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THAT PIERCED VEIL—FRIENDLY STOCKHOLDERS AND ENEMY CORPORATIONS

Norman S. Fink*

Introduction

CONSIDER, if you will, the position of Mr. A, an ordinary resident of Suburbia, Long Island, New York, U.S.A., who on the advice of his stock broker that he has an opportunity to buy a "growth" stock, invests \$5,000 in 100 shares of X company, organized under the laws of Switzerland. The World erupts into another tragic war and Mr. A receives peremptory demand from his government to turn over his shares to it.¹ He learns that his investment gives aid and comfort to

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¹ An analogous hazard to the private investor is nationalization. The development of the law in the United States as herein outlined might well serve, it is submitted, as a basis for discussing international protection for the private investor. This issue is very much alive at this writing in the United Nations.

A. The *New York Times* reported on December 12, 1952, p. 12, col. 3:

"UNITED NATIONS, N.Y., Dec. 11—The General Assembly's Economic and Financial Committee approved today a proposal pushed by Bolivia and Iran intended to promote the nationalization of resource industries in less developed countries. The majority prevented the United States and other defenders of the rights of private investors from expressing their views, and rejected any reference to such rights.

"The measure, which would seek to bar even diplomatic representation on behalf of nationals with financial interests in companies abroad undergoing nationalization, was supported by thirty-one countries and opposed only by the United States. Nineteen countries, including Britain and the Commonwealth bloc, abstained, many because the proposal would conflict with their constitutions. Thus the opposition, in effect, included the abstainers.

"The vote, a roll-call vote by motion of Dr. Isador Lubin, United States representative, put private investors on notice that many more countries than those that have been openly talking about nationalization, or undertaking it, are interested in preserving their ability to engage in nationalization. . . .

"The United States delegation will be able to debate the question fully when the approved resolution reaches the plenary session."

B. On December 17, 1952, p. 59, col. 4, the *Times* reported:

"The recent action of the United Nations in passing a Uruguayan-Bolivian proposal approving any country's right to nationalize private property without mentioning any obligation to compensate the owners drew sharp criticism yesterday from the National Association of Manufacturers and the New York Stock Exchange."

An excerpt from a letter to Ambassador Warren R. Austin, United States representative to the United Nations, from Keith Funston, President of the New York Stock Exchange was reported to have stated in part: "The resolution serves notice on investors everywhere that rights of long standing will no longer be respected. . . ."

C. The final action of the United Nations in this regard was reported in the *Times* on December 22, 1952, p. 3, col. 1:

"UNITED NATIONS, N.Y., Monday, Dec. 22—Taking account of the misgivings of investors in various parts of the world, the United Nations General Assembly amended

the enemy since X company, apparently a non-belligerent enterprise in a neutral country, is alleged to be a "cloak" for enemy interests. As a purchaser in good faith, an unquestionably loyal American citizen residing within the United States, is he to be penalized without recourse? Until very recently, the answer was yes. But we will see that, beginning with an ever-so-slight wedge in an otherwise impregnable doctrine of law, the answer has now changed.

The wedge was inserted by the District Court of the District of Columbia upon the remand from the Supreme Court of the case of *Clark v. Uebersee Finanz Korporation, A. G.*² Chief Judge Laws in his opinion³ dismissed a contention which counsel had raised during oral argument, but not in the pleadings or in pre-trial determination of issues. The question presented in substance was: where a corporation has been vested by the Alien Property Custodian as "enemy" and the claim is made for return by the corporation on behalf of its stockholders

last night a controversial resolution on nationalization of resources before adopting it by a vote of 36 to 4. There were twenty abstentions. . . .

"However, Dr. Isador Lubin, United States representative on the Economic and Financial Committee, voted against the amended resolution.

"Dr. Lubin argued that adoption of the resolution would seriously hinder the economic progress of underdeveloped nations.

