of State, at war with His Majesty.
 - (ii) Any person who resides or carries on business within enemy territory or proscribed territory and, as well, a person wherever resident or carrying on business who is an enemy or treated as an enemy and with whom trading is, for the time being, prohibited by these Regulations or by Statute or proclamation by His Majesty or by the common law.
 - (iii) Any person acting as agent or otherwise on behalf of an enemy, or under the control of a person who is an enemy.
 - (iv) Any person who is declared by the Governor in Council to be an enemy.

¹ Established in substitution of the "Regulations Respecting Trading With the Enemy, 1939," Order in Council P.C. 2512, September 5, 1939, as amended.

- (v) Any person who has been detained under the Defence of Canada Regulations during the period of such detention.
- (vi) ²Any person who has been interned or detained under the authority of the Government of a Power allied or associated with His Majesty or whose property within the territory of such Power has been treated by that Power as enemy property.

Provided, however, that Enemy shall not include any person by reason only that he is an enemy subject, and provided further that the Governor in Council shall have power to declare any person not to be an enemy who would otherwise be considered as such under these Regulations.

- (c) "Enemy subject" extends to and includes a person wherever resident, who is a subject of a State or Sovereign for the time being at war with His Majesty.
- (d) "Enemy territory" means any area which is under the sovereignty of, or in the occupation of, a State or Sovereign for the time being at war with His Majesty.
- (e) "Proscribed territory" means any area in respect of which the Governor in Council by reason of real or apprehended hostilities or otherwise, may order the protective custody of property of persons residing in that area and the regulating of trade with such persons.
- (f) "Securities" shall extend to and include stock, shares, annuities, bonds, debentures, debenture stock, certificates of indebtedness, trust receipts or other obligations, or rights, whether registered or in bearer form, issued by or on behalf of any Government, municipal or other authority, society or association, or any corporation or company whether within or without Canada and regardless of the place of registration of such securities or the situs of the certificates or other instruments representing same.
- (g) "Dividends, interest or share of profits" shall extend to and include any dividends, bonus or interest (whether payable within Canada or not) in respect of any security or other obligation of any person, any interest in respect of any loan to a person carrying on business for the purposes of that business, and any profits of such a business, and where a person is carrying on any business on behalf of an enemy, any sum which, had a state of war not existed, would have

² Added by Order in Council, P. C. 9797, December 16, 1941.

been transmissible by a person to the enemy by way of profits from that business, shall be deemed to be a money which would have been payable and paid to that enemy.

- (h) "Property" as used in these Regulations shall extend to and include all real and personal property of every description, and all rights and interests therein, whether legal or equitable, and without restricting the generality of the foregoing, including securities, debts, credits, accounts and choses in action.
- (i) "Enemy currency" means any such notes or coins which³ circulate as currency in any area under the sovereignty of a State or Sovereign with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a Power allied with His Majesty, or any such other notes or coins as are for the time being declared by an order of the Minister of Finance to be enemy currency.
- (j) "Commencement of the present war" shall mean, as respects any enemy, the first day on which a state of war existed between His Majesty and the country in which that enemy resides or carries on business, or the first day upon which such a person became an enemy.
- (k) "Proclamation by His Majesty" and like expressions shall mean, "proclamation by His Majesty acting by and with the advice of the Government of Canada."

2. Any person who since the commencement of the present war trades or attempts to trade, or directly or indirectly offers or proposes or agrees to trade, or has since the commencement of the present war traded, attempted or directly or indirectly offered or proposed or agreed, to trade with an enemy within the meaning of these Regulations, shall be guilty of the offence of trading with the enemy.

3. Without restricting the generality of the terms of the immediately preceding Regulation, it is declared that the following set forth matters constitute trading with the enemy within the meaning of these Regulations—

(1) Entering into any transaction or doing any act which was at the time of such transaction or act prohibited by or under any proclamation issued by His Majesty, for the time being in force, dealing with trading with the enemy, or which at common law or

³ As amended by P. C. 5353, October 3, 1940, substituting the word "which" for "as."

by statute or under any orders or regulations constitutes an offence of trading with the enemy.

(2) Entering into any transaction or doing any act with, to, on behalf of, or for the benefit of any person after the issue of any Order in Council or proclamation by His Majesty declaring that such person, although not resident or carrying on business in enemy territory or proscribed territory was, by reason of his enemy nationality or enemy associations a person with whom trading was prohibited, and which transaction or act, if entered into or done with, to, or on behalf of or for the benefit of an enemy would be trading with the enemy.

(3) Dealing or attempting or offering, proposing, or agreeing, whether directly or indirectly, to deal with any money or security for money or other property which is in the hands or custody of the person so dealing, attempting or offering, proposing or agreeing, or over which he has any claim or control, for the purpose of enabling an enemy to obtain money or credit thereon or thereby.

(4) Aiding or abetting any other person, whether or not such person is in Canada, to enter into, negotiate, or complete any transaction or do any act which, if effected or done in Canada by such other person would constitute an offence of trading with the enemy.

(5) Knowingly paying, discharging or satisfying any debt or chose in action to which paragraph (1) of Regulation 4 hereof applies.

(6) The knowingly discharging by any party to the instrument of any bill of exchange or promissory note to which paragraph (2) of Regulation 4 hereof applies.

(7) Purchasing of enemy currency.

(8) Having any commercial, financial or other intercourse, transactions or dealings with, or for the benefit of, an enemy.

(9) Doing or attempting to do anything which, under these Regulations, is to be treated as trading with the enemy.

Provided that any transaction or act permitted by or under any proclamation or otherwise or by the Secretary of State, or other competent authority, shall not be deemed to be trading with the enemy.

4. (1) No person shall by virtue of any assignment of any debt, security for a debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer or any other obligation, made or to be made in his favour by or on

behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery or transfer was made by leave of the Secretary of State or was made before the commencement of the present war, and any person who knowingly pays, discharges or satisfies any debt, or chose in action, to which this paragraph applies, shall be deemed guilty of the offence of trading with the enemy.

Provided that this paragraph shall not apply where a licence has been duly granted exempting the particular transaction from the provisions of these Regulations, or where the person to whom the assignment, delivery or transfer was made, or some person deriving title under him, proves that the transfer, delivery or assignment or some subsequent transfer, delivery or assignment was made in good faith and for valuable consideration before the commencement of the present war, nor shall this paragraph apply to any bill of exchange or promissory note.

(2) No person shall by virtue of any transfer of a bill of exchange or promissory note made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against any party to the instrument, unless he proves that the transfer was made before the commencement of the present war, and any party to the instrument who knowingly discharges the instrument shall be deemed to be guilty of the offence of trading with the enemy.

Provided that this paragraph shall not apply where a licence has been duly granted exempting the particular transaction from the provisions of these Regulations, or where the transferee, or some subsequent holder of the instrument, proves that the transfer, or some subsequent transfer, of the instrument, was made in good faith and for valuable consideration, before the commencement of the present war.

(3) Nothing in this Regulation shall be construed as validating any assignment, delivery or transfer which would be invalid apart from this Regulation or as applying to securities within the meaning of Regulation 5 of these Regulations.

5. (1) No transfer made after the commencement of the present war (unless upon licence duly granted exempting the particular transaction from the provisions of this paragraph), by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof, and no person by whom the

securities were issued or are managed or any other person shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.

(2) No entry shall hereafter be made in any register or branch register or other book kept by any company incorporated by or under the authority of the Parliament of Canada or the legislature of any Province of Canada whether or not such register or branch register or other book is kept within Canada, or by any other company which has within Canada any register or branch register or other book, of any transfer of any securities therein registered, inscribed or standing in the name of an enemy except by leave of the Secretary of State.

(3) The provisions of this Regulation shall apply to all transfer regardless of the nationality of the transferee, the place of transfer, the location of the certificates or the situs of the registry where such securities may be registered.

(4) No share warrants payable to bearer shall be issued during the continuance of the present war in respect of any securities registered in the name of an enemy.

(5) Any violation of any provision of this Regulation shall be an offence under these Regulations.

6. (1) The Secretary of State is hereby appointed to receive, hold, preserve and deal with such property, as may be paid to or vested in him in pursuance of these Regulations and he is hereafter referred to as "The Custodian."

(2) Any power or duty conferred or imposed by or under these Regulations upon the Secretary of State and/or Custodian may be delegated by him to such person or persons as he may think proper.

(3) No person shall have any rights or remedies and no action shall lie or be brought against any person in respect of any act or omission of such person which was required by the Secretary of State or Custodian or which such person acting in good faith reasonably believed to have been required by these Regulations.

7. If the Secretary of State is satisfied that there is reasonable ground for suspecting that an offence under any of Regulations 2 to 5 inclusive has been or is about to be committed by any person he may, by written order, authorize a specified person to inspect all books or documents belonging to or under the control or in the Custody of the person named in the order, and to require any person able to give any information with respect to the property, business or trade of the suspected person, to give that information and if accompanied by a police officer to enter and

search any premises used in connection with the business or trade and to seize any such books or documents as aforesaid.

8. (1) Where it appears to the Secretary of State:—

- (a) That one of the partners in a firm was immediately before or at any time since the commencement of the present war an enemy or enemy subject; or
- (b) That one-third or more of the issued share capital of a company, immediately before or at any time since the commencement of the present war, was held by enemies or enemy subjects; or
- (c) That one-third or more of the directorate of a company, immediately before or at any time since the commencement of the present war, consisted of persons who were enemies or enemy subjects; or
- (d) That a person was or is acting as agent for any person trading or carrying on business in enemy territory;

The Secretary of State may, if he thinks it expedient for the purpose of satisfying himself that such person is not trading with the enemy, by written order give to a person appointed by him authority to inspect all books and documents belonging to or under the control of such person, and to require any person able to give any information whatsoever with respect to the property, business or trade of that person to give such information.

(2) For the purpose of this Regulation any person authorized in that behalf by the Secretary of State may inspect the register of members of a company at any time, and any shares in a company for which share warrants to bearer have been issued shall not be reckoned as part of the issued share capital of the company.

(3) No action shall be brought or other proceedings commenced by a person whose books and documents are liable to inspection under this Regulation unless notice in writing has previously been given by such person to the Secretary of State, and the Secretary of State may order such person to refrain from taking any such action or other proceedings, and failure to comply with such order shall be an offence under these Regulations.

9. Any person who, having custody of any book or document which a person is authorized to inspect under Regulations 7 or 8 hereof, with intent to evade the provisions of these Regulations, destroys, mutilates or defaces any such book or other document or refuses or wilfully neglects to produce it for inspection, and any person who being able to give any information which may be

required to be given under said Regulations 7 or 8 refuses or wilfully neglects when required to give that information, shall be guilty of an offence under these Regulations.

10. Where a person has given any information to an Inspector appointed to make an inspection under Regulations 7 or 8 hereof the information so given may be used in evidence against such person in any proceedings relating to offences of trading with the enemy within the meaning of these Regulations, notwithstanding that such information was given as required by the Inspector, in pursuance of his powers under the said Regulations.

11. Where, on the report of an Inspector appointed under Regulations 7 or 8 hereof, it appears to the Secretary of State that it is expedient that the property, business or trade should be subject to frequent inspection or constant supervision, the Secretary of State may appoint that Inspector or some other person to supervise the property, business or trade with such powers as the Secretary of State may determine, and any remuneration payable and expenses incurred, whether for the original inspection or the subsequent supervision, to such amount as may be fixed by the Secretary of State, shall be paid by the said person.

