

# California Law Review

MEMBER NATIONAL AND WESTERN CONFERENCES OF LAW REVIEWS

Published Quarterly throughout the Year by Students of the School of Law  
of the University of California, Berkeley, California. Indexed in Index to  
Legal Periodicals and Public Affairs Information Service.

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Subscription Price, \$5.00

Current Single Copies, \$1.50

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## Comment

### PROTECTION OF NONENEMY INTERESTS IN ENEMY CORPORATIONS

Assets worth hundreds of millions, vested in the Alien Property Custodian, may be taken from the government and returned to former owners under recent Supreme Court decisions. These decisions have raised anew the problems of definition of "enemy" and of protection of nonenemy interests in corporations characterized as "enemy" under the Trading with the Enemy Act.<sup>1</sup> These problems must be considered in the light of the basic objectives of trading with the enemy legislation which, as originally enacted, were threefold: (1) economic warfare, by preventing use by the enemy of any of his external assets in furtherance of his own war effort and by putting such assets to work wherever possible for the Allies; (2) security, by eliminating present and preventing future economic penetration of strategic industries in Allied countries and thereby depriving the enemy of external assets which could provide the basis for a future war; (3) reparations, by creating a pool of enemy external assets for compensation to the Allies and their nationals for losses sustained in the war.<sup>2</sup> The

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<sup>1</sup> 40 STAT. 411 (1917), as amended, 50 U.S.C. APP. § 1 *et seq.* (1946).

<sup>2</sup> Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 HARV. L. REV. 721, 722, 742-743 (1949); Clayton, *Security Against Renewed German Aggression*, 13 DEP'T STATE

termination of the war and the new pattern of international relations which has emerged in the postwar years has wrought considerable change in the relative importance of these objectives. The economic warfare objective has disappeared completely. The security objective with relation to enemy external assets has been almost forgotten in the haste to marshal the combined resources of Western Europe, including those of Germany and Italy, in a defensive effort against the threat of the Soviet Union and its Eastern European satellites. The reparations objective is still of great importance, especially in view of the almost complete absence of the more traditional form of reparation by direct intergovernmental payment,<sup>3</sup> as a source of compensation to the Allies and their nationals for war damage claims.

#### THE CONCEPT OF "ENEMY" CHARACTER

During the period of hostilities very broad definitions of "enemy" were employed and a large amount of property was seized and vested in the Alien Property Custodian. With the end of the war, when there was time again for inquiry and considered determinations, the definitions were narrowed in order to give protection to interests which might have been unjustly seized and vested as enemy.<sup>4</sup> The present policy of the United States is to maintain as large a reparations pool as possible and, at the same time, to return all property which is determined to have been unjustly seized and characterized as enemy.

#### *The "Territorial" and "Control" Tests*

Dealing with enemy external assets in the two world wars of this century has produced two tests for the determination of enemy character of corporations: (1) the "territorial" test which looks solely to the place of incorporation to fix the character of the corporation as friendly, neutral or enemy; and (2) the "control" test which disregards the place of incorporation, "pierces the corporate veil," and looks to the friendly, neutral or

BULL. 21 (1945); Maurer, *Protection of Non-enemy Interests in Enemy External Assets*, 16 LAW & CONTEMP. PROB. 407, 410 (1951); Rubin, *Allied-Swedish Accord on German External Assets, Looted Gold, and Related Matters*, 17 DEP'T STATE BULL. 155, 157, 161 (1947).

<sup>3</sup> See, e.g., Article 74 of the Italian Peace Treaty, February 10, 1947, 61 STAT. 1245; and see generally, Martin, *The Treatment of Enemy Property Under the Peace Treaties of 1947*, 34 TRANSACTIONS OF THE GROTIUS SOCIETY FOR THE YEAR 1948, 77 (1949).