'In our opinion, this resolution will be interpreted by private investors as a danger signal—a warning to private investors, everywhere in the world, that they had better think twice before they place their capital in underdeveloped countries,' he said. 'The fear that this resolution has already stirred up is evident.'

"Senator Angel Maria Cusano of Uruguay and Dr. Eduardo Arze Quiroga of Bolivia interpreted the first operative paragraph of the resolution as reminding states, in exercising their sovereign right freely to dispose of their resources, of their obligations to respect the rights of private investors—national and foreign.

"This paragraph read: 'The General Assembly recommends all member states, in the exercise of their right freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development, to have due regard, consistently with their sovereignty, to the need for the maintenance of mutual confidence and economic cooperation among nations.' . . .

"The United States did not disagree with the statements of principle in the resolution, he [Dr. Lubin] pointed out. The right of eminent domain is a constitutional principle in the United States, and the United States has subscribed to treaties, such as that of the Organization of American States, that bar acts designed to impede the exercise of sovereignty by any state, he continued.

"'We voted against this resolution not because of what it does contain, but rather because of what it does not contain,' he declared. . . ."

See Kronstein, "The Nationality of International Enterprises," 52 *Col. L. Rev.* 983 (1952).

² 332 U.S. 480, 68 S.Ct. 174 (1947).

³ (D.C. D.C. 1949) 82 F. Supp. 602.

some of whom are found to be "enemy" and some of whom are found to be "non-enemy," may the court in such a case separate the interests?

Coincidentally, another stockholder in a corporation whose interests had been vested by the Alien Property Custodian, was pressing this very theory as the basis for intervention in similar action by a corporation for return of vested property.⁴ The same day the Supreme Court announced its opinion in *Kaufman*, it opened the very question posed in *Uebersee* before Chief Judge Laws.

On April 7, 1952 the Supreme Court stated: "Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected."⁵

Justice Black in deciding that *Kaufman* had an "interest" allowing him to intervene under Rule 24(a) of the Federal Rules of Civil Procedure in the action by Interhandel under section 9(a) of the Trading with the Enemy Act⁶ (hereinafter, "TEA"), answered the question:

"What part of the assets of a corporation organized under the laws of a neutral country may the [Alien Property] Custodian retain where part of the corporate stock is owned by enemies, part by American citizens and part by nonenemy aliens?"⁷

⁴ *Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* (popularly called "Interhandel"), (D.C. D.C. 1950) 90 F. Supp. 1011, *affd.* (D.C. Cir. 1951) 188 F. (2d) 1017, reversed 343 U.S. 156, 72 S.Ct. 611 (1952).

⁵ 343 U.S. 156 at 159.

⁶ 40 Stat. L. 411 (1917), 50 U.S.C. App. (1946) §1 et seq., as amended, 55 Stat. L. 839 (1941), 50 U.S.C. App. (Supp. V, 1952).

⁷ 343 U.S. 156 at 158. On July 23, 1952, William J. Hughes, Jr., Special Master in the Interhandel case rendered his opinion allowing intervention by a group of "non-enemy aliens" [Swiss], stockholders in that action. Master Hughes indicated that the latter group [Attenhofer] is seeking precisely the same remedy as Kaufman. He stated on page 3 of his opinion: "The Master is of the opinion that while the Supreme Court validated the right of a non-enemy stockholder to assert his *pro tanto* claim by a derivative suit [intervention], it did not close the door to direct individual assertions of the right."

The Master goes on to say on page 8 of his opinion: "The plain fact is that Kaufman represents only himself and his group; this follows inevitably from the Supreme Court's holding that freedom from enemy taint is a personal and individual matter." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A., etc. (Plaintiff) v. McGrath (Defendants), Kaufman (Intervenors) and Attenhofer (Applicant For Intervention)*, (D.C. D.C. 1952) (unreported). In the same action, on February 19, 1953, Laws, C. J., granted a conditional dismissal of Interhandel's action for return of vested assets for failure to produce certain documents; however, he stated on page 25 of his opinion: "Under the decision of the Supreme Court of the United States in *Kaufman v. Societe Internationale*

As is pointed out by Justice Reed in his dissent, "The result reached by the Court is brought about by a disregard of the ordinary incidents of the relation of a stockholder to a corporation."