12. (1) Where it appears to the Secretary of State in reference to any person—

- (a) That an offence against any of these Regulations has been or is likely to be committed in connection with such person's property, business or trades; or
- (b) That the control or management of said property, business or trade has been or is likely to be so affected by the state of war as to prejudice the effective continuance or administration thereof and that it is in the public interest that the said business or trade should continue to be carried on or such property to be administered; or
- (c) That it is expedient in the public interest owing to circumstances or considerations arising out of the present war, that a controller or manager of said property, business or trade should be appointed;

the Secretary of State may apply to the same Court as would within the province wherein said person owns property or carries on said business or trade, have jurisdiction to appoint a receiver or liquidator or to grant a winding-up order, for the appointment of a controller of the said business or trade and said Court shall have power to appoint such a controller, for such time and subject to such conditions and with such powers as the Court thinks fit;

and the powers so conferred shall be either those of a receiver and manager or those powers subject to such modifications, restrictions or extensions as the Court thinks fit (including if the Court considers it necessary or expedient for enabling the controller to borrow money, power, after a special application to the Court for that purpose, to create charges on the property of the said person in priority to existing charges).

(2) The Court shall have power to direct how and by whom the costs of any proceedings under this Regulation and the remuneration, charges and expenses of the controller shall be borne, and shall have power, if it thinks fit, to charge such costs, charges and expenses on the property of the said person in such order of priority, in relation to any existing charges thereon, as it thinks fit.

13. Where the Secretary of State certifies that it appears to him that a company registered within Canada is carrying on business either directly or through an agent, branch, or subsidiary company outside Canada, and that in carrying on such business it has entered into or done acts which if entered into or done within Canada would constitute the offence of trading with the enemy, the Secretary of State may present a petition for the winding-up of the company to the Court having jurisdiction, and the issue of such a certificate shall be a ground on which the company may be wound up by the Court, and the certificate shall, for the purposes of the petition, be evidence of the facts therein stated.

14. (1) No company shall during the continuance of the present war without having previously obtained the permission of the Secretary of State, acquire or attempt to acquire the whole or any part of the undertaking of a person whose books and documents are liable to inspection under Regulations 7 or 8 hereof.

(2) Any company which in violation of this Regulation acquires or attempts to acquire the whole or any part of the undertaking of a person whose books and documents are liable to inspection under Regulations 7 or 8 hereof shall, without prejudice to other liability be guilty of an offence under these Regulations.

15. (1) Where it appears to the Secretary of State that the business carried on within Canada by any person is by reason of the enemy nationality or enemy association of that person, or otherwise carried on wholly or mainly for the benefit of or under the control of an enemy or enemy subject, the Secretary of State shall, unless for any special reason it appears to him inexpedient to do so, make an order either—

(a) prohibiting such person from carrying on the business, except for the purposes and subject to the conditions, if any, specified in the order; or

(b) requiring the business to be wound up.

(2) The Secretary of State may at any time revoke or vary any such order and may, in any case where he has made an order prohibiting or limiting the carrying on of the business, at any time, if he thinks it expedient, substitute for that order an order requiring the business to be wound up.

(3) Where the Secretary of State makes any such order he may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order; and, if the case requires, to conduct the winding-up of the business, and in any case where it appears expedient to the Secretary of State, he may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding-up of a company, including power in the name of such person, or in his own name and by deed or otherwise to convey or transfer any property and power to apply to the Court having power to appoint a receiver or liquidator or to grant a winding-up order, or a judge thereof to determine any question arising in the carrying out of the order, or those powers subject to such modifications, restrictions or extensions as the Secretary of State thinks necessary or convenient for the purpose of giving full effect to the order, and the remuneration of and costs, charges and expenses incurred by the controller, and any remuneration payable and costs, charges and expenses incurred in connection with the supervision or inspection of the business, to such amount as may be approved by the Secretary of State, shall be defrayed out of the assets of the business and shall be charged on such assets in priority to any other charges thereof.

(4) The distribution of any sums or other property resulting from the realization of any assets of the business, whether these assets are realized as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business, shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up under the Winding-Up Act of Canada, and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemy creditors for whose benefit or under whose control the business was carried

on, in priority to debts due to such enemy creditors; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Secretary of State may direct;

Provided that any sums or other property which, had a state of war not existed, would have been payable or transferable under this paragraph to enemies, whether as creditors or otherwise, shall be paid or transferred to the Custodian to be dealt with by him in like manner as money paid to him under these Regulations.

(5) The Secretary of State may, on application for the purpose being made by a controller appointed under this Regulation, after considering the application and any objection which may be made by any persons who appears to him to be interested grant him a release, and an order of the Secretary of State releasing the controller shall discharge him from all liability in respect of any act done or default made by him in the exercise and performance of his powers and duties as controller, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(6) Where an order under paragraph (1) of this Regulation has been made as respects the business carried on by any person, no steps shall be taken for the enforcement of the rights of any creditors of such person, nor shall any petition for the winding-up of such business be presented, nor any resolution for the winding-up of such business be passed, without the consent of the Secretary of State, but the Secretary of State may present a petition for the winding up of the business by the Court, and the making of an order under this Regulation shall be on a ground on which a company may be wound up by the Court.

(7) The Secretary of State may from time to time prepare and publish in the *Canada Gazette* lists of the persons as to whom orders have been made under this Regulation, together with short particulars of such orders, and notice of the making of an order under this Regulation prohibiting or limiting the carrying on of any business, or requiring any business to be wound up may likewise be published in the *Canada Gazette*.

(8) An order under this Regulation shall continue in force, notwithstanding the termination of the present war, until determined by order of the Secretary of State.

(9) If any person contravenes the provisions of any order made under paragraph (1) of this Regulation he shall be guilty of an offence punishable and triable in like manner as the offence

of trading with the enemy and such of these Regulations as relate to the trial and punishment of that offence shall apply accordingly.

16. Where it appears to the Secretary of State that a contract entered into prior to or after the commencement of the present war, with an enemy or enemy subject or with a person in respect of whose business an order shall have been made under Regulation 15⁴ hereof, is injurious to the public interest, the Secretary of State may by order cancel or determine such contract either unconditionally or upon such conditions as he may think fit, and thereupon such contract shall be deemed to be cancelled or determined accordingly.

17. The powers of the Secretary of State to appoint inspectors and supervisors under Regulations 7, 8 and 11⁵ hereof includes a power to appoint an inspector or supervisor of the business carried on by any person within Canada for the purpose of ascertaining whether the business is carried on for the benefit of or under the control of an enemy or enemy subject, or for the purpose of ascertaining the relations existing, or which before the commencement of the present war existed, between such person and any such enemy or enemy subject; and the Secretary of State may require any inspector, supervisor or controller appointed as aforesaid to furnish him with reports on any matters connected with such business.

18. (1) Where on an application for the registration or incorporation of a company it appears that any subscriber or applicant or any proposed director of the company is an enemy subject, such registration or incorporation may be refused.

(2) No allotment or transfer of any shares, stock debentures, or other security issued by a company made after the commencement of the present war to or for the benefit of an enemy subject, shall not, unless made with the consent of the Secretary of State, confer on the allottee or transferee any rights or remedies in respect thereof, and the company by whom the security was issued shall not take any cognizance of or otherwise act upon any notice of any such transfer except by leave of the Secretary of State, and any company which contravenes any provision of this paragraph shall be guilty of an offence under these Regulations.

19. (1) Where the right of nominating or appointing a director of a company is vested in any enemy or enemy subject, the right

⁴ As amended by P. C. 5353, October 3, 1940, substituting the number "15" for "17."

⁵ *Ibid.*, substituting the number "11" for "12."

shall not be exercisable except by leave of the Secretary of State, and any director nominated or appointed in exercise of such right shall, except as aforesaid, cease to hold office as director.

(2) The Secretary of State may, notwithstanding any regulation or stipulation of a company or other body, by written order remove any enemy director and appoint a person in substitution therefor and such person shall continue to act as a director until such time as a new board of directors is duly elected or appointed.

20. Notwithstanding the provisions of any statute the Custodian shall be entitled to receive from any person or from any Department of the Government of Canada such information as he deems necessary to enable him to enforce these Regulations, and all such information shall be supplied to the Custodian upon his written request.

21. (1) All property in Canada belonging to enemies at or subsequent to the commencement of the present war, and whether or not such property has been disclosed to the Custodian as required by these Regulations, is hereby vested in and subject to the control of the Custodian.

(2) This regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies, including the power of dealing with such property in such manner, as he may in his sole discretion decide.

22. (1) No enemy whose property is vested in the Custodian under these Regulations shall have any rights or remedies against any person in respect of any such property after such vesting has taken place.

(2) No enemy shall have any rights or remedies against any person in respect of any matter whatsoever other than the rights and remedies referred to in paragraph (1) hereof.

23. (1) Where any real estate or interest therein is vested in the Custodian by these Regulations, the Custodian may issue a certificate stating that such property is vested in the Custodian and such certificate shall be registered without charge in the Land Titles Office or registration office in the district in which the land is situate, but failure to register such a certificate shall not release the property or interest therein from the provisions of these Regulations.

(2) After the registering of such certificate and upon the written request of the Custodian, the property or interest therein affected thereby shall be transferred to him as Custodian of Enemy Property.

(3) The interest of any enemy in such property shall be regarded as having been effectively dealt with by and such action on the part of the Custodian whether or not his interests are specifically mentioned therein.

(4) The Custodian shall have full power to release, sell or otherwise dispose of all such property in accordance with these Regulations and may issue a certificate vacating any certificate of vesting previously registered.

24. If the benefit of an application made by or on behalf of or for the benefit of an enemy or enemy subject for any patent is by a certificate of the Custodian declared to have been vested by these Regulations in the Custodian, the patent may be granted to the Custodian as patentee and may, notwithstanding anything in any statute to the contrary, be sealed accordingly.

25. (1) The Exchequer Court of Canada or any judge thereof, on the application of the Custodian, or any one acting on his behalf, may by order vest in the Custodian any property suspected of belonging to or of being held or managed for or on behalf of an enemy, and may be such order confer on the Custodian such powers of dealing with the property vested as to the Court or Judge may seem proper.

(2) It shall not be necessary to give any notices of such application to the suspected enemy unless notice or notices shall be ordered by the court or judge before whom the application is made.

26. Where the property of any person is vested in the Custodian under these Regulations such vesting shall not, nor shall any proceedings relating thereto or in consequence of such vesting, be invalidated or affected by reason only of such person having, prior or subsequent to the date of the vesting, died or ceased to be an enemy, or where the property has been vested by a court order as provided for by Regulation 25, by reason of its being subsequently ascertained that such person was not an enemy.

27. (1) In case of a dispute or question as to whether or not any property belongs to an enemy or is subject to these Regulations the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration, as to the ownership thereof or as to whether or not such property is subject to these Regulations.

(2) The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.

(3) No mandamus proceedings shall be taken against the

Custodian to obtain his consent, nor shall any proceedings by way of petition of right be instituted by any claimant where the Custodian has, under paragraph (1) hereof, refused a consent.

28. (1) Any person who holds or manages any property for or on behalf of an enemy shall within thirty days after the commencement of the present war, or if the property comes into his possession or custody or under his control after the commencement of the present war, then within thirty days after the time when it comes into his possession or custody or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may prescribe and require and shall, on the Custodian's written request, deliver to him all documents or other evidence of title relating to such property.

(2) The preceding paragraphs shall extend and apply to balances and deposits standing to the credit of enemies at any bank, and to debts which are due, or which, had a state of war not existed, would have been due to enemies, or which shall become due, as if such bank or debtor were a person who held property on behalf of an enemy. All such balances, deposits, debts shall be paid to the Custodian as required by these Regulations.

(3) Every company incorporated by or under the authority of the Parliament of Canada or of the legislature of a Province of Canada, and every company which, though not so incorporated, has a share transfer or share registration office in Canada, shall within thirty days after the commencement of the present war, by notice in writing communicate to the Custodian full particulars of any securities or other obligations of the company which are held by or for the benefit of an enemy; and every partner of every firm or member of a partnership, one or more partners of which on the commencement of the present war became enemies or to which money has been lent for the purpose of the business of the firm by a person who so became an enemy, shall, within thirty days after the commencement of the present war, by notice in writing communicate to the Custodian full particulars as to any dividends, interests or share of profits due to such enemy.

