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NEW CONCEPTS OF "ENEMY" IN THE "TRADING WITH THE ENEMY ACT"

The purpose of economic warfare is to use any enemy-owned property available to our advantage, and to prevent the enemy, so far as possible, from deriving any advantage from foreign trade. The idea of economic warfare as a vital complement to military-naval war is not purely a modern development in United States policy. The cases significant of the early legal problems involved in economic warfare arose through the activities of our privateers in enforcing prohibitions against trading with the enemy.¹ Those decisions clearly indicate our country's vital concern with "trading with the enemy" ever since its first wars.

When the United States entered the World War in 1917, Congress did not rely on the case law and procedure developed in and since the War of 1812. It passed the Trading With the Enemy Act,² which, as amended and expanded,³ is the same act governing economic offense and defense in the present war.

The United States from the beginning had adopted as a test of enemy character, the idea that the "commercial domicile of a merchant at the time of capture of his goods determines the character of those goods, whether hostile or neutral."⁴ In the Trading With the Enemy Act, residence and the place of doing business, rather than nationality, are continued as the measure of enemy status.⁵ Both,

¹ The San Jose Indiano, Fed. Cas. No. 12,322 (C. C. Mass. 1814), *aff'd* 14 U. S. (1 Wheat.) 208, 4 L. ed. 73 (1816); The Mary and Susan, 14 U. S. (1 Wheat.) 46, 4 L. ed. 32 (N. Y. 1816); The Mary, Fed. Cas. No. 9,184 (C. C. R. I. 1813), *aff'd in part and rev'd in part*, 12 U. S. (8 Cranch) 388, 3 L. ed. 599 (1814); The Frances, 12 U. S. (8 Cranch) 335, 3 L. ed. 581 (R. I. 1814); The Venus, 12 U. S. (8 Cranch) 253, 3 L. ed. 553 (Mass. 1814); The St. Lawrence, Fed. Cas. No. 12,232 (C. C. N. H. 1813); The Ann Green, Fed. Cas. No. 414 (C. C. Mass. 1812).

² Act Oct. 6, 1917, c. 106, 40 STAT. 411, 50 U. S. C. A. App.

³ FIRST WAR POWERS ACT, 55 STAT. 839, 50 U. S. C. A. App. § 616 *et seq.* (1941)).

⁴ The Frances, 9 Fed. Cas. No. 5034, 673, *aff'd*, 8 Cranch 363, 3 L. ed. 590 (1814).

⁵ Sec. 2, *supra* note 3. "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

therefore, under the old system, and under the Act, it has been held in many instances that persons residing within enemy territory are enemies, although they may be citizens of neutral nations, or even citizens of the United States or personally loyal to the United States.⁶ The present war has shown beyond any question that the thought underlying such a conception is correct; so long as these individuals are within the territory controlled by the enemy, they too are, willing or not, controlled, and may be used as tools by such enemy.

The conflict of tests for enemy character (domicile or residence versus nationality or citizenship) was early recognized in England, and it was there held that where a native-born subject of one country is domiciled for trade purposes in another country, and the two nations engage in a war, his property becomes subject to reprisal at the hands of his native country in the same manner as if it were the property of one who owed affirmative allegiance to the enemy state.⁷ The British Prize Court defined what sort of residence would constitute such a domicile as would cause a native to be treated as an enemy. In a judgment of the Lords of Appeal in Prizes delivered in 1785, Lord Camden stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence not attended with these circumstances, ought to be considered as a permanent residence."⁸

This standard seems to have been followed by the courts of the United States in interpreting the word "enemy" when the Alien Property Custodian took possession of properties pursuant to Section 6⁹ of the Trading With the Enemy Act. A mere transient is not considered an enemy within the meaning of the Act where he has been detained in an enemy country against his will, and has done no act against the interest of the United States.¹⁰ But a citizen of 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."

⁶ See cases cited in the note on 50 U. S. C. A. §§ 194, 195.

⁷ WHEATON, INTERNATIONAL LAW (5th ed.) 443.

⁸ *Id.* at 443, 444.

⁹ During the present war the Alien Property Custodian functions pursuant to Section 5b of the Act and Executive Order No. 9095 as amended rather than Section 6, under which he operated during the last war.