This "disregard" has a historical background which again indicates as Justice Cardozo once said, that "the law never is, it is always about to be," or stated in another way, the law is dynamic, never static.

It is here proposed to show how Congress, the executive branch of our government and the courts have treated one vexatious problem which is a handmaiden of modern warfare. With the tremendous advances in communication and transportation in the past fifty years, the fantastic web of international economics has become a powerful weapon of war, and sophisticated techniques have evolved to challenge our traditional notions of private property.⁸

Political philosophers like Rousseau and Montesquieu have maintained that war is primarily a relation between state and state, and that individuals are enemies only accidentally and that their private property should remain inviolate. In both of the recent World Wars the seed of this view has existed, but it is only now, after shedding the sword and shield of those wars, that the Supreme Court has announced a precedent which is philosophically grounded on that thesis. Where private property is no longer respected and individual worth is denied, there is no problem, but in the story behind the *Kaufman* decision, one

Pour Participations Industrielles et Commerciales S.A., 343 U.S. 156 (1952), if a final order of dismissal against plaintiff is entered, intervenor plaintiffs may yet maintain their suit, it appearing that they never had possession, custody or control of the pertinent documents."

⁸ The Magna Carta of June 15, 1215 provided that merchants could proceed in safe conduct even in time of war until the King was informed how merchants were treated in the enemy's country. MARTIN AND CLARK, *AMERICAN POLICY RELATIVE TO ENEMY PROPERTY*, 69th Cong., 2d sess., S. Doc. No. 181 (1926). The "Statute of Staples" of 27 Edw. III, c. 17 (1354) made these amnesty provisions more specific by allowing a resident alien merchant 40 days after war was proclaimed to depart from the realm with his goods and if by accident they needed more time, they were given an additional 40 days with the right in the meantime to sell their goods. *Id.*, p. 3. See *Brown v. United States*, 8 Cranch (12 U.S.) 110 at 123 (1814) (Opinion by Marshall, C. J.).

By early treaties with France (Feb. 6, 1778) six months amnesty were given to merchants after declaration of war. *Id.*, p. 19. Thus, precedent existed and was followed in World War I; the United States went to war with Germany on April 6, 1917 and the TEA was not made law until six months later.

However, on June 14, 1941, *six months before Pearl Harbor and war*, Executive Order No. 8389 was issued freezing all assets of Germany, Italy and Japan and those of their citizens, in effect, economic war was declared, Congress and military officialdom notwithstanding.

can find solace in the evidence of progressive evolution which gives grist to the substance of "due process" and "equal protection under law."

WORLD WAR I

Providing for the seizure of enemy property, the Trading with the Enemy Act of 1917 covered this problem of the enemy character of corporations by including in section 2 of that act within its definition of "enemy" and "ally of enemy," "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 United States doing business within such territory." Section 7 gave the Custodian the right to seizure of such corporations, and section 12 first put him in the position of a common law trustee and then by amendment of March 28, 1918, he became the "absolute owner."

Thus, organization under the laws of an enemy state or a foreign corporation doing business in an enemy state were the decisive tests in classifying corporations as "enemy." No corporation organized under the laws of any one of the several United States was then capable of acquiring "enemy" character, even though the corporation was fully controlled by stockholders, resident in enemy territory. However, the shares of stock within the United States held by or beneficially for citizens of enemy belligerents were seized and as "property" that stock followed the way of all other seized enemy property.