<sup>4</sup> Compare § 5(b) of the Trading With the Enemy Act as it was during the war years, *supra* note 1, 50 U.S.C. APP. § 2 (1946): the President may, during the period of national emergency, regulate or prohibit any transfer of or transaction relating to any "... property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States," with the narrower criteria of § 32, as added Mar. 8, 1946, 60 STAT. 50, and amended Aug. 8, 1946, 60 STAT. 925, 50 U.S.C. APP. § 32: the President may return any property or interest vested in the Custodian provided that the owner of such property or interest is not a government of a nation with which the United States has been at war since December 7, 1941, a citizen of or a voluntary resident in such a nation, a corporation organized under the laws of such a nation, or "... a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 percentum or more of the stock of which was owned ..." by any of the above persons. Cf. Note 22, *infra*.

enemy character of the person or persons controlling the corporation as being determinative of the corporation's character.

The determination of the enemy character of domestic and neutral corporations by the "control" test was first established in the judgment of the House of Lords in *Daimler Co. v. Continental Tyre and Rubber Co.*<sup>5</sup> The application of the control test was widely discussed during World War I and immediately thereafter.<sup>6</sup> It was later adopted in the peace treaties of 1919<sup>7</sup> and applied by the mixed arbitral tribunals established by those treaties.<sup>8</sup>

Unlike its Allies, the United States refused to adopt the control theory during World War I. The original Trading with the Enemy Act<sup>9</sup> gave the President the power to seize the property of enemy corporations, but limited that power by restricting the definition of enemy to "... 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."<sup>10</sup> The courts, following the policy fixed by Congress, refused to recognize the concept that an American, neutral, or friendly corporation could be considered an enemy and its property subject to the vesting power of the President, even though all of the stock of such corporation might be owned by enemies.<sup>11</sup>

During the interwar period the intricate maze of intercorporate relationships became even more complex than it had been at the time of World War I. Enemy interests were concealed and enemy control exercised not only through direct ownership of stock but also by a variety of other means,

<sup>5</sup> [1916] 2 A.C. 307. *Accord: Re Badische Co., Ltd.*, [1921] 2 Ch. 331. *Cf. The Hamborn*, [1919] A.C. 993 (rule of the *Daimler* case extended to the question of liability in prize).

<sup>6</sup> HUBERICH, *TRADING WITH THE ENEMY* 79 (1918); McNair, *The National Character and Status of Corporations*, [1923-1924] BRIT. Y. B. INT'L L. 44 (criticizing the rule of the *Daimler* case); 1 GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* § 152 (1920); 5 MOORE, *COLLECTED PAPERS* 224, 257 (1944).

<sup>7</sup> E.g., Article 297(b) of *The [Versailles] Treaty of Peace Between the Allied and Associated Powers and Germany* (1919) which permitted the Allies to retain and liquidate property belonging to German nationals "or companies controlled by them." See the decision of the United States-German Arbitral Tribunal in the *Standard Oil Company Tankers* case, reported in 22 AM. J. INT'L L. 404, 411 (1928); DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* 127 (1943). Compare text at note 51, *infra*.

<sup>8</sup> See SCHWARZENBERGER, *INTERNATIONAL LAW* 177-180 (2d ed. 1949); *ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 1919-1942*, 472 (Lauterpacht ed. 1947).

<sup>9</sup> 40 STAT. 411 (1917), *supra* note 1.

<sup>10</sup> *Id.* § 2(a).

<sup>11</sup> Thus, in *Hamburg-American Co. v. United States*, 277 U.S. 138, 140 (1928), Mr. Justice McReynolds, speaking for the Court, said: "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." (All the stock was owned by enemy nationals.) *Accord: Belin, Meyer & Co. v. Miller*, 266 U.S. 457 (1925) where the Court pointed out that Congress consciously declined to adopt the rule of the *Daimler* case, *supra* note 5; *Fritz Schulz, Jr., Co. v. Raines & Co.*, 100 Misc. 697, 166 N.Y.S. 567 (Sup. Ct. 1917) (New York court held that an entirely German-owned New Jersey corporation did not cease to be a domestic corporation on the outbreak of the war, following the decision of the English Court of Appeals in the *Daimler* case, [1915] 1 K.B. 893, and rejecting the House of Lords decision, *supra* note 5, which had reversed the Court of Appeals). *But see Amtorg Trading Corporation v. United States*, 71 F.2d 524 (1934). *Cf. the "I'm Alone" case*, 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 703, 750 (1941).