(4) Where before the commencement of the present war any money has been paid into an account with a bank, or has been paid to any other person in trust for an enemy, the person by whom the payment was made shall, within thirty days after the commencement of the present war as aforesaid, by notice in writing, require the bank or person to pay the money over to the

Custodian to hold as aforesaid, and shall furnish the Custodian with such particulars as aforesaid. The bank or other person shall, within one week after the receipt of the notice, comply with the requirements and shall be exempt from all liability for having done so.

Provided that in the case of such payments as, had a state of war not existed, would have been payable and paid to an enemy (other than a payment in respect of securities issued by a company) the duty of making payments to the Custodian and of requiring payments to be made to him and of furnishing him with particulars shall rest with the person through whom the payments are made.

29. (1) Any money which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, and any such money which shall become so payable after the commencement of the present war shall be paid to the Custodian by the person by whom it would have been payable, and the payment shall be accompanied by such particulars as the Custodian may prescribe and require and shall be held by him subject to the provisions of these and any future Regulations.

(2) Without restricting the generality of paragraph (1) of this Regulation it shall be deemed to extend to and include moneys payable by way of—

- (a) dividends, interest or share of profits,
- (b) any payment in respect of securities, including the payment of any securities which have become payable on maturity or by being drawn for payment or otherwise,
- (c) any moneys due under or in respect of any policy of assurance or insurance),
- (d) any payment in respect of requisitioned property,
- (e) any payment under any trust, will or settlement,
- (f) any other payment required to be made to the Custodian under these or any other Regulations.

30. If in the case of any person whose books and documents are liable to inspection under these Regulations, any question arise as to the amount which would have been so payable and paid as provided in the last preceding Regulation, the question shall be determined by the person who has been or who may be appointed to inspect the books and documents of such person, or on appeal, by the Secretary of State, and if, in the course of determining the question, it appears to the inspector or the Secretary of State, that such person has not distributed as dividend, interest

or share of profits the whole of the amount properly available for that purpose the inspector or Secretary of State may ascertain what amount was so available and require the whole of such amount to be distributed, and, in the case of a company, if such dividends have not been declared, the inspector, or the Secretary of State may declare the appropriate dividends, and every such declaration shall be as effective as a declaration to the like effect duly made in accordance with the constitution of the company; provided that where a controller has been appointed under these Regulations, this paragraph shall apply as if for references to the inspector there were substituted references to the controller.

31. Where since the commencement of the present war any coupon or other security transferable by delivery is presented for payment to any person and such person has reason to suspect that it is so presented on behalf of or for the benefit of an enemy, or that since the commencement of the present war it has been held by or for the benefit of an enemy, such person shall pay the sum due in respect thereof to the Custodian who shall deal with it in accordance with these and any future Regulations, and such payment shall for all purposes be a good discharge to such person.

32. Where the Custodian is satisfied from returns made to him under these Regulations that any securities are held by any person on behalf of an enemy, the Custodian may give notice thereof to the person, by or through whom any dividends, interest or share or profits in respect of the securities or any money by way of payment of the securities are payable, and upon receipt of such notice any dividends, interest or share of profits payable in respect of, and any money by way of payment of the securities to which the notice relates shall be paid to the Custodian in like manner as if the securities were held by an enemy.

33. All moneys payable to the Custodian in pursuance of these Regulations shall be paid to the credit of the Custodian through such officers, banks or persons, and in such manner as the Custodian from time to time directs and appoints.

34. (1) Any money required to be paid to the Custodian under these Regulations shall be paid:

- (a) Within thirty days after the commencement of the present war, if the money, had a state of war not existed, would have been payable before the commencement of the present war,
- (b) in any other case within thirty days after it would have been payable.

(2) All interest payable on any such money shall be paid to the Custodian and any moneys not paid within the time required by these Regulations shall bear interest at the rate of five per cent per annum from the date on which such payment is required by these Regulations.

(3) Where any money is payable or becomes payable to any enemy by contract, law or custom or in any other manner⁶ in other than Canadian currency, it shall be paid to the Custodian in Canadian currency at the rate of exchange equal to the average cable transfer rate prevailing in Canada during the month immediately preceding the commencement of the present war, or at such rate as may be fixed by the Foreign Exchange Control Board.

35. (1) Any payment by or on behalf of a debtor made to the Custodian shall, to the extent of the payment, discharge the debtor from all obligations and liabilities in respect of the debt, and interest shall cease to run against the debtor on the amount so paid from the date of its receipt by the Custodian.

(2) The Custodian shall have power to execute and deliver any document necessary or proper as evidence of such discharge and may deliver up to the person making such payment any note, bond or other evidence of or any security for the debt which may be in the possession of the Custodian.

(3) The receipt of the Custodian or any person duly authorized to sign receipts on his behalf for any money paid to him under these Regulations shall be a good discharge to the person paying the same.

(4) The Custodian may execute any agreement or document whether of indemnity or otherwise, or do anything necessary to deal effectively with any money or property delivered to or vested in him or subject to his control.

36. (1) In the event of failure by any person to pay to the Custodian any money payable to him under these Regulations the Custodian may take action in the Exchequer Court of Canada to recover such money.

(2) Any money found due by the Exchequer Court of Canada, in any action taken by the Custodian under paragraph (1) hereof, or admitted by a debtor to be due, may be certified by the Custodian to have been found to be due by the Exchequer Court of Canada, or to have been admitted to be so due, and on production

⁶ As amended by P. C. 5353, October 3, 1940, substituting the word "manner" for "matter."

to the proper officer of the Exchequer Court of Canada the certificate shall be registered by that officer.

(3) Any certificate registered in the Exchequer Court of Canada as provided in paragraph (2) hereof shall from the date of such registration be of the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in that Court for the recovery of a debt of the amount specified in the certificate and entered upon the date of such registration.

(4) All reasonable costs and charges attendant upon the registration of such certificate shall be recoverable in like manner as if they were part of such judgment.

37. (1) Where the Custodian executes a transfer of any securities which are vested in him by these Regulations, the person in whose books the securities are registered shall, upon the receipt of the transfer so executed and upon the request of the Custodian register the securities in the name of the Custodian or his nominee or other transferee, notwithstanding any regulation or stipulation to the contrary, and notwithstanding that the Custodian is not in possession of the certificate, script or other document of title relating to the securities transferred, but such registration shall be without prejudice to any lien or charge in favour of such person or to any other lien or charge of which the Custodian has notice.

(2) If any question arises as to the existence or amount of any lien or charge the question may, on application being made for the purpose, be determined by any Superior Court of Record or a judgment thereof.

38. The Custodian may, where he considers it advisable to do so, liquidate any property vested in him and shall deal with the proceeds of the liquidation of such property in the same manner as he may deal with moneys paid to him under these Regulations.

39. The Custodian may at any time, at his discretion and by such notice, conveyance, transfer or release as he may think proper, relinquish any property or the proceeds of the liquidation of any property.

40. (1) The Custodian may dispose of any property at such time and place and to such person and upon such terms and in such manner, whether publicly or privately, as he in his discretion shall think proper.

(2) The transfer or sale by the Custodian of any property shall be conclusive evidence in favour of the purchaser and of the

Custodian that the requirements of these Regulations have been complied with.

41. Where in exercise of the powers conferred on him under these Regulations, the Custodian proposes to sell any shares or stock forming part of the capital of any company or any securities issued by the company which are vested by these Regulations, the company may, with the consent of the Custodian, purchase the shares, stock or securities, any law or any regulation of the company to the contrary notwithstanding, and any shares, stock or securities so purchased may from time to time be reissued by the company.

42. The Custodian may place on deposit with any bank or may, with the approval of the Treasury Board, invest in any securities, approved by the Board, any moneys paid to him or received by him from property vested in him pursuant to these Regulations.

43. (1) The Custodian shall establish an office or offices for the administration of these Regulations, and such other matters as may be delegated to him, and there shall be attached to the said office such officers, clerks and advisers as the Custodian may select, and there shall be paid to such officers, clerks and advisers such remuneration as the Custodian may determine.

(2) The Custodian's Office shall be deemed to be a Department of the Government of Canada and the Custodian the head of such Department, for the purposes of the Canada Evidence Act.

44. (1) The Custodian shall have power to charge against all property investigated, controlled or administered by him but which is subsequently released, in addition to any other charges authorized under these Regulations, an amount not exceeding two per centum of the value of all such property, including the income if any.

(2) The Custodian shall have power to retain out of the proceeds of all property vested in him under these Regulations sufficient moneys to pay the expenses incurred in the administration of such Regulations.

(3) The Custodian shall have power to charge such additional fees in respect of his duties under these Regulations, whether by way of percentage or otherwise as the Treasury may fix or approve, and such fees shall be collected and accounted for by such persons in such manner and shall be paid to such account as the Custodian directs, and the incidence of the fees as to capital and income shall be determined by the Custodian.

45. (1) The Custodian shall, in addition to his other duties as defined by these Regulations, keep a record of:—

- (a) Debts (including bank balances) due to persons residing in Canada, from persons residing or carrying on business in enemy territory or proscribed territory.
- (b) Other property in enemy territory or proscribed territory including securities) belonging to persons residing in Canada.
- (c) All debts reported to him under these Regulations.

(2) Any person desiring to record such claims or property may obtain the necessary forms for that purpose from the Custodian, but the action of the Custodian will be confined to entering upon the record claims of which particulars are supplied to him, and it shall in no way commit the Custodian or the Government of Canada either to responsibility for the correctness of the claim entered or to taking any action on the conclusion of hostilities or otherwise for the recovery of the claim or property in question.

(3) The Custodian shall record claims against enemy Governments, as distinct from claims against other enemies, in respect of public securities of these governments held by the claimants but not any other claims against enemy Governments.

(4) The Custodian shall keep a record of all property, whereof returns have been made to him or which is held by him, under these Regulations, and such record may be inspected by any person, who appears to the Custodian to be interested as creditor or otherwise, at all reasonable times free of charge.

46. (1) It shall be the duty of every enemy or enemy subject who is within Canada, if so required by the Custodian, within one month after being required, to furnish the Custodian with such particulars as he may require of:

- (a) any securities issued by any person, held by him or in which he is interested, and
- (b) any other property of the value of two hundred dollars or upwards belonging to him or in which he is interested.

(2) Any such person who refuses or fails to furnish such particulars within the time mentioned shall be guilty of an offence under these Regulations.

47. (1) Every person in Canada to whom a debt is owing at the commencement of the present war, or to whom a debt becomes payable since the commencement of the present war, by an enemy shall within one month after the commencement of the present war,

or within one month after such debt becomes payable, notify the Custodian of such debt and thereafter from time to time shall within one month of demand by the Custodian furnish such further information and documents in his possession or power, in such form and verified in such manner, as the Custodian shall require.

(2) The claim of any person who fails to comply with any provision of paragraph (1) shall, if the Custodian so orders, be forever barred and extinguished and such person shall be guilty of an offence under these Regulations.

(3) No person shall bring or take or continue in any Court in Canada any action or other proceeding relating to the payment of an enemy debt unless such person shall have obtained the written consent of the Custodian to take or continue such action.

(4) The notification to the Custodian under paragraph (1) of this Regulation shall not impose upon the Custodian any liability with respect to such debt.

(5) Any person who furnishes any false information with respect to any enemy debt shall be guilty of an offence under these Regulations.

48. (1) The Custodian may order the reporting of any claim against enemies not otherwise provided for by these Regulations and shall, if he so orders, cause a record to be kept of all such claims.

(2) Any person who furnishes any false information with respect to any claim reported under paragraph (1) hereof shall be guilty of an offence under these Regulations.

49. The property held by the Custodian under these Regulations shall not be liable to be attached or otherwise taken in execution, but the Custodian may upon an order of a Superior Court of Record or a Judge thereof, or of any Court in which judgment has been recovered against an enemy, pay out of the property paid to him in respect of that enemy the whole or any part of any debts due by that enemy and specified in the order.

Provided that before paying any such debt the Custodian shall take into consideration the sufficiency of the property paid to or vested in him in respect of the enemy in question to satisfy that debt and any other claims against the enemy of which notice verified by statutory declaration may have been served upon him.