The courts never went into the sufficiency of the Custodian's investigation of property which he subsequently deemed "enemy property." They uniformly held that his determinations as to enemy status were conclusive and binding in the first instance.⁹

The theory was that seizure merely gave the right of possession and, where a mistake was made, the claim provisions of section 9(a) would protect the constitutional rights of any person wrongfully designated "enemy" and wrongfully deprived of his property. In the landmark case of *Stoehr v. Wallace*, the Court said, ". . . [the TEA] dis-

⁹ *Stoehr v. Wallace*, 255 U.S. 239, 41 S.Ct. 293 (1921); *Commercial Trust Co. v. Miller*, 262 U.S. 51, 43 S.Ct. 486 (1923); *Central Union Trust Co. v. Garvan*, 254 U.S. 554, 41 S.Ct. 214 (1921); *The Confiscation Cases*, 20 Wall. (87 U.S.) 92 at 109 (1873).

tinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination."¹⁰ As Justice Frankfurter noted recently in *Guessefeldt v. McGrath*,¹¹ "It is clear that the Custodian can lawfully vest under §5 a good deal more than he can hold against a §9(a) action." The seizure process was peremptory, but a "strong hand" was needed in time of war and the provision for legal recourse was held to be an adequate guarantee of due process. The cases¹² further held that this plenary right to seize property was a proper administrative exercise of the legislative grant.

Nonetheless, to call a corporation "enemy" during World War I was impossible under our separate entity theory of corporations where it was incorporated within the United States. This was true even though any assets held by a corporation for, on account of, or on behalf of, or for the benefit of an enemy, were subject to seizure under section 7 as they would be if they were held by an individual beneficially for an enemy.

The policy of the act may well have been determined by a New York Supreme Court decision by Judge Lehman which came while the TEA was being drafted.¹³ That case was *Schultz Co. v. Raimes Co.*¹⁴ The question before the court was whether the plaintiff corporation had standing to sue. It was a corporation organized under the laws of New Jersey with fifty outstanding shares of stock. Forty-seven shares were owned by a German corporation and a German citizen residing in Germany; the other three shares belonged to the resident directors. We were at war with Germany, but the TEA had not yet become law. In holding that the plaintiff corporation was not an enemy and therefore entitled to sue in his court, Judge Lehman reviewed past authority in England and in the United States. He concluded that a corporation is a separate entity from its stockholders; the domicile of a corporation as a matter of law is the place of its creation; and the in-

¹⁰ 255 U.S. 239 at 246.

¹¹ 342 U.S. 308 at 313, 72 S.Ct. 338 (1952).

¹² Note 9 *supra*.

¹³ See, Norem, "Determination of Enemy Character of Corporations," 24 AM. J. INT. L. 310 (1930); for early cases, "Enemy Character of Corporations," 1 MINN. L. REV. 89 (1917).

¹⁴ 100 Misc. 697, 166 N.Y.S. 567 (1917).

corporator's residence has no significance in this regard. At page 710, he said that in the case where there are no members of a corporation who can legally manage its affairs by virtue of being enemies, the court may have to appoint receivers or officers of the corporation, even though dividends will not be distributable. "So long, however, as a corporation created by any state still has legal existence, and officers or agents with authority to do business or to bring actions, it cannot be deprived of access to the courts for the protection of its legal rights."¹⁵

Other countries regarded residence in enemy territory, control by enemies, as well as organization under the law of an enemy state as criteria for action.¹⁶ The *control* test was widely discussed during the first World War. It was introduced by way of a dictum in *Damiler Co. Ltd. v. Continental Tyre and Rubber Co. Ltd.*¹⁷ There, the secretary of the company, a naturalized British subject, who owned one share of twenty-five thousand sought to bring an action in behalf of the company. 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 English TEA.