including corporate affiliations with Allied and neutral corporations, patent, trademark, and copyright arrangements, loan options, and other contractual and personal relationships.<sup>12</sup> To prevent the use of such enemy interests and control in economic warfare against the Allies, the trading with the enemy legislation was revised in World War II in the light of the experience of World War I. New and more detailed legislation was enacted by most of the principal Allied Powers establishing, among other things, the control test for the determination of enemy character. To varying degrees, the incidents of control necessary to constitute enemy character were specified.<sup>13</sup>

Again, as in World War I, the United States did not join its Allies, and the amendments to its Trading with the Enemy Act during the war years failed to incorporate the control test of enemy character.<sup>14</sup> Congress reaffirmed<sup>15</sup> the policy it had expressed in the Act of 1917,<sup>16</sup> and the courts continued to apply the "territorial" test.<sup>17</sup> However, the President, in measures of economic warfare<sup>18</sup> and in international agreements concluded after the end of the war,<sup>19</sup> applied the control test as a determinant of the enemy character of corporations and the courts gave their sanction to this administrative practice.<sup>20</sup>

The first step toward adopting the control test in American legislation was the addition in 1946 of Section 32 of the Trading with the Enemy Act.<sup>21</sup> This section authorizes the President to return any property or interest vested in or transferred to the Alien Property Custodian, provided it is determined that the owner of such property or interest is not "... (E) 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 any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) . . . ." The subdivisions referred to prohibit returns of property to governments with which the United States has been at war since December 7, 1941, to their citizens and residents, and to corporations incorporated in their territory.

<sup>12</sup> See *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 485, n.3 (1947) (*Uebersee I*).

<sup>13</sup> For a survey of these statutory provisions, see DOMKE, *op. cit. supra* note 7, at 1-9, 127-130. The legislative and administrative enactments of the United Kingdom, Australia, New Zealand, and the Union of South Africa are reproduced in part at Appendices N-S, *id.* at 469-532, and at Appendices O-S, *id.* at 242-244, of its supplement, entitled *The Control of Alien Property* (1947).

The leading cases are collected *id.* at 101-104; and see Domke, *The Control of Corporations*, 3 INT'L L. Q. 52, 53 and n.6; Cohn, *German Enemy Property—I & II*, 3 INT'L L. Q. 391, 530 (1950) (emphasizing British practice); Martin, *supra* note 3.

<sup>14</sup> *Cf. supra* note 4.

<sup>15</sup> The First War Powers Act, 55 STAT. 838 (1941), 50 U.S.C. APP. § 601 *et seq.* (1946). See text at notes 27, 28, *infra*.

<sup>16</sup> See text at note 9, *supra*.

<sup>17</sup> *H. P. Drewry, S.A.R.L. v. Onassis*, 266 App. Div. 292, 42 N.Y.S. 2d 74 (1st Dep't 1943).

<sup>18</sup> *E.g.*, the blocking of foreign funds and the blacklisting of neutral corporations. See DOMKE, *op. cit. supra* note 7, cc. 10 and 20 and references cited there.

<sup>19</sup> See text at notes 65-69, *infra*.

<sup>20</sup> *119 Fifth Avenue Inc. v. Taiyo Trading Co.*, 73 N.Y.S. 2d 774, 775 (Sup. Ct. 1947); DOMKE, *op. cit. supra* note 7, cc. 10 and 20.

<sup>21</sup> *Supra* note 4.