50. The Custodian shall not be liable for any tax, assessment, mortgage, lien, charge, call, rent, interest or payment upon or in respect of any property vested in him.

51. No property vested in the Custodian shall be forfeited for default in doing any act or making any payment in respect thereof, or attached, seized or taken under any legal process or any distress, or foreclosed, or sold under any mortgage, lien, pledge or charge, or sold for any tax or assessment.

52. Every document purporting to be an order, certificate or other instrument issued by the Custodian and signed by him or any other person authorized by the Custodian, shall without further proof, unless the contrary is shown, be deemed for all purposes, including its receipt in evidence, to be such order, certificate or other instrument.

53. All periods of prescription or limitations of right of action, whether they began to run before or after the commencement of the present war, shall be treated in Canada, so far as regards relations between persons who are not enemies under these Regulations and enemies, as having been suspended during the present war.

54. A certificate of the Secretary of State that any area is or was enemy territory or proscribed territory, or as to the time at which any area became or ceased to be enemy territory or proscribed territory shall, for the purposes of any proceedings under and arising out of these Regulations, be conclusive evidence of the facts stated in such certificate.

55. Any person who for the purpose of obtaining any authority or sanction under these Regulations or for any other reason, or in giving any information for the purposes of these Regulations or any order made thereunder, knowingly or recklessly makes a statement knowing it to be false, shall be guilty of an offence under these Regulations.

56. (1) Any person who refuses or fails to make or require the making, as the case may be, of any payment, or to furnish the prescribed particulars as required by these Regulations, shall be guilty of an offence under these Regulations.

(2) Any person who refuses or fails to furnish information and particulars within the time mentioned in these Regulations, or fails to deliver to the Custodian the documents or other evidence of title pursuant to the Custodian's written request as provided by these Regulations, shall be guilty of an offence under these Regulations.

57. Any person who wilfully obstructs any person in the exercise of any powers conferred on him by or under these Regulations shall be guilty of an offence under these Regulations.

58. (1) The onus of proof in every instance shall rest upon the person who asserts that he or any property claimed or held by him is not within the provisions of these Regulations.

(2) All evidence submitted to the Custodian shall become the property of the Custodian and may be retained by him.

59. The Judges of the Court to which any jurisdiction is by these Regulations committed may make provision by rules for the practice and procedure to be adopted for the purpose of the exercise of such jurisdiction.

60. No prosecution for an offence under Regulations 2, 3, or 4 of these Regulations shall be instituted except by or with the consent of the Attorney-General of Canada; provided that the person charged with such an offence may be arrested and a warrant for his arrest may be issued and executed, and such person may be remanded in custody or on bail notwithstanding that the consent of the Attorney-General of Canada to the institution of the prosecution for the offence has not been obtained, but no further or other proceeds shall be taken until that consent has been obtained.

61. Where an act or default constitutes an offence both under these Regulations and under any statute, or both under these Regulations and at common law, the offender shall be liable to be prosecuted and punished under either these Regulations, or such statute, or at common law, but he shall not be liable to be punished twice for the same offence.

62. Subject to the provisions of Regulation 60 hereof, any offence declared and any penalty or forfeiture imposed or authorized by these Regulations may in the absence of any provision for a different procedure be prosecuted, recovered, or enforced by summary proceedings and conviction under the provisions of Part XV of the Criminal Code.

63. Any person guilty of the offence of trading, attempting or directly or indirectly offering or proposing or agreeing to trade with the enemy in violation of any of these Regulations shall be liable—

- (a) on summary conviction to imprisonment with or without hard labour, for a term not exceeding twelve months, or to a fine not exceeding two thousand dollars, or to both such imprisonment and such fine; or
- (b) on conviction on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding five thousand dollars, or to both such imprisonment and fine. And the Court may in any case order that any goods or

money in respect of which the offence has been committed shall be forfeited to the Custodian.

64. Any person guilty of an offence under these Regulations shall be liable to a fine not exceeding five hundred dollars or imprisonment with or without hard labour for a term not exceeding six months, or to both such fine and imprisonment.

65. Where a company, incorporated or unincorporated, or other body of persons, has been guilty of an offence or default under these Regulations, and the penalty or punishment provided as respects said offence or default is or includes a fine and whether or not imprisonment, additionally or alternatively, the company or other body shall be liable to the fine only (with any additional fine or fines provided by any of these Regulations with respect to continuing defaults) and every director, manager, secretary, or other officer of such company or body of persons and every partner or member of such unincorporated company or body of persons who is knowingly a party to the offence or default, shall also be deemed guilty of the offence or default and liable on conviction to the like fine or fines as the company or other body of persons, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both such fine or fines and such imprisonment.

66. Any restrictions imposed by statute, Proclamation or Regulations on dealings with enemy property shall continue to apply to property particulars whereof are or are liable to be notified to the Custodian in pursuance of these Regulations, not only during the continuance of the present war, but thereafter until such time as they may be removed by Order in Council, either simultaneously as respects all such property or at different times as respects different classes or items of property.

67. Nothing in these Regulations shall be construed as limiting the power of His Majesty by proclamation, or otherwise to prohibit any transaction which is not prohibited by these Regulations.

68. (1) The period from and including the 2nd day of September, 1939, to the 11th day of September, 1939, shall be referred to as the period of apprehended war.

(2) (i) Notwithstanding anything in these Regulations, they shall apply, *mutatis mutandis* during the period of apprehended war, and the expressions therein contained shall be construed so as to adapt them for such purpose.

(ii) Without restricting the generality of the foregoing, the

following expressions shall be construed, so as to adapt them for such purpose—

- (a) The expression "the German Reich" shall be substituted for the expression "any State or Sovereign of a State at War with His Majesty," and like expressions.
- (b) The expression "the period of apprehended war" shall be substituted for the expression "the present war" and like expressions.
 - (c) The expression "commencement of the period of apprehended war" shall be substituted for the expression "commencement of the present war" and like expressions.
- (d) The expression "period of apprehended war" shall, when the context otherwise permits, be substituted for the expression "state of war."

69. These Regulations shall be deemed to have come into force on the 11th day of September, 1939, and may be cited as "Consolidated Regulations Respecting Trading with the Enemy (1939)."

Commonwealth of Australia

APPENDIX Q

Trading with the Enemy Act 1939-1940

AN ACT RELATING TO TRADING WITH THE ENEMY

September 9, 1939, No. 14 of 1939

as amended by the Trading with the Enemy Act 1940

June 3, 1940, No. 33 of 1940

Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:—

1. This Act may be cited as the Trading with the Enemy Act 1939.

2. This Act shall come into operation on the day on which it receives the Royal Assent.

3. (1) In this Act, unless the contrary intention appears—
“Australia” includes the Territories of the Commonwealth;
“constable” includes any member of the police force of the Commonwealth, of a State, or of a Territory, and any Peace Officer appointed in pursuance of the Peace Officers Act 1925;

“corporation” means a body corporate;

“enemy subject”¹ means any person, firm or corporation trading with whom or with which would be deemed to be trading with the enemy within the meaning of sub-section (2) of this section.

(b) any corporation, whether incorporated in any enemy country or not, which the Attorney-General, by notice published in the *Gazette*, declares to be in his opinion managed or controlled, directly or indirectly, by or under

¹ Amended by the Act to amend section three of the Trading with the Enemy Act 1939, June 3, 1940, No. 33 of 1940, cited as the Trading with the Enemy Act 1940, by omitting from sub-section 1 the definitions of “enemy country” and “enemy subject” and inserting in their stead the definition “enemy subject” reprinted above.

the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country;

“the Comptroller-General” means the Comptroller-General of Customs;

“the present state of war” means the period from the third day of September, One thousand nine hundred and thirty-nine at the hour of nine-thirty o'clock *post meridiem* reckoned according to standard time in the Australian Capital Territory, until the issue of a Proclamation by the Governor-General that war no longer exists.

(2) For the purposes of this Act, a person shall be deemed to trade with the enemy, if he performs or takes part in—

- (a) any act or transaction which is prohibited by or under any Proclamation made by the King and published in the *Gazette*, whether before or after the commencement of this Act;
- (b) any act or transaction which, by notice published in the *Gazette*, whether before or after the commencement of this Act, persons are warned not to do or into which by such notice they are warned not to enter.
- (c) any act or transaction which is prohibited by or under any Proclamation made by the Governor-General and published in the *Gazette*; or
- (d) any act or transaction which at common law or by statute constitutes trading with the enemy.

4. This Act shall extend to the Territories of the Commonwealth as if each of those Territories were part of the Commonwealth.

5. (1) Any person who, during the continuance of the present state of war, trades, or directly or indirectly offers or proposes or agrees to trade, or has before the commencement of this Act traded, or directly or indirectly offered or proposed or agreed to trade, with the enemy shall be guilty of an offence.

(2) Any person who, without lawful authority, deals, or offers or proposes or agrees, whether directly or indirectly, to deal, with any money or security for money or other property which is in his hands or over which he has any claim or control for the purpose of enabling an enemy subject to obtain money or credit thereon or thereby, shall be guilty of an offence.

(3) An offence against this section may be prosecuted either

summarily or upon indictment, but an offender shall not be liable to be punished more than once in respect of the same offence.

(4) The punishment for an offence against this section shall—

(a) if the offence is prosecuted summarily—be a fine not exceeding Five hundred pounds, or imprisonment for any term not exceeding twelve months, or both; or

(b) if the offence is prosecuted upon indictment—be a fine of any amount, or imprisonment for not more than seven years, or both.

(5) Any goods or money in relation to which an offence against this section has been committed or which has been used in connexion with such an offence shall be forfeited to the King, and may be seized without warrant by any constable, or by any person thereto authorized in writing by the Comptroller-General, and shall be taken before a court of summary jurisdiction and dealt with in the same manner as articles seized under section nine of the *Crimes Act 1914-1937*.

(6) A corporation guilty of an offence against this section shall be liable to the pecuniary penalties thereby provided, and any director, officer, servant or agent of a corporation who is knowingly concerned in the commission of an offence against this section by the corporation shall be deemed to be guilty of the offence and punishable accordingly by fine or imprisonment, or both.

6. (1) A prosecution under section five of this Act shall be instituted only by or with the consent of the Attorney-General or of a person acting under his direction:

Provided that a person charged with any offence against that section may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General or of a person acting under his direction has not been obtained, but no further proceedings shall be taken until that consent has been obtained.

(2) Nothing in this section shall prevent the discharge of the person charged if proceedings are not continued within a reasonable time.

7. (1) Where it appears to a Justice of the Peace that an offence has been, or is likely to be, committed by any person against section five of this Act, or that it is desirable for the purposes of this Act to inspect the books or documents of any person, he may, upon information on oath made by the Comptroller-

General or a person thereto authorized by him, by warrant authorize any person named in the warrant—

- (a) to inspect, and if thought fit impound, any books or documents belonging to or in the possession or control of the first-mentioned person;
- (b) to require any person whom the Comptroller-General believes to be able to give information or to produce books or documents respecting the business or trade of the first-mentioned person to give that information or produce those books or documents; and
- (c) if accompanied by a constable or prescribed officer, to enter into, break open and search any house, premises or place used or believed by the Comptroller-General to be used in connexion with that business or trade or in which the Comptroller-General believes there are any books or documents belonging to the first-mentioned person.

(2) Where the Comptroller-General certifies in writing that, in relation to any person, it is desirable on account of urgency that any or all of the powers contained in paragraphs (a), (b) and (c) of sub-section (1) of this section should be exercised without prior application to a Justice of the Peace for the issue of a warrant, the Comptroller-General may, by writing under his hand, authorize any person named in the writing to exercise all or any of the powers contained in those paragraphs.

(3) Any person who obstructs or interferes with any person authorized under sub-section (1) or sub-section (2) of this section in the exercise of any power conferred upon him in pursuance of this section, or who refuses or fails to produce any book or document or to give any information when required to do so in pursuance of this section, shall be guilty of an offence.

Penalty: Five hundred pounds or imprisonment for one year, or both.

(4) Offences against this section may be prosecuted either summarily or on indictment.