The *control* test was later adopted by the Versaille 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."¹⁸

Nonetheless, the United States refused to adopt the *control* test. The United States Supreme Court in *Behn, Meyer & Co. v. Miller*¹⁹ announced the principle that under no conditions were the courts to determine the enemy character of a corporation by looking through the corporation to those who composed it. In that case, the majority stockholder was German, the corporation was English and it was doing business in the Philippines. The seizure was held illegal since the

¹⁵ The right of alien enemies resident within the United States during World War I to sue in our courts turned on residence rather than nationality although in 1942 the question was very much alive. See Sterck and Schuck, "The Right of Resident Alien Enemies to Sue," 30 *Georgetown L.J.* 421 at 429 (1942).

¹⁶ DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II*, 120 (1943).

¹⁷ [1916] 2 A.C. 307.

¹⁸ See I GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* §152, p. 223 (1920); BORCHARD, *INTRODUCTION TO GATHINGS INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY*, p. IX (1940).

¹⁹ 266 U.S. 457 at 472, 45 S.Ct. 165 (1925).

corporation was not doing business in enemy country and the property of the corporation, it was said, was *not* held for the benefit of the shareholders.²⁰

In 1928, *Behn, Meyer* was followed in the case of *Hamburg-American Line Terminal and Navigation Co. v. United States*.²¹ There, confining itself to section (2) of the TEA, the Court held through Justice McReynolds, that property in this country owned by a domestic corporation (New Jersey) was non-enemy property even though a German corporation owned all the stock. He said at page 140: 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."²² The Mixed Claims Commission confirmed this notion in 1939.²³

WORLD WAR II

The existence of the 1917 statute precluded the necessity of resort to *de novo* legislation in the second world war, but not without some confusion as to its applicability.²⁴ The ultimate rationale was that the original TEA was an act of permanent legislation which could be applied in the event the United States was again involved in war.²⁵ Amendments served to correct archaic provisions.

Before our formal declaration of war, in 1940 and 1941, we undertook to deprive the economic exploitation of occupied territories or axis-dominated territories by the blocking of foreign funds. The so-called "freezing" regulations²⁶ were issued under authority of the amended TEA. These administrative regulations integrated and modified the interpretations of statutory definitions.²⁷

²⁰ *Accord*, *Swiss National Ins. Co. v. Miller*, 267 U.S. 42, 45 S.Ct. 213 (1925).

²¹ 277 U.S. 138, 48 S.Ct. 470 (1928).

²² But see *Amtorg Trading Corp. v. United States*, (Cust. and Pat. App. 1934) 71 F. (2d) 524; 2 HACKWORTH, *DICTIONARY OF INTERNATIONAL LAW* 703, 750 (1941).

²³ *Mixed Claims Comm.*, Op. and Dec. 321 at 324 (Oct. 31, 1939); note, 27 VA. L. REV. 394 (1941); "The TEA and the Definition of Enemy," 4 MOD. L. REV. 161 (1941).

²⁴ See Woodward, "Meaning of 'Enemy' under TEA," 20 TEX. L. REV. 746 (1942).

²⁵ *Cabell v. Markham*, (2d Cir. 1945) 148 F. (2d) 737, *affd.* 326 U.S. 404, 66 S.Ct. 193 (1945).

²⁶ Exec. Order No. 8389, 5 Fed. Reg. 1400 (1940) as amended, 6 Fed. Reg. 2897, 3715, 6348, 6785 (1941).

²⁷ "New Administrative Definitions of 'Enemy' to Supersede the TEA," 51 YALE L.J. 1388 at 1391 (1942); See Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 HARV. L. REV. 30 at 33 (1942).

