

### **War--Constitutional Law (Draeger Shipping Co. Inc. et al. v. Crowley, Alien Property Custodian, 49 F. Supp. 215 (S.D.N.Y. 1943))**

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the court's invasion of the contract.<sup>4</sup> The right of the court under Section 17 seems to be based on inherent equity powers to regulate trusts, and this power is expressly forbidden to be exercised as against such accumulations in policies of insurance.<sup>5</sup>

F. G.

WAR—CONSTITUTIONAL LAW.—Plaintiff brought suit against the defendant, the Alien Property Custodian under Section 9a of the Trading With the Enemy Act of 1917, as amended,<sup>1</sup> to recover its property that was seized and was being liquidated by the defendant. Plaintiff made a motion for an order directing defendant to retain in his custody until final judgment the property seized and to permit the plaintiff to carry on its business. The defendant countered with a motion to dismiss the entire complaint on the ground that the court has no jurisdiction over this seizure and that the defendant has determined that the plaintiff corporation and its president were nationals of a designated enemy country and cloaking for German interests in Germany and that the interests of the United States require the liquidation of the corporation. *Held*, motion to dismiss the complaint denied. The court has jurisdiction over all seizures under the Trading With the Enemy Act so long as the plaintiff is not an "enemy" or "ally of enemy" within the meaning of those terms in the Act.<sup>2</sup> Defendant shall not liquidate the corporation or sell the stock until it is decided whether the plaintiffs are "nationals of a designated enemy country." *Draeger Shipping Co. Inc. et al. v. Crowley, Alien Property Custodian*, 49 F. Supp. 215 (S. D. N. Y. 1943).

<sup>4</sup> *Pierowich v. Metropolitan Life Ins. Co.*, 282 Mich. 118, 275 N. W. 789 (1937).

<sup>5</sup> *In re Howland*, 37 Misc. 114, 74 N. Y. Supp. 950 (1902), *rev'd on other grounds*, 75 App. Div. 207, 77 N. Y. Supp. 1025 (1902); *Matter of Muller*, 29 Hun 418 (N. Y. 1883); *Matter of Kane*, 2 Barb. Ch. 375 (N. Y. 1847); *Matter of Bostwick*, 4 Johns. Ch. 100 (N. Y. 1819).

See N. Y. PERSONAL PROPERTY LAW § 15.

<sup>1</sup> 40 STAT. 411, 50 U. S. C. A. App. (1917).

<sup>2</sup> 40 STAT. 411, § 9 (1917), permits suit to review seizure by the Alien Property Custodian but does not allow one who is an enemy or ally of an enemy to bring suit. *Id.* § 2, defines an enemy as: "(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." The phrase "ally of enemy" has a similar definition with reference to nations which are allies of nations with which the United States is at war.

During World War I the Alien Property Custodian was created by Section 6 of the Trading With the Enemy Act and that office proceeded to act thereunder. Now, during our contemporary complex carnage, the Alien Property Custodian derives its authority from Section 5(b) of the Act, as amended by Title III, Section 301 of the First War Powers Act of 1941<sup>3</sup> which gives the President broad powers during this national emergency over any property within United States jurisdiction in which a foreign country or national thereof has any interest. It also authorizes him to delegate these broad powers to any agency. Pursuant thereto, the President in Exec. Ord. No. 9095, as amended by Exec. Ord. No. 9193<sup>4</sup> set up the Office of the Alien Property Custodian and delegated to it the power to "direct, manage, supervise, control or vest" business enterprises which were nationals of a designated enemy or foreign country, and any property which is owned or controlled by foreign or enemy countries or their nationals.<sup>5</sup> Thus all the present powers of the Custodian stem from Section 5(b), as amended, whereas the former Alien Property Custodian got his powers from the various sections of the Trading With the Enemy Act of 1917, Section 7(c) among others. Section 9 provides administrative and judicial relief for anyone not an enemy or an ally of an enemy whose property was seized by the Custodian. In view of this difference in the derivation of powers, the defendant Custodian in the principal case argued that the relief permitted under Section 9(a) of the Act applied only to seizures under 7(c) and not to seizures of property of a foreign "national" under Section 5(b) as amended by the First War Powers Act of 1941, which, he claimed, was a separate and distinct statute. The Custodian also argued that the plaintiff had not exhausted his administrative remedies available under Section 5(b).

The defendant's contentions were overruled by the court because it thought that it was the intention of Congress, by not making Title III of the First War Powers Act of 1941 a separate act, but rather an amendment to Section 5(b) of the Trading With the Enemy Act, that it intended it and the orders thereunder to be governed by the other provisions in the Trading With the Enemy Act. The court also thought that without the judicial remedies provided in Section 9(a), the 1941 Amendment would be unconstitutional because it itself does not provide for any remedy for the return of property erroneously seized. The court said, "If construed as unaffected by Section 9(a) it would depend upon the will of the President or

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<sup>3</sup> 55 STAT. 839, 50 U. S. C. A. App. § 616 *et seq.*

<sup>4</sup> 7 FED. REG. 1971 (1942), 7 FED. REG. 5205 (1942), 1 CCH WAR LAW (Stat.) 7001.

<sup>5</sup> EXEC. ORD. No. 9095, *as amended* S. 10, 7 FED. REG. 1971 (1942), 7 FED. REG. 5205 (1942), and EXEC. ORD. No. 8389, § 5, *as amended*, 5 FED. REG. 1400, 1 CCH WAR LAW (Stat.) 14,011, contain the various definitions which go to make up the concept of a national of a designated enemy country or of a foreign country.

his representative whether there should be even an administrative remedy, and if so, what it shall be." <sup>6</sup> Arbitrary seizure by an administrative agency even if under war's exigencies must be subject to judicial remedies, <sup>7</sup> otherwise such seizures would be unconstitutional as depriving one of property without due process of law.

This decision is another indication that the courts will not wholly forget the Constitution because of the war but will give a claimant who is not an enemy or an ally of an enemy a hearing. The Alien Property Custodian also finds himself bound by provisions of the Trading With the Enemy Act of 1917, as amended, as well as by the very broad and loosely worded provisions of Exec. Ords. Nos. 9095 and 9193. <sup>8</sup> However, the plaintiff must still overcome the administrative determination that it is a national of a designated enemy country and that the interest of the United States requires the liquidation of the corporation. The effect of this decision is that any claimant who finds himself within the scope of the new executive definitions of "national of a designated enemy or foreign country" but without the scope of the statutory definition of "enemy" or "ally of enemy" may bring suit to review seizure by the Alien Property Custodian. The principal case does not decide how far the court will go in reviewing the administrative finding or what its interpretations are of the aforementioned executive definitions.

L. Y.

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<sup>6</sup> *Draeger Shipping Co., Inc. v. Crowley*, 49 F. Supp. 215, 218 (S. D. N. Y. 1943).

<sup>7</sup> *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), *aff'g*, *Garvan v. \$20,000 Bonds*, 265 Fed. 477 (C. C. A. 2d, 1920).

<sup>8</sup> 7 FED. REG. 1971 (1942), 7 FED. REG. 5205 (1942), 1 CCH WAR LAW (Stat.) 7001.