8. Where a person has been authorized under this Act to inspect the books and documents of any person, and any book or document is found by him to have been destroyed, mutilated or falsified, any person having, or having had, control of that book or document shall be guilty of an offence and liable to the same punishment as if he had been guilty of trading with the enemy, unless he proves that the destruction, mutilation or falsification was not intended for the purpose of concealing any transaction which

would constitute an offence against section five of this Act.

9. Where a person has given any information to a person authorized in pursuance of this Act to require him to give the information, the information so given may be used in evidence against him in any proceeding for an offence against this Act.

10. A person shall not, in any proceeding for an offence against this Act, be excused from answering any question or producing any book or document on the ground that the answer or production may criminate or tend to criminate him, but his answer shall not be admissible in evidence against him in any criminal proceeding other than a prosecution for perjury or a proceeding under this Act.

11. Any person who aids, abets, counsels or procures, or by act or omission is in any way, directly or indirectly, knowingly concerned in or privy to—

- (a) the commission of any offence against this Act; or
- (b) the doing of any act outside Australia which would, if done within Australia, be an offence against this Act,

shall be deemed to have committed the offence and shall be punishable accordingly.

12. For the purposes of this Act, evidence of any Proclamation made by the King or by the Governor-General may be given in all Courts by the production of the *Gazette* purporting to contain it.

13. (1) Where it appears to the Minister that, with reference to any person, firm or corporation—

- (a) an offence against section five of this Act has been or is likely to be committed in connexion with the trade or business thereof;
- (b) (in the case of a firm or corporation) the control or management thereof has been or is likely to be so affected by the state of war as to prejudice the effective continuance of its trade or business, and that it is in the public interest that the trade or business should continue to be carried on;
- (c) the business thereof is controlled or managed directly or indirectly by or under the influence of enemy subjects, or is carried on wholly or mainly for the benefit or on behalf of enemy subjects; or
- (d) it is expedient in the public interest, or necessary for the safety of the Commonwealth, that a controller of the business should be appointed,

the Minister may apply to the High Court for the appointment of a controller of the person, firm or corporation, and the High Court shall have power to appoint such a controller for such time and with such powers and subjects to such conditions as the Court thinks fit, and the powers so conferred may include any powers of controlling, conducting, continuing, discontinuing, extending, restricting or varying the business and operations of the person, firm or corporation, including, if the Court considers it necessary or expedient for the purpose of enabling the controller to borrow money, the power, upon special application made to the Court for that purpose, to create charges on the property of the person, firm or corporation in priority to existing charges.

(2) The Court shall have power to direct how and by whom the costs of any proceedings under this section, and the remuneration, charges and expenses of the controller, shall be borne, and shall have power, if it thinks fit, to charge those costs, charges and expenses on the property of the person, firm or corporation in such order of priority in relation to any existing charges thereon as it thinks fit.

(3) Where the Minister is satisfied that, with reference to any person, firm or corporation, the business thereof is managed, controlled or carried on as mentioned in paragraph (c) of sub-section (1) of this section, or that it is expedient in the public interest or necessary for the safety of the Commonwealth that a controller of the business should be appointed, he may, before applying to the High Court under that sub-section, appoint an interim controller of the person, firm or corporation with such powers and subject to such conditions as he thinks fit, but in that case he shall as soon as practicable thereafter apply to the High Court under that sub-section.

14. (1) Where any person has reasonable ground for believing that any person to whom he owes money is an enemy subject, he may tender the money to the Comptroller-General, or to any officer authorized in that behalf by the Comptroller-General, together with a statutory declaration stating the transaction or matter in respect of which he owes the money, and his grounds for believing that the creditor is an enemy subject.

(2) The Comptroller-General or officer shall, if he is satisfied that the grounds of belief stated in the declaration are reasonable, receive the money, and give a receipt therefor stating the name of the creditor on whose account the money is paid.

(3) The receipt shall be a good and valid discharge to the

debtor as against the creditor and all persons claiming through or on behalf of the creditor.

(4) The Comptroller-General or officer shall pay the money into a Trust Account to be established for that purpose by the Treasurer under the *Audit Act* 1901-1934.

(5) The Treasurer may pay the money to the creditor, his executors or administrators, on demand made after the termination of the present state of war, or before that time, if he is satisfied that the creditor is not an enemy subject.

15. (1) Notwithstanding anything contained in this Act, the Governor-General may, by licence under his hand, exempt any particular transaction or class of transactions from the provisions of this Act.

(2) Every licence granted in pursuance of this section shall be published in the *Gazette*.

(3) Any person who, for the purpose of obtaining a licence under this section—

(a) makes or presents to an officer any declaration, statement or representation which is false in any material particular; or

(b) produces to an officer any instrument or document which—

(i) is false in any material particular;

(ii) has not been executed by the person by whom it purports to be executed; or

(iii) has been in any way altered or tampered with,

shall be guilty of an offence.

Penalty: Five hundred pounds, or three times the value of any goods or money in respect of which the offence has been committed, whichever is the greater, or imprisonment for six months, or both.

16. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

New Zealand

APPENDIX R

THE ENEMY TRADING EMERGENCY REGULATIONS, 1939

September 4, 1939

The New Zealand Gazette, September 4, 1939, No. 91, p. 2355.

REGULATIONS

REGULATION 1.—PRELIMINARY

(1) These regulations may be cited as the Enemy Trading Emergency Regulations 1939.

(2) In these regulations, unless inconsistent with the context,—

“Alien enemy” means every person wherever resident who is or who has at any time been a subject of any State with which His Majesty is now at war, notwithstanding the fact that such person may be also by birth, naturalization, or otherwise a British subject or have in any manner ceased to be a subject of any such State, and includes the wife of an alien enemy:

“Enemy country” means the territories of Germany, and includes also any territory for the time being in the occupation of the military forces of Germany:

“Enemy trader” means any person or body of persons of whatever nationality (and if incorporated, wherever incorporated) resident or carrying on business in an enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in an enemy country, and includes any person, firm, or company declared to be an enemy trader under the provisions hereinafter contained:

“Outbreak of war” means 9.30 p.m., New Zealand standard time, on the third day of September, 1939:

“Minister” means, unless the context otherwise requires, the Minister of Industries and Commerce.

(3) For the purposes of general interpretation hereof these regulations shall be deemed to be made under the Public Safety Conservation Act, 1932.

(4) Nothing in these regulations shall be deemed to prohibit any person from importing and taking delivery of any goods if it be proved that prior to the coming into force of these regulations such goods had been shipped from an enemy country or from any other country and were in course of direct transit to New Zealand, but this exemption shall not be deemed to authorize any payment of money in breach of these regulations or any dealing contrary to these regulations or contrary to any other regulations relating to enemy property with goods that remain the property of an enemy trader.

(5) Nothing in these regulations shall be taken to prohibit payments by or on account of enemies to persons resident, carrying on business, or being in New Zealand or its dependencies or mandated territory if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted.

REGULATION 2.—TRADING WITH THE ENEMY PROHIBITED.

(1) No person shall at any time do or attempt to do any of the following things:—

- (a) to pay any sum of money to or for the benefit of an enemy trader:
- (b) To compromise or give security for the payment of any debt or other sum of money with or for the benefit of an enemy trader:
- (c) To act on behalf of an enemy trader in drawing, accepting, paying, presenting for acceptance or payment, negotiating, or otherwise dealing with any negotiable instrument:
- (d) To accept, pay, or otherwise deal with any negotiable instrument which is held by or on behalf of any enemy trader:

Provided that this prohibition shall not be deemed to be infringed by any person who has no reasonable ground for believing that the instrument is held by or on behalf of an enemy trader:

- (e) To enter into any new transaction, or complete any transaction already entered into, with an enemy trader in any stocks, shares, or other securities:
- (f) To make or enter into any new marine, life, fire, or other

policy or contract of insurance (including reinsurance) with or for the benefit of an enemy trader; or to accept, or give effect to any insurance of, any risk arising under any policy or contract of insurance (including reinsurance) made or entered into with or for the benefit of an enemy trader before the outbreak of war; and in particular as regards treaties or contracts of reinsurance current at the outbreak of war to which an enemy trader is a party or in which an enemy trader is interested, to cede to an enemy trader or to accept from an enemy trader under any such treaty or contract any risk arising under any policy or contract of insurance (including reinsurance) made or entered into after the outbreak of war, or any share in any such risk:

- (g) Directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy trader any goods, wares, or merchandise, or directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods, wares, or merchandise for or by way of transmission to or from an enemy country or any enemy trader, or directly or indirectly to trade in or carry any goods, wares, or merchandise destined for or coming from an enemy country or an enemy trader.
- (h) To permit any British ship to leave for, enter, or communicate with any port or place in an enemy country:
- (i) To enter into any commercial, financial, or other contract or obligation with or for the benefit of an enemy trader.

(2) Any person who does or attempts to do, or directly or indirectly offers or proposes or agrees to do, anything prohibited by the last preceding clause hereof commits an offence against these regulations.

(3) If any person without lawful authority in any wise aids or abets any other person, whether or not such other person is in New Zealand, to do or attempt to do anything which if done in New Zealand by such other person would be an offence against these regulations, he commits an offence against these regulations.

(4) If any person without lawful authority deals or attempts, or directly or indirectly offers or proposes or agrees, to deal with any money or security for money or other property which is in his hands or over which he has any claim or control for the purpose of enabling an enemy trader to obtain money on credit thereon or thereby, he commits an offence against these regulations.

(5) No prosecution for an offence against any of the preceding clauses of this regulation shall be instituted except with the written consent of the Attorney-General.

(6) Judicial notice shall be taken of the signature to any consent given under the last preceding clause hereof.

REGULATION 3.—DECLARATION OF ENEMIES.

(1) If the Minister is satisfied that any person, firm, or company carrying on business in any place, whether in or out of New Zealand, is carrying on such business exclusively or to a substantial extent for the benefit or under the control of an alien enemy resident out of New Zealand or of an enemy trader, or is engaged in any business communications or undertaking injurious to the interests of His Majesty in respect of the present war, he may, by notice in the *Gazette*, declare such first-mentioned person, firm, or company to be an enemy trader for the purposes of these regulations.

(2) If the Minister is satisfied that any person, firm, or company resident out of New Zealand is an alien enemy and is carrying on business in New Zealand, or is carrying on business with persons, firms, or companies in New Zealand, he may, by notice in the *Gazette*, declare such first-mentioned person, firm, or company to be an enemy trader for the purposes of these regulations.

(3) If the Minister is satisfied with respect to any company incorporated in New Zealand that any enemy trader, or any alien company, or any alien enemy possesses or exercises any substantial interest or control in or over that company, the Minister may, by notice in the *Gazette*, declare such first-mentioned company to be an enemy trader for the purposes of these regulations.

(4) Any such declaration as aforesaid may at any time in like manner be revoked by the Minister.

(5) So long as any such declaration remains unrevoked no person shall trade with the person, firm, or company so declared to be an enemy trader:

Provided that, for the purposes of this clause, to "trade with a person, firm, or company" means to do any act which would be an offence against Regulation 2 hereof if that person, firm, or company was resident or carrying on business in an enemy country.

(6) So long as any such declaration remains unrevoked no person shall act as an agent or servant or otherwise on behalf of any person, firm, or company so declared to be an enemy trader, or be or act as a partner of any such person in any such firm.

REGULATION 4.—PROHIBITION OF EXPORTS.

(1) In this regulation "Collector of Customs," "Officer of Customs," and "goods" have the same meaning as those terms in the Customs Act, 1913.

(2) If the Minister of Customs has reason to suspect that the consignee of any goods shipped or about to be shipped for exportation to any place not being within His Majesty's Dominions or mandated territories, or that any person for whom such goods are destined, whether immediately or ultimately, is an enemy trader or a person engaged in any business undertaking or communications injurious to the interests of His Majesty in respect of the war, he may prohibit the exportation of those goods.

(3) No Collector of Customs or Officer of Customs shall permit to be laden on board any exporting ship any goods the exportation of which is prohibited under this regulation.