The freezing regulations in 1942 by General Ruling No. 11, as amended, expressly adhered to the separability doctrine of corporations by classifying as "enemy national" an organization "to the extent it is actually situated within enemy territory." However, the early freezing regulations did use the control test. According to section 5(E)(ii) of Executive Order 8389, as amended, an enterprise was regarded as a "national of a foreign country" and its assets were 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 of the nationals thereof. . . ."²⁸ Thus, a domestic corporation was deemed to be under the control of a "national of a foreign country" when a substantial portion of its capital was represented by funds which belonged to blocked nationals.²⁹

The freezing of practically all foreign owned property, including funds, before our entrance into the war was even more unprecedented³⁰ than was the original enactment of the TEA; however, this kind of war was new, and it called for new techniques. The blocking of foreign funds was essentially a defensive and protective measure and as such it was successful. With the Japanese attack on Pearl Harbor on December 7, 1941, full aggressive economic mobilization was called for and it was for this purpose that the first War Powers Act was enacted on December 18, 1941.³¹

This act in the form of amendments to the TEA specifically provided that the President could investigate any right to any property in which "any foreign national" had any interest. It further conferred on the President the power to regulate such property and to "vest" such interests in any agency, or person, as the President might designate, to

²⁸ The Treasury Department thus had almost unlimited power which in retrospect gives rise to the question of whether in the event of future emergencies such omnipotence should be provided, to whom and with what safeguards to prevent injustices.

²⁹ See Foreign Funds Control through Presidential Freezing Orders, 41 COL. L. REV. 1039 at 1045 (1941).

³⁰ The War Trade Board in existence for a very short period of time at the beginning of World War I was set up to control trading with the enemy prior to effective enactment of the TEA, but was primarily a supervisory agency.

³¹ 55 Stat. L. 839 (1941), 50 U.S.C. App. (1946) §1 et seq.

be "held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States."³² The President delegated this authority to the Alien Property Custodian whose office was an independent executive agency.³³ This authority subsequently passed to the Attorney General.³⁴

With the second World War, England put the *control* test in its TEA statute.³⁵ The United States maintained the corporate entity fiction.³⁶ Nationality and residence of the corporation and not that of the stockholders were deemed to control, even in the cases where the corporation was organized under the law of an enemy-occupied country.³⁷

Although not recognized by the administrators of the freezing powers during the period of the emergency prior to World War II and during the period of hostilities, the courts have construed the powers delegated under section 5(b) of TEA, cognizant of the constitutional limitations effected by section 9(a) which was not amended. As applied to individuals the territorial test of residence remained, and any national of an enemy country or an enemy occupied country who voluntarily or involuntarily remained there was deemed within the purview of the act to be an "enemy national."³⁸

Always protected constitutionally by section 9(a), American citizens could not, however, claim immunity in the face of the Custodian's determination that they were "enemy nationals."³⁹ In short, through the

³² 50 U.S.C. App. (1946) §5(b)1; Cf. *Halbach v. Markham*, (D.C. N.J. 1952) 106 F. Supp. 475 at 481.

³³ Exec. Order No. 9095, 7 Fed. Reg. 1971 (1942), as amended by Exec. Order No. 9193, 7 Fed. Reg. 5205 (1942), as amended by Exec. Order No. 9567, 10 Fed. Reg. 6917 (1945).

³⁴ Exec. Order No. 9788, 11 Fed. Reg. 11981 (1946).

³⁵ ANNUAL SURVEY OF ENGLISH LAW 1, 383 (1939).

³⁶ *Toa Kigyo Corp. v. Offenberger*, N.Y. L.J. 687 (Feb. 14, 1942).

³⁷ *Drewry v. Onassis*, 179 Misc. 578, 39 N.Y.S. (2d) 688 (1942), *revd. on other grounds* 266 App. Div. 292, 42 N.Y.S. (2d) 74 (1943), *affd.* 291 N.Y. 779, 53 N.E. (2d) 243 (1944). (France held designated enemy country; British citizen's ownership of French Corp. held immaterial); 12 *FORDHAM L. REV.* 293 (1943); *Mumm Champagne v. Eastern Wine Corp.*, (D.C. N.Y. 1943) 52 F. Supp. 167.