¹⁰ In the case of *Stadmüller v. Miller*, 11 F. (2d) 732 (C. C. A. N. Y. 1926), the plaintiff, who was domiciled in the United States although not a citizen, had gone to Germany temporarily but was caught by the outbreak of the war and not permitted to leave. It was held that he could recover his property seized by the Alien Property Custodian when he showed that during his enforced stay in Germany he did not act against the United States. In *Vowinckel v. First Federal Trust Co.*, 10 F. (2d) 19 (C. C. A. Cal. 1926), the plaintiff was held not to be an enemy within the meaning of the Trading With

United States may come under the statutory definition of "enemy" as well as any alien.¹¹ It has been held that it is sufficient to warrant a seizure, detention and even confiscation of enemy-owned property that the owner thereof or reputed owner thereof, is a resident of the enemy's country.¹² It has been the general doctrine of international law that citizens domiciled in enemy territory are regarded as enemies.¹³

Today there is no necessity for abstract legal speculation as to who or what constitutes an "enemy" under the Trading With the Enemy Act. In so far as practical commercial considerations about trading with an enemy or with neutrals of axis tint are concerned, all such questions are decided by the Treasury Department in its licensing procedure. The Treasury Department derived its authority from the President by means of a general license under Section 3a of the Act, which license authorized all transactions or acts otherwise prohibited in the Act; provided that such transaction or act is authorized by the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended,¹⁴ the Treasury Department has the power to license any transaction or to deny such license, if it deems the national interest will be served by doing so, whether the trade be with an enemy or not. Since this is administrative procedure, the facts of each case are weighed independently, and without regard to the residuary or national character of the parties.¹⁵ Under Treasury Department General Ruling No. 11, the Trading With the Enemy Act terminology of "enemy" or "ally of enemy" has been changed to "enemy national" for purposes of classification, but there is substantially no difference in the scope of its practical effect.¹⁶ All this, it must be remembered, applies to transactions or commerce with the

the Enemy Act even though he went to Germany before our entrance into the war to become, and did perform the functions of, a Red Cross surgeon with the German Army.

¹¹ *Faber v. United States*, 10 F. Supp. 602, 81 Ct. Cl. 142, cert. denied, 296 U. S. 596, 56 Sup. Ct. 115, 80 L. ed. 422 (1935).

¹² *Tate v. Escher*, 59 App. D. C. 81, 33 F. (2d) 556 (1929), *rev'd on other grounds*, 281 U. S. 379, 50 Sup. Ct. 337, 74 L. ed. 918 (1930).

¹³ *The Venice*, 2 Wall. 258, 275, 17 L. ed. 866 (U. S. 1864); *The Frances*, cited *supra* note 4; *The Venus*, cited *supra* note 1.

¹⁴ PRESIDENTIAL LICENSE, Dec. 13, 1941, 6 Fed. Reg. 6420. The Treasury Department release of the same date explains in part that: "The new general license provides that transactions which the Secretary of the Treasury licenses under the freezing control orders may be effected without regard for the provisions of Section 3a of the Trading With the Enemy Act."

¹⁵ See EXEC. ORD. No. 8389 as amended 5 Fed. Reg. 1400, 1 CCH War Law (Stat. Vol.) 14,011.

¹⁶ Treasury Department, General Ruling No. 11, March 28, 1942, 7 Fed. Reg. 2168 (1942), 1 CCH War Law (Stat. Vol.) 14,108. *Sec. 2a*: "The term 'enemy national' shall mean the following: . . . (iii) Any individual within enemy territory and any partnership, association, corporation or other organization to the extent that it is actually situated within enemy territory." Subdivision (iv) includes those individuals and firms on the "blacklist".

enemy, and does not necessarily govern the functions of the Alien Property Custodian.

The definition of the word "enemy" as contained in the Trading With the Enemy Act is still controlling for the Alien Property Custodian, since no change of definition has been effected. The Office of the Alien Property Custodian, as created by the President¹⁷ is empowered to "direct, manage, supervise, control or vest" any business whose activity or place of birth makes it a "national" of a *designated enemy* country, or whose beneficial interest is in or controlled by a national of a *designated enemy* country. Before the Alien Property Custodian may so "direct, manage, supervise, control or vest" a business enterprise which is a national of a *foreign* country, or an interest of a national of a foreign country, he must determine and certify to the Secretary of the Treasury "that it is necessary in the national interest."¹⁸ By these definitions, therefore, there are two "species" of enemy created, upon whom the laws governing economic warfare will operate: (1) National of a designated enemy country, and (2) National of a foreign country.

A "designated enemy country" is declared to mean "any foreign country against which the United States has declared war (Germany, Italy, Japan, Bulgaria, Hungary and Roumania) and any country with which the United States is at war in the future."¹⁹ This definition refers to the enemy itself. A "foreign country" is any country other than a "designated enemy country."²⁰ The term "national" is deemed to mean any person who has been domiciled in, or is a subject, citizen or resident of a foreign country at any time on or since April 10, 1940, or acting on behalf of such person, or any business enterprise organized in or doing business in or controlled by the foreign government or any person in the foreign country. "Persons not within designated enemy countries (even though they may be within enemy occupied countries or areas) shall not be deemed to be a national 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

¹⁷ EXEC. ORD. No. 9095, March 11, 1942, 7 Fed. Reg. 1971, as amended by EXEC. ORD. No. 9193, July 6, 1942, 7 Fed. Reg. 5205, 1 CCH War Law (Stat.) 7001.