*The Uebersee Cases—I and II*

In 1945 Uebersee Finanz-Korporation, a Swiss corporation, brought suit against the Attorney General, as successor to the Alien Property Custodian, under Section 9(a)<sup>22</sup> of the Trading with the Enemy Act to recover shares of stock in several American corporations, valued at approximately \$4,000,000, which had been seized and vested in the Custodian in 1942 as enemy property.<sup>23</sup> In its petition Uebersee alleged that it had not at any time traded with the enemy, nor had it ever been owned or controlled by enemies. Uebersee's suit was dismissed on motion by the district court,<sup>24</sup> and its dismissal was reversed by the court of appeals.<sup>25</sup> On certiorari, the Supreme Court held [*Uebersee I*]<sup>26</sup> that the 1941 amendment to Section 5(b)<sup>27</sup> of the Trading with the Enemy Act authorizing the President to seize and vest "... any property in which any foreign country or national thereof has any interest . . .," applied even to friendly or neutral nations. The purpose of the amendment, the Court stated, was to place the property of "... all foreign interests . . . within reach of the vesting power[,] not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts."<sup>28</sup> The Court said further that the amendment to Section 5(b) required a construction of the definition of "enemy" in Section 2 not limited to foreign corporations organized in enemy territory, but capable of including corporations organized in friendly and neutral countries as well. The holding of the court of appeals was affirmed and the action remanded for trial.

On remand the following facts were found by the district court:<sup>29</sup> in 1931 Wilhelm von Opel, a citizen and resident of Germany, owned shares in the Adam Opel Works. Wilhelm and his wife entered into a usufruct<sup>30</sup> (*Niessbrauch*) agreement with their son, Fritz, who had not lived in Germany since 1929. The district court found that the usufruct agreement gave Fritz legal title to the Adam Opel shares, an interest in the corpus contingent on survival of his parents, plus a right to 20% of the income. Wilhelm and his wife retained a right *in rem* in the subject of the usufruct which consisted of enjoyment (income) of the property, co-possession with the holder of the legal title, including a right to prevent sale or other disposition of the property, a limited voice in the management and, finally,

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<sup>22</sup> *Supra* note 1, 50 U.S.C. APP. § 9(a) (1946): Any person "... claiming any interest, right, or title in any money or property . . ." vested in the custodian may maintain suit for its recovery.

<sup>23</sup> ANNUAL REPORT OF THE OFFICE OF ALIEN PROPERTY, DEP'T OF JUSTICE 79 (Fiscal year ended June 30, 1950).

<sup>24</sup> Without opinion.

<sup>25</sup> 158 F.2d 313 (D.C. Cir. 1946).

<sup>26</sup> *Supra* note 12.

<sup>27</sup> 55 STAT. 838 (1941), 50 U.S.C. APP. § 5(b) (1946).

<sup>28</sup> *Uebersee I*, *supra* note 12, at 485, 488.

<sup>29</sup> *Uebersee v. Clark*, 82 F. Supp. 602 (D.C. Cir. 1949).

<sup>30</sup> The usufruct is similar to the common law trust in its division of legal title and equitable ownership, but differs from the trust in that the usufructary, unlike the cestui que trust, has certain powers of control and management over the corpus.

a right to vote the shares, a point the court found to be unclear under German law.<sup>31</sup>

Pursuant to the usufruct agreement, Fritz sold the shares and transferred the proceeds to Uebersee, a Swiss corporation that Fritz had "acquired" for that purpose. The proceeds of the sale of the Adam Opel stock were used to purchase various American corporate securities and these, in the hands of Uebersee, were found by the district court to be subject to the rights of Wilhelm and his wife under the usufruct agreement. It was further found that the usufruct property had been entirely under the direction and control of Wilhelm and his agents since the date on which the agreement was concluded.

The district court gave judgment for the Custodian.<sup>31a</sup> The court of appeals affirmed.<sup>31b</sup> On certiorari, the Supreme Court held [*Uebersee II*]<sup>32</sup> that Uebersee was affected with an "enemy taint" and observed that it would be difficult "... to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case."<sup>33</sup> The Court held the following factors indicative of enemy taint: (1) the von Opel parents, resident German nationals, owned a usufructary interest in the American securities bought by the Swiss corporation, Uebersee; (2) unusual circumstances surrounded Fritz von Opel's citizenship of the Principality of Liechtenstein; (3) there were connections between this neutral citizen and enemy interests through Uebersee's ownership of a Hungarian bauxite mining corporation;<sup>34</sup> (4) the direct and indirect domination and control of Uebersee, the holder of the usufruct property, by Wilhelm von Opel, a German national.