³⁸ 11 *LAW & CONTEMP. PROB.* 1 at 6 (1945); See *Silesian American Corp. v. Clark*, 332 U.S. 469 at 476, 68 S.Ct. 179 (1947) (policy behind the act is to prevent enemy acquisition of any possible economic gain). But see *Guessefeldt v. McGrath*, 342 U.S. 308, 72 S.Ct. 338 (1951).

³⁹ *Fujino v. Clark*, (D.C. Hawaii 1947) 71 F. Supp. 1; *Draeger Shipping Co. v. Crowley*, (D.C. N.Y. 1944) 55 F. Supp. 906.

investigation channel *loyalty* frequently became the test of who was an "enemy" for purposes of vesting, and the decisive yardsticks were the administrative regulations, bulletins, interpretations, and releases rather than the statute.⁴⁰

In the late 1940's, when the issues finally were presented to the courts, they uniformly supported the Custodian's determinations on the basis of the unequivocal language in the World War I cases of *Stoehr v. Wallace*, *Commercial Trust Co. v. Miller*, and *Central Union Trust Co. v. Garvan*,⁴¹ although these decisions were apparently not apposite in the minds of the administrators.

The inevitable judicial wedge in the fictional notion of "corporate entity" finally came in the case of *Clark v. Uebersee Finanz-Korporation A. G.*⁴² The Supreme Court, through Justice Douglas declared that the principle established by *Behn, Meyer & Co. v. Miller*⁴³ that a corporation wholly owned by enemies was not itself an enemy, was clearly inconsistent with the objectives of the 1941 amendment to the TEA and should not be carried over into the amended act. The situation there arose in the following fashion: a suit was filed by a Swiss corporation for the return of stock and the proceeds of a contract which were vested. The plaintiff claimed that the shares were owned by it and have not been held by, for, or on behalf, of any enemy. No answer was filed. The government filed a motion to dismiss on the ground that a foreign national could not recover vested property by suit under section 9(a) in the light of the amendment to section 5(b) in the first War Powers Act. The district court granted the motion. The Court of Appeals for the District of Columbia reversed the district court.⁴⁴ The Supreme Court affirmed the court of appeals saying that a foreign national without *enemy taint* could recover vested property under section 9(a). The Court pointed out that although the scope of the President's powers was broadened, there was no amendment restricting section 9(a). Further, the 1941 amendment to section 5(b) did not alter the definitions of an enemy or ally of an enemy contained in sec-

⁴⁰ See Domke, "Western Hemisphere Control over Enemy Property," 11 LAW & CONTEMP. PROB. 1 at 28, 29, 47 (1945).

⁴¹ See note 9 supra. See, e.g., *Clark v. Edmunds*, (D.C. Va. 1947) 73 F. Supp. 390.

⁴² 332 U.S. 480, 68 S.Ct. 174 (1947).

⁴³ 266 U.S. 457, 45 S.Ct. 165 (1925).

⁴⁴ 158 F. (2d) 313 (1946).

tion (2). This was done by executive order as we have seen. The Court indicated that in giving the provisions "the most harmonious, comprehensive meaning possible" it was reluctant to attribute to Congress an intention to deny the remedy of return to friendly alien nationals without enemy taint. But it said that the objectives of the 1941 amendment could be achieved if the definitions of enemy or ally of an enemy were regarded as "merely illustrative, not exclusionary" and if "the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission."

Beyond overruling the *Behn-Meyer* case, the Court indicated that the *content* of "enemy" must await future judicial or legislative clarification.⁴⁵

In considering the *Uebersee*⁴⁶ case on the merits, Justice Minton for the Court summarized the law in this field as it related to the enemy character of corporations and footnoted his remarks with the following:⁴⁷

"We note that Congress has provided a similar test of enemy ownership or control where the claim is for a discretionary administrative return of vested property. The President's power to return such property is conditioned upon his finding that the owner who has filed a claim is *not* 'a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by (a citizen or subject of a nation with which the United States has at any time since December 7, 1941, been at war, and who on or after December 7, 1941, and prior to the date of enactment of this section, March 8, 1946, was present in the territory of such nation).' 50 U.S.C. App. §32(a)(2)(E). The courts should not go further than Congress."