¹⁸ EXEC. ORD. No. 9095 and No. 9193, *supra* note 17. Notice that certification by the Alien Property Custodian to the Secretary of the Treasury is not necessary where the business or interest is of a *designated enemy* character, but only where it is of a mere *foreign* character.

¹⁹ *Supra* note 15, § 10a, 1 CCH War Law (Stat.) 7003.

²⁰ See § 5d of EXEC. ORD. No. 8389, *supra* note 15.

a national of a designated enemy country.”²¹

By these definitions the meaning of the word “enemy” under the Trading With the Enemy Act has been so enlarged as to apply now not only to those persons who are enemies or in the enemy jurisdictions, but may be extended to include as well any person that the “national interest” requires to be included.²² A citizen of the United States could be declared to be a national of a designated enemy where it is found by the Alien Property Custodian that he acted for a designated enemy country or national thereof or that the national interest of the United States requires him to be so declared, whereupon the Alien Property Custodian may seize his properties pursuant to Section 2 of Executive Order No. 9095 as amended.²³

The effect of the orders establishing these varying definitions seems to be that the determination of enemy character lies with the Treasury Department in one phase, and with the Alien Property Custodian in another phase of activity under the Act. In particular, the Alien Property Custodian has great latitude of action in those cases where he is to decide whether it is in the national interest that any person be declared a national of a designated enemy country. This enlargement of administrative discretion is accomplished through the amendment of Section 5b of the Trading With the Enemy Act by Title III, Section 301 of the First War Powers Act, 1941,²⁴ and by Executive Order No. 9095, as amended,²⁵ which affords the President and his agencies more leeway than had been possible under Section 6 of the Trading With the Enemy Act, which originally created the Office of Alien Property Custodian. The aforementioned changes in definition and the increase in administrative discretion must be considered to be necessary concomitants to the complexities of contemporary international trade and business associations and intrigues.

The constitutionality of the Act's confiscatory provisions was upheld only because adequate remedies were provided in Section 9a²⁶ for return of the property in cases where it had been erroneously seized.²⁷ But these remedies are available only to those who are not enemies or allies of enemies, within the meaning of the Act.

²¹ EXEC. ORD. NO. 9095, *supra* note 17, § 10a; EXEC. ORD. NO. 8389, *supra* note 15, § 5e, 1 CCH War Law (Stat.) 14,013.

²² Inquiry at the Office of the Alien Property Custodian in New York has disclosed that the Custodian has not acted in all cases where he has authority to do so, but rather proceeds where he finds it in the national interest to do so. More particularly is this true in regard to nationals of a *foreign* country and loyal American citizens.

²³ Cited *supra* note 17; *infra* note 25.

²⁴ Cited *supra* note 3.

²⁵ Cited *supra* note 17.

²⁶ See 50 U. S. C. A. App., 1 CCH War Law (Stat.) 6210.

²⁷ *Stoehr v. Wallace*, 255 U. S. 239, 41 Sup. Ct. 293, 65 L. ed. 604 (1921); *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 41 Sup. Ct. 214, 65 L. ed. 403 (1921).

It has been recently held that Section 9a applies to proceedings under 5b of the Act and that a plaintiff in an action to recover stock seized by the Alien Property Custodian must show that he is not an enemy or ally of an enemy in order to establish himself in court or bring suit at all. The court will then determine whether he is a national of a designated enemy country or whether the seized property itself is owned or controlled by a designated enemy country or a national thereof.²⁸ The result of the decision would appear to be that anyone whose property is seized by the Alien Property Custodian must be without the scope of the definitions of "enemy" and "ally of enemy" on the one hand, and "national of a designated enemy country" on the other. Otherwise he must await Congressional disposition of the property, which is held "pending further determination of the Alien Property Custodian."²⁹

What an "enemy" is, within the meaning of the Trading With the Enemy Act has been well litigated.³⁰ As yet, the enemy or foreign "national" concept has not.

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²⁸ *Draeger Shipping Co. v. Crowley, Alien Property Custodian*, 49 F. Supp. 215 (S. D. N. Y. 1943).

²⁹ The quotation is the language used in the vesting orders of the Alien Property Custodian. See VESTING ORDER No. 1 (1942), 7 Fed. Reg. 2417, VESTING ORDER No. 1090 (1943), 8 Fed. Reg. 5278.

Under the SETTLEMENT OF WAR CLAIMS ACT, 45 STAT. 254, March 10, 1928, c. 167, 50 U. S. C. A. App., the United States, through the Alien Property Custodian, became a joint trustee; trustee for the former (German) owners to the extent of 80% of the funds which Congress declared should be returned to them, and trustee for American claimants against Germany, to the extent of 20% of the funds which Congress required to be retained and held for the purposes of the latter. *Cummings v. Société Suisse pour Valeurs de Métaux*, 85 F. (2d) 287 (App. D. C. 1936), *cert. denied*, 306 U. S. 616 (1938).

³⁰ See annotations to § 2, TRADING WITH THE ENEMY ACT, 50 U. S. C. A. App.