(4) A Collector of Customs may decline to grant a certificate of clearance for any ship until he is satisfied that no goods are laden therein in breach of these regulations.

(5) Clauses (3) and (4) of this regulation shall not apply to goods which the Collector of Customs is satisfied were laden prior to the coming into force of these regulations upon the exporting ship for export from New Zealand.

(6) The master of a ship shall not permit to be laden in that ship any goods the exportation of which is prohibited under these regulations.

(7) This regulation shall not be deemed in any to affect any prohibition or restriction on the exportation or the importation of goods which may at present or hereafter be in force under any other provision of law.

REGULATION 5.—LICENSES.

(1) It shall be lawful for the Minister, by writing under his hand, to grant a license to any person, firm, or company to engage in any transaction or series or class of transactions which, but for such license, would or might amount to a breach of these regulations, and any such license may, by like writing delivered to the licensee or to any member of a licensed firm, be at any time withdrawn.

(2) It shall be lawful for the Minister, by a notice published in the *Gazette*, generally to permit any transaction or series or class of transactions to be engaged in which but for such notice would or might amount to a breach of these regulations, and any such

notice may, by further notice published in the *Gazette*, be at any time withdrawn.

(3) Any license or notice issued under the two last preceding clauses hereof may be made subject to such limitations as to time and otherwise and such conditions and restrictions as the Minister thinks fit to include, and may at any time be modified or withdrawn.

(4) Any person who for the purpose of obtaining any license under these regulations makes any statement or supplies any information or produces any document which is false or misleading in any material particular, or which has not been given by the person by whom it purports to have been given, or which has been in any way altered or tampered with, commits an offence against these regulations unless he proves that he took all reasonable steps to ascertain the truth of such statement or information or document or to satisfy himself of the genuineness of such document.

REGULATION 6.—INVESTIGATIONS OF TRADING TRANSACTIONS.

(1) If a Justice of the Peace is satisfied on information on oath laid on behalf of the Minister that there is reasonable ground for suspecting that an offence under these regulations has been or is about to be committed by any person, firm, or company, he may issue a warrant authorizing any person appointed by the Minister and named in the warrant to inspect all books and documents belonging to or under the control of that person, firm, or company, and to require any person able to give any information with respect to the business or trade of that person, firm, or company to give that information and, if accompanied by a constable, to enter and search any premises used in connection with the business or trade, and to seize any such books or documents as aforesaid.

(2) Any person who obstructs or attempts to obstruct any person inspecting or demanding to inspect any books or documents, or, if accompanied by a constable, entering or demanding to enter or searching or demanding to search any premises in the execution of a warrant issued to such person under the last preceding clause hereof, commits an offence against these regulations.

(3) Any person having the custody of any book or document who refuses or wilfully neglects to produce it for inspection to any person to whom a warrant under this regulation has been issued, or who refuses or wilfully neglects to give any information with respect to the business or trade of the person, firm, or company referred to in the warrant which such person is able to give, commits an offence against these regulations.

- (4) Where it appears to the Minister—
- (a) In the case of an individual, that such individual, or in the case of a firm, that any one of the partners in the firm was immediately before or has been at any time since the outbreak of war an alien enemy or a subject of or resident or carrying on business in an enemy country; or
 - (b) In the case of a company, that immediately before or at any time since the outbreak of war one-third or more of the issued share capital or of the directorate of the company was or has been held by or on behalf of or consisted or has consisted of persons being alien enemies or subjects of or resident or carrying on business in an enemy country, or that immediately before or at any time since the outbreak of war the substantial control of any company was or has been exercised by persons being alien enemies or subjects of or resident or carrying on business in an enemy country; or
 - (c) In the case of a person, firm, or company, that such person, firm, or company immediately before or at any time since the outbreak of war was or has been acting as agent for any person, firm, or company being alien enemies or subjects of or resident or carrying on business in an enemy country; or
 - (d) That the business or any part thereof carried on by any person, firm, or company is, by reason of the enemy nationality or enemy association of that person, firm, or company, or of any member of that firm or company or otherwise, carried on wholly or mainly for the benefit of or under the control of alien enemies, enemy traders, or enemy subjects; or
 - (e) That contracts have immediately before or at any time since the outbreak of war been entered into between any person, firm, or company and an alien enemy or an enemy subject or enemy trader,—

then, and in any such case, and so that the Minister may satisfy himself that the person, firm, or company is not trading with an enemy trader, or for the purpose of ascertaining whether the business is carried on for the benefit or under the control of alien enemies, enemy traders, or enemy subjects, or for the purpose of ascertaining the relations existing immediately before or at any time since the outbreak of war between such person, firm, or company, or any member of that firm or company and an alien enemy

or an enem subject or an enemy trader, or for the purpose of obtaining information on which to decide whether any person, firm, or company ought to be declared to be an enemy trader under Regulation 3 hereof, the Minister may, if he thinks it expedient so to do, by written order under his hand give to any officer of the Department of Industries and Commerce, Tourist and Publicity named in the order authority from time to time to inspect all books and documents belonging to or under the control of the person, firm, or company, and to require any person able to give information with respect to the business or trade of that person, firm, or company to give that information.

(5) Any person having the custody of any books or documents who refuses or wilfully neglects to produce them for inspection to any officer holding an order from the Minister under the last preceding clause hereof, or who refuses or wilfully neglects to give such officer any information with respect to the business or trade of the person, firm, or company referred to in the order which such person is able to give, commits an offence against these regulations.

(6) Where any officer holding an order from the Minister given under clause (4) of this regulation finds any book or document to have been destroyed, mutilated, or falsified, any person having or having had control of such book or document shall be guilty of an offence against these regulations unless he proves that the destruction, mutilation, or falsification was not intended for the purpose of concealing any transaction which in the opinion of the Court would be likely to constitute an offence under Regulation 2 hereof.

(7) Where a person has given any information to a person to whom a warrant under this regulation has been issued or to an officer holding an order from the Minister given under clause (4) of this regulation, the information so given may be used in evidence against that person in any proceedings under these regulations, notwithstanding that he only gave the information on being required so to do pursuant to these regulations.

(8) For the purpose of the effective administration of this regulation any person expressly appointed in that behalf by the Minister shall have the powers of holding judicial inquiries and ancillary powers conferred on the Minister of Industries and Commerce pursuant to section 13 of the Board of Trade Act, 1919, as amended by the Board of Trade Amendment Act, 1923, and for that purpose the provisions of sections 14 to 25 of the Board of Trade Act, 1919, and all other relevant provisions of that Act shall apply *mutatis mutandis*.

REGULATION 7.—RESTRICTIONS ON BUSINESS.

(1) When the Minister is satisfied with respect to any business carried on in New Zealand that it is being carried on wholly or partially by or on behalf of or under the control or management of an enemy trader or an alien enemy, the Minister may, by notice to any person by whom such business is being carried on or managed in New Zealand or to the agent attorney or representative in New Zealand of any such person, impose such restrictions as he thinks fit upon the scope or nature of that business or upon the mode of carrying it on.

(2) Any such restriction may be in like manner removed or varied by the Minister.

(3) Where any person is or has at any time been, whether before or after the making of these regulations, a servant or agent of an alien enemy or of an enemy trader within the meaning of these regulations, or a servant or member of a firm or company being an enemy trader within the meaning of these Regulations, the Minister may from time to time, by notice given to that person, impose such restrictions as he thinks fit upon the scope or nature of any business carried or to be carried on by him or upon the mode of carrying on any such business.

(4) No restrictions on the business of any person shall be imposed under the authority of the last preceding clause hereof or shall remain in force at any time later than six months after the person has ceased to be a servant or agent of an alien enemy or of an enemy trader or a servant or member of a firm or company being an enemy trader as aforesaid.

(5) No person shall carry on, or be in any manner concerned in carrying on, a business in breach of any restriction imposed under this regulation and for the time being in force.

(6) At any time when a restriction imposed under this regulation is in force in respect of any business the Minister may, by written order under his hand, give to any officer of the Department of Industries and Commerce, Tourist and Publicity named in the order authority from time to time to inspect all books and documents belonging to or used in connection with the business, including the books and documents of any bank at which is kept a bank account in connection with the business, and to require any person able to give information with respect to the business to give that information, and the provisions of clauses (5), (6), and (7) of Regulation 6 hereof shall, *mutatis mutandis*, apply as if such

order had been given under the powers conferred by clause (4) of Regulation 6 hereof.

REGULATION 8.—RETURNS OF FOREIGN CORRESPONDENTS.

(1) The Ministry may, by notice in writing to any person, firm, or company carrying on business in New Zealand in respect of the purchase, sale, exportation, or importation of goods, and having any foreign correspondents or having had since the outbreak of war any foreign correspondents in respect of that business or any part thereof, require such person, firm, or company to make and deliver to him within the period stated in such notice a return in writing of the name and place of business of every such foreign correspondent.

(2) "Correspondent" means any person, firm, or company between whom and the person, firm, or company making the return there exists, or has existed, the relation of principal and agent, vendor and purchaser, or consignor and consignee in respect to the purchase, sale, exportation, or importation of goods.

(3) "Foreign correspondent" means any correspondent having a head office or chief place of business elsewhere than in His Majesty's Dominions or mandated territories or territory in the military occupation of His Majesty.

(4) Every such return shall specify the nature of the business of the foreign correspondent and every place in which, to the knowledge or belief of the person, firm, or company making the return, the foreign correspondent has any office, factory, warehouse, branch, or other place of business.

(5) Failure to make any such return within the time stated in any such notice, or making any return which is knowingly incomplete or misleading, shall be an offence against these regulations on the part of every person concerned in the management of the business in respect of which the return is or ought to have been made.

(6) Except for the purpose of legal proceedings in any Court of Justice, no person shall divulge any of the particulars or information contained in any return of foreign correspondents.

REGULATION 9.—ADVERTISING BY DECLARED ENEMIES.

(1) The Minister may serve notice on any person, firm, or company declared to be an enemy trader for the purpose of these regulations forbidding the publication of any advertisement of the business of such person, firm, or company, or any advertisement of

the goods or merchandise manufactured, produced, or sold by such person, firm, or company.

(2) The Minister may serve on the owner, printer, or publisher of any newspaper, periodical, or other publication, or publish in the *Gazette*, a like notice relating to any declared enemy.

(3) Any such notice may at any time be modified or withdrawn.

(4) No person shall knowingly publish or attempt to publish any advertisement contrary to the terms of a notice in force under this regulation.

Nothing in this regulation shall apply to the Public Trustee in his capacity of controller of any business under any regulations at any time in force relating to the control by the Public Trustee of enemy property or to advertisements relating to a business over which the Public Trustee exercises control by virtue of such regulations.

REGULATION 10.—LEGAL PROCEEDINGS.

(1) It shall be a defence to any person charged with a breach of these regulations if he proves that the acts with which he is charged are authorized by any license or notice issued under Regulation 5 hereof and for the time being in force.

(2) In any proceedings for a breach of these regulations an allegation in an information that any person, firm, or company is an enemy trader or an alien enemy shall, until the contrary is proved, be sufficient evidence that such person, firm, or company is an enemy trader or (as the case may be) an alien enemy within the meaning of these regulations.

Union of South Africa

APPENDIX S

NATIONAL EMERGENCY REGULATIONS,

September 14, 1939

Government Gazette Extraordinary, September 14, 1939, p. 1054C.

TRADING WITH THE ENEMY AND SETTING OFF CERTAIN DEBTS AGAINST CERTAIN CLAIMS

8. (1) Any person who, without proper authority, sends, directly or indirectly, any money or goods to any person in a country with which the Union is at war, or carries on any business transactions with such a person, shall be guilty of an offence.

(2) If a person resident in the Union at any time while these regulations are in force, owes any money to any person in a country with which the Union is at war or to any authority or institution in such a country, or if a person has in his possession or under his control in the Union any money on behalf of any person in such a country or on behalf of any such authority or institution as aforesaid, he shall forthwith give notice in writing to the Secretary for Finance at Pretoria, that he owes such money or has such money in his possession or control as aforesaid.