⁴⁵ Cf. *Feller v. McGrath*, (D.C. Pa. 1952) 106 F. Supp. 147 at 152. In the *Interhandel* action (see note 7 *supra* for citation) it is clear that each claiming stockholder will have to prove nonenemy status. Special Master Hughes in an unreported opinion dated January 31, 1953 indicates that each claimant can be required to become a named party in the action and that interrogatories may be propounded to each. The content of such interrogatories is not yet settled, however; the Master holds that the manner of acquisition and known information with respect to predecessor stock owners together with details of blacklisting or blocking of assets of any holding of claimants or their predecessors is a proper matter for inquiry.

⁴⁶ *Uebersee Finanz-Korp., A. G. v. McGrath*, 343 U.S. 205, 72 S.Ct. 618 (1952).

⁴⁷ The footnote does not appear in the unofficial Supreme Court Reporter advance sheets. See 20 U.S. LAW WEEK 4241 at 4243 (1952).

In the face of this footnote⁴⁸ and the reference of Justice Minton to the holding of the *Kaufman* decision as "novel," we find the Court going "further than Congress" on the very same day. The details of the lengthy litigation encountered in the "Interhandel" action are not here germane but for the holding in *Kaufman*.

The Court, as shown in the first part of this paper, holds that an innocent stockholder is entitled to protection of his proportionate interest in the assets of a neutral corporation seized by the Custodian on the administrative finding that it was "enemy." This conforms to the many safeguards our law provides for "purchasers in good faith." The pall of protection should be no less broad in the case of a stock purchaser than a purchaser of other goods and chattels.

The cycle has almost been completed. The burden upon the lower courts to determine what part of the assets of an "enemy corporation" a "friendly" stockholder may look to for protection is yet to be resolved.⁴⁹ Justice Black granted in *Kaufman* that a stockholder may not have title to corporate assets, indeed there appears a contradiction in terms, if such were the case. However, the Court seems to reject the claim of the United States in *Kaufman* that if nonenemy stockholders of an unliquidated corporation are to be given a day in court, they should be limited to individual suits for money judgments against the Custodian. Nonetheless the "severable interest" in corporate assets seized by the Custodian has justified intervention by a stockholder in an action by the officers seeking return of the corporate assets in a section 9(a) action. The dissenting opinion in *Kaufman* readily points up the inroad into the law of corporations that the majority has made and with no less vigor questions the validity of giving relief to friendly stockholders of enemy corporations as distinct from allegedly enemy-dominated neutral corporations.

CONCLUSION

Broadly stated, we have once again the delicate problem of balancing conflicting interests in this instance between protecting the prop-

⁴⁸ *Halbach v. Markham*, (D.C. N.J. 1952) 106 F. Supp. 475 at 482 (Attorney General has full authority to make a compromise settlement in the return of the calculated non-enemy interest in vested stock with the Custodian for the United States retaining the enemy interest).

⁴⁹ In *Albert v. McGrath*, (D.C. Cal. 1952) (unreported), the court (Judge Yankwich) construed the *Kaufman* decision to hold that non-enemy interests were severable.

erty rights of innocent investors and denying relief to those who directly or indirectly give aid or comfort to the enemy. An innocent investor may have his day in court and he has the avenue of intervention marked for him. The burning question to be resolved is the *quantum* of his protection. Apparently, the traditional forms of recovery will not suffice in this rather extraordinary situation. As we have done so often, we lawyers shall have to employ our imagination once more to conjure a solution both equitable and acceptable to the courts who must face this question; but the solution to this problem is worthy of an independent inquiry. *Kaufman* opened wide the door to this boundless inquiry. It transcends the facts of that case and beckons thoughtful consideration not only by the courts but also by investors, lawyers and political philosophers.