(3) The Minister of Finance may order any such person as aforesaid to furnish him with further information in regard to the aforesaid debt or money, and may order the said person to deposit a sum equal to the amount of the debt or the said money to the credit of the Treasury at such place as may be specified in the order, and may use any such money to pay any claim which any person resident in the Union has against any person in a country with which the Union is at war.

(4) If a debt mentioned in sub-regulation (2) was contracted in a foreign currency the amount of the debt shall be deposited in terms of sub-regulation (3) in the currency of the Union at the

rate of exchange which applied on the date when the debt became due.

(5) When any person has deposited any money in terms of sub-regulation (3) he shall be deemed to have discharged his liability toward the person to whom the money was due, as if he had paid it to that person.

(6) Any person mentioned in sub-regulation (2) who fails to comply with the requirements of that sub-regulation and any person who has received an order under sub-regulation (3) who fails to comply with that order, shall be guilty of an offence.

APPENDIX T

SUPREME COURT OF THE UNITED STATES

Ex Parte Don Ascanio Colonna.

62 S. Ct. 373, 86 L. Ed. Adv. Op. 357 (January 5, 1942).

Per curiam: Petitioner, the Royal Italian Ambassador, seeks leave to file in this Court a petition for writs of prohibition and mandamus, directed to the United States District Court for the District of New Jersey. The basis of this application is petitioner's allegation that a vessel and its cargo of oil, the subject of litigation in the District Court and now in its possession, are the property of the Italian Government and are entitled to the benefit of Italy's sovereign immunity from suit.

After the motion was filed, there occurred on December, 11, 1941, the declaration that the United States is at war with Italy. Section 2(b) of the Trading with the Enemy Act, 40 Stat. 411, defines "enemy" to include the government of any nation with which the United States is at war. Section 7(b) contains the following provisions, 40 Stat. at 417:

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof" [which relates to patent, trademark and copyright suits] ". . . And provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

This provision was inserted in the act in the light of the principle recognized by Congress and by this Court that war suspends the right of enemy plaintiffs to prosecute actions in our courts. See S. Repts. No. 111 and 113, pp. 21, 24, 65th Cong., 1st Sess.; *Caperton v. Bowyer*, 14 Wall. 216, 236; *Hanger v. Abbott*, 6 Wall. 532, 536-37, 539; *Masterson v. Howard*, 18 Wall. 99, 105; *Porter v. Freudenberg*, [1915] 1 K. B. 857, 866-80. In view of the statute and the opinions in the cases cited, the application will not be entertained. Cf. *Rothbarth v. Herzfeld*, 179 App. Div. 865, 867-69, affirmed 223 N. Y. 578. *Motion for leave to file denied.*

APPENDIX U

SUPREME COURT OF THE UNITED STATES

Ex Parte Kumezo Kawato.

317 U. S. 69, 63 S. Ct. 115, 87 L. Ed. Adv. Op. 94 (Nov. 9, 1942).

Mr. Justice Black delivered the opinion of the Court.

The petitioner, born in Japan, became a resident of the United States in 1905. April 15, 1941, he filed a libel in admiralty against the vessel *Rally* in the District Court for the Southern District of California. He claimed wages were due him for services as a seaman and fisherman on the *Rally*, and sought an allowance for maintenance and cure on allegations that he had sustained severe injuries while engaged in the performance of his duties. Claimants of the vessel appeared and filed an answer on grounds not here material, but later, on January 20, 1942, moved to abate the action on the ground that petitioner, by reason of the state of war then existing between Japan and the United States, had become an enemy alien and therefore had no "right to prosecute any action in any court of the United States during the pendency of said war." The District Judge granted the motion. Petitioner sought mandamus in the Circuit Court of Appeals for the Ninth Circuit to compel the District Court to vacate its judgment and proceed to trial of his action, but his motion for leave to file was denied without opinion. We granted leave to file in this Court, 316 U. S. 650, and the cause was submitted on answer, briefs and oral argument.

Although the Court's order of abatement for the duration of the war rested solely on the ground of petitioner's status as an alien enemy, it has been argued here that the writ should be denied because the Court could have dismissed the bill on other grounds, particularly claimed defects in the allegations of the libel. These contentions are irrelevant here. Unless the action was properly abated for the reasons set out in the motion and the Court's order, the petitioner is entitled to have the District Court proceed with his action and pass upon the sufficiency of his allegations. This is an essential step in an orderly trial leading to a final judgment from which an appeal will lie to correct errors. If the Court's order of abatement was erroneous, mandamus is the appropriate remedy. 28 U. S. C. 342; *McClellan v. Carland*, 217

U. S. 268, 279-282; *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546.

"Alien enemy" as applied to petitioner is at present but the legal definition of his status because he was born in Japan with which we are at war. Nothing in this record indicates, and we cannot assume, that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them. His suit invokes the protection of those laws through our courts both to obtain payment of wages alleged to have been promised him by American citizens for lawful work and reimbursement on account of damages suffered while working for those citizens.

Petitioner contends that he has the right under the common law and treaties to proceed with his action, and that this right is not limited by the statutes. In our view the possibility of treaty rights, which has not been argued extensively, need not be considered. Applicable treaties are ambiguous and should not be interpreted without more care than is necessary in this case.¹

There doubtless was a time when the common law of England would have supported dismissal of petitioner's action, but that time has long since passed. A number of early English decisions, based on a group concept which made little difference between friends and enemies barred all aliens from the courts. This rule was gradually relaxed as to friendly aliens² until finally in *Wells v. Williams*, 1 Ld. Raym. 282 (1698), the Court put the necessities of trade ahead of whatever advantages had been imagined to

¹ Petitioner argues that his case is covered by article 23 h of the Annex to the IVth Hague Convention of 1907: "It is especially prohibited . . . to declare abolished, suspended, or inadmissible in a Court of law the rights and action of the nationals of the hostile party." This clause, which was added to the Convention of 1899 without substantial discussion either by the Delegates in General Assembly or by the committee and sub-committee which dealt with it, III Proceedings of the Hague Convention of 1907, 12, 107, 136, 240; and I *ibid.* 83, was construed by an English Court to apply solely in enemy areas occupied by a belligerent. *Porter v. Freudenberg*, [1915] 1 K. B. 857. This question has not been raised by the courts in this country, but the English interpretation was repeated with approval by Representative Montague of the Interstate Commerce Committee in his address to the House when he presented it to the Trading With the Enemy Act. 55 Cong. Rec. 4842 (1917).

² According to Littleton, an alien might not sue in either a real or personal action; but this rule was modified by Coke to bar such actions only by alien enemies and to permit personal actions by alien friends. See Coke on Littleton 129 b. Pollock and Maitland suggest that this modification by Coke was

exist in the old rule, and held that enemy aliens in England under license from the Crown might proceed in the courts. As applied ever since, alien enemies residing in England have been permitted to maintain actions, while those in the land of the enemy were not; and this modern, humane principle has been applied even when the alien was interned as is petitioner here.³ *Schaffenius v. Goldberg* [1916] 1 K. B. 284.

The original English common law rule, long ago abandoned there, was, from the beginning, objectionable here. The policy of severity toward alien enemies was clearly impossible for a country whose life blood came from an immigrant stream. In the war of 1812, for example, many persons born in England fought on the American side.⁴ Harshness toward immigrants was inconsistent with that national knowledge, present then as now, of the contributions made in peace and war by the millions of immigrants who have learned to love the country of their adoption more than the country of their birth. Hence in 1813 Chief Justice Kent, in *Clarke v. Morey*, 10 John. 69, 72, set the legal pattern which, with sporadic exceptions, has since been followed.⁵ The core of that decision he put in these words: "A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity."⁶ Thus the courts aligned their policy with that en-

"a bold treatment of a carefully worded text." 1 History of English Law, 2d ed., 459. The early law treated all aliens as a group. See the sub-titles of Pollock and Maitland's chapter, "The Sorts and Conditions of Men," some of which are: The Knights, The Unfree, The Clergy, Aliens, The Jews, Women, etc. *Ibid.*, Chap. II. For a summary of English views now largely obsolete on alien standing in court see Hansard, *Law Relating to Aliens*, chap. 7 (1844). For a survey of the common law on inheritance of land by aliens see *Techt v. Hughes*, 229 N. Y. 222 (Cardozo, J.).

³ Petitioner was interned some months after the court had abated his action. The government has filed a supplemental brief stating that it does not consider that this circumstance alters the position of petitioner in respect to his privilege of access to the courts.

⁴ One writer estimates that half of the 400 men on board the *Constitution* when it captured the *Guerriere* were seamen who had deserted the British, and the ship *United States* was reported by its captain to have no men on board who had not served with British war ships. Bradley, *The United Empire Loyalists*, 192; and see 3 McMaster, *History of the United States*, 242.

⁵ For collection of cases see 30 Georgetown L. J. 421; 28 Virginia L. R. 429; 27 Yale L. J. 105; Huberich, *Trading With the Enemy*, 188 *et seq.*; *Daimler v. Continental Tyre Co.*, Anno. Cas. 1917 C, 170, 204; *In the Matter of Bernheimer*, C. C. A. 3rd, —F. 2d —; and for English cases, McNair, *Legal Effects of War*.

⁶ Story was one of the few commentators to approve any part of the early

joined upon the President by Congress in 1812 when it directed him to administer the laws controlling aliens in a manner that would be "consistent with the public safety, and according to the dictates of humanity and national hospitality." 50 U. S. C. §22.

In asking that the rights of resident aliens be abrogated in their behalf, private litigants in effect seek to stand in the position of government. But only the government, and not the private individual is vested with the power to protect all the people, including loyal aliens, from possible injury by disloyal aliens. If the public welfare demands that this alien shall not receive compensation for his work or payment for his injuries received in the course of his employment, the government can make the decision without allowing a windfall to these claimants. Even if petitioner were a non-resident enemy alien, it might be more appropriate to release the amount of his claim to the Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co. v. Heye*, 251 U. S. 317, 323, in which this Court said that the sole objection to giving judgment for an alien enemy "goes only so far as it would give aid and comfort to the other side." The ancient rule against suits by resident alien enemies has survived only so far as necessary to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or give aid to the enemy. This may be taken as the sound principle of the common law today.

It is argued that the petitioner is barred from the courts by the Trading With the Enemy Act, 50 U. S. C. Appendix. The particular clause relied on is Sec. 7: "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in Section 10 hereof [which relates to patents]; . . ." Analysis of its terms makes clear that this section was not meant to apply to petitioner, and an examination of its legislative history makes this doubly certain. Section 7 bars from the courts only an "enemy or ally of enemy." Section 2 of the Act defines the "alien enemy" to which the Act applies as those residing within the territory owned or occupied by the enemy; the enemy government or its officers,⁷

common law rule. He accepted so much of that doctrine as required enemy aliens entitled to relief in the courts to have entered the country under safe conduct or license. Story on Civil Pleadings, p. 10; Story's Equity Pleadings, Sec. 51-54, and particularly Sec. 724. This requirement was reduced to legal fiction in *Clarke v. Morey*, *supra*, at 72, when Chief Justice Kent held that "The license is implied by law and the usage of nations."

⁷ Some possible confusion on the part of the Court below and of other courts

or citizens of an enemy nation, wherever residing, as the President by proclamation may include within the definition. Since the President has not under this Act⁸ made any declaration as to enemy aliens, the Act does not bar petitioner from maintaining his suit.

This interpretation, compelled by the words of the Act, is wholly in accord with its general scope, for the Trading With the Enemy Act was never intended, without Presidential proclamation, to affect resident aliens at all. Prior to the passage of the Act, the courts had consistently held that during a state of war, commercial intercourse between our nationals and non-resident alien enemies, unless specifically authorized by Congress and the Executive, was absolutely prohibited, and that contracts made in such intercourse were void and unenforceable.⁹ This strict barrier could be relaxed only by Congressional direction, and therefore the Act was passed with its declared purpose "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit under careful safeguards and restrictions, certain kinds of business to be carried on."¹⁰ Thus Congress expressly recognized by the passage of the Act that "the more enlightened views of the present day as to treatment of enemies makes possible certain relaxations in the old law."¹¹

Since the purpose of the bill was to permit certain relations with non-resident alien enemies, there is no frustration of its purpose in permitting resident aliens to sue in our courts. Statements

may have developed from our per curiam opinion in *Ex parte Colonna*, 314 U. S. 510, in which leave to file a petition for writs of prohibition and mandamus in connection with a proceeding brought on behalf of the Italian government was denied on the basis of the Trading With the Enemy Act. That opinion emphasized that an enemy government was included within the definition of the classification "enemy" as used in that act, and that such enemy plaintiffs had no right to prosecute actions in our courts. The decision has no bearing on the rights of resident enemy aliens. The *Colonna* decision was momentarily misapplied in *Kaufman v. Eisenberg*, 177 N. Y. Misc. 939, but the trial judge corrected a stay in proceedings he had previously allowed upon his further consideration of the fact that the plaintiff was a resident alien.

⁸ The President has issued a Proclamation taking certain steps with reference to alien enemies under the Alien Enemy Act of 1798 as amended, 50 U. S. C. §21, but this Proclamation has no bearing on the power of the President under the Trading With the Enemy Act.

⁹ Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., pages 15-22. *Coppell v. Hall*, 7 Wall. 542, 554, 557, 558.

¹⁰ Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 1.

¹¹ Report of the Senate Committee on Commerce, Report No. 111, 65th Cong., 1st Sess., 2.

made on the floor of the House of Representatives by the sponsor of the bill make this interpretation conclusive.¹²

Not only has the President not seen fit to use the authority possessed by him under the Trading With the Enemy Act to exclude resident aliens from the Courts, but his administration has adopted precisely the opposite program. The Attorney General is primarily responsible for the administration of alien affairs. He has construed the existing statutes and proclamations as not barring this petitioner from our courts,¹³ and this stand is emphasized by the government's appearance in behalf of petitioner in this case.¹⁴

The consequence of this legislative and administrative policy is a clear authorization to resident enemy aliens to proceed in all courts until administrative or legislative action is taken to exclude them. Were this not true, contractual promises made to them by individuals, as well as promises held out to them under our laws, would become no more than teasing illusions. The doors of our courts have not been shut to peaceable law-abiding aliens to enforce rights growing out of legal occupations. Let the writ issue.

¹² "Mr. Montague: A German resident in the United States is not an enemy under the bill, unless he should be so declared subsequently by the proclamation of the President, in which case he would have no standing in court." . . .

"Mr. Stafford: Do I understand that this bill confers upon the President any authority to grant to an alien subject doing business in this country the right to sue in the courts to enforce his contract?

"Mr. Montague: If he is a resident of this country, he has the right under this bill without the proclamation of the President.

"Mr. Stafford: If so, where is that authority?

"Mr. Montague: In the very terms of the bill defining an enemy, whereby German residents in the United States have all rights in this respect of native-born citizens, unless these rights be recalled by the proclamation of the President for hostile conduct on the part of the Germans resident in the United States." 55 Cong. Rec. 4842, 4843 (1917).

¹³ "No native, citizen, or subject of any nation with which the United States is at war and who is resident in the United States is prevented by federal statute or regulation from suing in federal or state courts." Dept. of Justice press release, Jan. 31, 1942.

¹⁴ The determination by Congress and the Executive not to interfere with the rights of resident enemy aliens to proceed in the courts marks a choice of remedies rather than a waiver of protection. The government has an elaborate protective program. Under the Alien Enemy Act, 50 U. S. C. §21, the President has ordered the internment of aliens, has instituted a system of identification, and has regulated travel. Under the First War Powers Act, 50 U. S. C. Supp. I, 1940 ed. Appendix, Sec. 5(b), and various executive orders he has controlled the funds of resident enemy aliens. Many other statutes make a composite pattern which Congress has apparently thought adequate for the control of this problem. See, e. g., the controls on alien ownership of land in the territories, 8 U. S. C. Chap. 5.

APPENDIX V

UNITED KINGDOM: HOUSE OF LORDS

V/O Sovfracht v. N. V. Gebr. van Uden's Scheepvaart en Agentuur Maatschappij

(1943) 1 All E. R. 76; 59 T. L. R. 101 (December 3, 1942).

THE LORD CHANCELLOR—My Lords, the respondents are a ship-owning company incorporated before the war under the law of the kingdom of the Netherlands, with their principal place of business at Rotterdam. By a charterparty dated August 11, 1939, the respondents chartered one of their vessels to the appellants, who are a Russian company; disputes arose between the parties and the respondents sought arbitration under a clause in the charterparty which provided for arbitration in London. During the month of April, 1940, each party appointed an arbitrator. Before the matter could proceed farther, the German invasion of the Netherlands took place and by the second week of May, 1940, that country, including Rotterdam, was completely occupied by the enemy and has ever since been entirely under enemy control. In these circumstances, the appellants and their arbitrator refused to proceed with the arbitration on the ground that the respondents had become enemies, and ultimately, on June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. Master Ball, after hearing argument from both sides, made the order, and this order was confirmed by the Judge in Chambers, Mr. Justice Asquith, who gave to the present appellants leave to appeal to the Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the view that the respondents were not in the position of alien enemies at common law and thus still enjoyed the right to resort to the King's Courts.

This is the principal question to be decided in the present appeal.

On the main question, it is, of course, common ground that an "alien enemy" cannot sue in the King's Courts or otherwise take up the position of an actor in British litigation, save under royal licence. An alien enemy, in this connexion, does not mean a subject of a State at war with this country, but a person, of

whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy's country: *Porter v. Freudenberg* (31 *The Times* L. R. 162; [1915] 1 K. B. 857, at p. 869).

That case was the decision of a specially constituted Court of Appeal at the beginning of the last war. It confirmed the view which was taken by our Courts during the Napoleonic wars, for example, in the King's Bench in *O'Mealey v. Wilson* ((1808) 1 Camp 482), where Lord Ellenborough, C.J., said (at p. 483): "If a British subject resides in an enemy's country without being detained as a prisoner of war, he is precluded from suing here," and by the Court of Common Pleas in *M'Connell v. Hector* ((1802) 3 Bos. and P. 113, at p. 114), when the Court declined to support a commission of bankruptcy granted at the suit of three partners, all British subjects, on the ground that two of them resided and traded at an enemy port. (The port was the Dutch port of Flushing, described as "a port belonging to the enemies of this country"—the relevant date is not given, but, as Professor McNair points out in a learned article on the "Procedural Capacity of Alien Enemies" in the *Law Quarterly Review* of April last, the time was probably during the period when Holland under a francophil puppet government was at war with Great Britain.) In that case Lord Alvanley, C.J., said: "I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile State, and who is so far a merchant settled in that State that his goods would be liable to confiscation in a Court of prize, is yet to be considered as entitled to sue as an English subject in an English Court of justice." This decision was approved by this House in *Rodriguez v. Speyer Brothers* (134 *The Times* L. R. 628; [1919] A. C. 59), when Lord Finlay, L.C., said of it: "All that was decided by the Court was that enemy character results from residence in the enemy country, and there is no doubt as to the correctness of this proposition."

There can be no doubt that the respondent company must be treated as "resident" in Rotterdam. Their commercial domicile was there, and there is no indication that it has changed. The case must be dealt with as though they were an individual subject of the Queen of Holland living there. I share to the full the feeling of distaste, expressed by the Master of the Rolls, at the idea that loyal Dutch subjects, who have suffered so cruelly at the hands of a brutal enemy and whose fellow countrymen are none the less maintaining from this country all the resistance they can to the invaders of their native land, should be regarded by

English law, for any purpose, as alien enemies. But for the purposes of the statute law prohibiting trading with the enemy, they would plainly be so regarded, for "enemy territory" is defined, by section 15(1) of the Act, so as to include "any area which is . . . in the occupation of a Power with whom His Majesty is at war." Here, however, we are concerned with the common law. Even a British subject, if voluntarily resident in enemy territory, would be treated at common law as unable to sue: see, for example, Lord Parker's speech in *Daimler Company, Limited v. Continental Tyre and Rubber Company (Great Britain) Limited* (32 *The Times* L. R. 624, at p. 633; [1916] 2 A. C. 307, at p. 338), for the denial of *persona standi in judicio* does not turn on allegiance but on locality. The question is, therefore, simply whether residence in territory which has been invaded and is forcibly occupied by the enemy disqualifies (apart from royal licence) from bringing or pursuing a suit in the King's Courts. I will add a reference to a Scottish decision given during the last war—*Gebruder Van Uden v. Burrell* ([1916] S. C. 391). There the Court of Session (Lord President Strathclyde, Lord Skerrington, and Lord Anderson) held that a Dutch firm (I do not know whether the firm was the precursor of the respondent company, but the name is the same and it was a firm of steamship owners in Rotterdam), which was an enemy within the meaning of the Trading with the Enemy Act, 1914, because the partners also carried on business in Germany, could be defeated as pursuers by the plea of alien enemy.

My own conclusions, deduced from the authorities, may be summarized as follows:—

1. The test of "enemy character" is fundamentally the same, so far as areas occupied by an enemy power are concerned, whether the question arises over a claim to sue in our Courts, or over issues raised in a Court of prize, or over a charge of trading with the enemy at common law.

2. The test is an objective test, turning on the relation of the enemy power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled; it is not a question of nationality or of patriotic sentiment.

3. If the enemy power invades and forcibly occupies territory outside his own boundaries, residence in that territory may disqualify from bringing or maintaining suit in the King's Courts in the like manner as residence in the enemy power's own territory would. The same applies to a company commercially domiciled or controlled in occupied territory.

4. But this is not always or absolutely so. It depends on the

nature of the occupation and on the facts of each case. If as a result of the occupation the enemy is provisionally in effective control of an area at the material time, and is exercising some kind of government or administration over it, the area acquires "enemy character"; local residents cannot sue in our Courts, and goods shipped from such an area have enemy origin: see *per* Chief Justice Marshall in the *Thirty Hogsheads of Sugar* case, *Bentzen v. Boyle* ((1815) 9 Cranch. 191, at p. 195). If, on the other hand, the occupation is of a slighter character, for instance, if it is incidental to military occupations and does not result in effective control, the case is different, as in *The Gerasimo* ((1857) 11 Moo. P.C.C. 88). I would adopt the observations of my noble and learned friend Lord Wright on this decision, for I agree that, while Dr. Lushington's statement of the law in that case went too far in one direction, Lord Kingsdown in delivering the judgment of the Privy Council, reversing the decision of the Prize Court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind.

5. It is not irrelevant to bear in mind the reason why a resident in enemy-occupied territory is in certain circumstances subject to the same disability as a resident in enemy territory. "This law," said Lord Reading, C.J. ([1915] 1 K. B., at p. 867) of *Porter v. Freudenberg*, referring to the denial to alien enemies of a right to sue, "was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be, or may be, to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods or other resources available to individuals in the enemy State." This consideration equally applies to a claim sought to be established in our Courts by a resident in enemy-occupied territory, for if the claimant succeeds, an asset in the form of an award or a judgment is created which the occupying Power can appropriate and which is calculated to increase the enemy's resources.

6. The common-law disability to sue in such cases cannot be regarded as got rid of because Emergency Regulations would prevent the transmission abroad of the sum recovered. The asset would be created, even though it necessarily remained here till the end of the war. Such an asset might well operate as security for an advantage to the enemy from a neutral lender.

7. The operation of the rule refusing *persona standi in judicio* is always subject to permission being given by royal licence. In the present case, no application for a royal licence has been made.

For these reasons I find myself obliged to differ from the Court of Appeal, and to move that the appeal be allowed with costs here and below.

LORD ATKIN, LORD THANKERTON, LORD WRIGHT and LORD PORTER also delivered opinions agreeing that the appeal should be allowed.¹

¹ These opinions are reported (1943) 1 All E. R. at p. 80, 81, 82, and 93.

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