By holding that Uebersee was affected with an enemy taint, and affirming dismissal of its suit, the Supreme Court in *Uebersee II* established the control test of enemy character in the United States. The Court assumed the right to "look behind the corporate veil" to uncover enemy property concealed by a cloak of apparent nonenemy ownership.

#### PROTECTION OF NONEMENY INTERESTS

The enunciation of the control test in *Uebersee II* as applicable to corporations organized in neutral and friendly countries raised immediately the problem<sup>34a</sup> of the protection to be given to nonenemy shareholders, suing

<sup>31</sup> *Id.* at 605.

<sup>31a</sup> *Uebersee v. Clark*, *supra* note 29.

<sup>31b</sup> *Uebersee v. McGrath*, 191 F.2d 327 (D.C. Cir. 1951).

<sup>32</sup> *Uebersee v. McGrath*, 343 U.S. 205 (1952). The Court's opinion dealt with two quite separate points and, for purposes of convenience, they are discussed separately in the text. See text at note 44 *et seq.*, *infra*.

<sup>33</sup> *Id.* at 212, quoting the District Court, 82 F. Supp. at 606.

<sup>34</sup> *Uebersee*, in 1939 and 1940, guaranteed a loan from a Swiss bank to a wholly-owned subsidiary Hungarian mining corporation which shipped bauxite to Germany during October, November, and December 1941 and had a contract to do so until the end of 1942. The loan was repaid to the Swiss bank in November 1942. *Uebersee II*, *supra* note 32 at 211.

<sup>34a</sup> This was not an issue so long as the "territorial test" was followed since only corporations organized in enemy nations came within the definition of enemy. No American cases were found where nonenemy shareholders were successful in recovering a proportionate share of the vested assets of such enemy corporations.

under Section 9(a) of the Trading with the Enemy Act,<sup>34b</sup> in corporations characterized as "enemy." This section permits "... any person not an enemy or an ally of an enemy ..." claiming any right or interest in any property vested in the Alien Property Custodian, to file with the Custodian a notice of his claim and then commence a suit in equity to establish his interest which, if the suit is successful, shall be ordered by the Court to be surrendered to the claimant. Its application to the claims of nonenemy shareholders of an enemy controlled corporation was the central issue of *Kaufman v. Societe Internationale*,<sup>35</sup> decided the same day as *Uebersee II*.

### *The Kaufman Case*

*Societe Internationale*, a Swiss Corporation commonly called "Interhandel," brought suit in the District Court of the District of Columbia to recover assets seized and vested in the Alien Property Custodian under Section 5(b) of the Trading with the Enemy Act, as amended. The American assets thus seized consisted of bank accounts and over 90% of the capital stock of General Aniline and Film Corporation of Delaware, the total value of which exceeded \$100,000,000.<sup>36</sup> The Custodian's answer urged the control test as a reason for denying recovery and alleged that Interhandel was controlled by persons who had conspired to conduct the corporation's business in the interest of Germany during World War II.<sup>37</sup> A motion to intervene was filed by American stockholders in Interhandel. The motion admitted that the corporation was controlled by persons who had conspired to act in the interests of the enemy, and admitted the right of the Custodian to retain a part of the seized assets proportional to the stock ownership of enemy stockholders. The intervenors contended, however, that they and other nonenemy stockholders had interests in the corporate assets which it was the duty of the corporation to protect, and that the persons in control of the corporation would not, because of their enemy bias, adequately protect the interests of the nonenemy or "innocent" stockholders. They therefore claimed the right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure. The district court denied the motion to intervene,<sup>38</sup> and the court of appeals affirmed.<sup>39</sup> On certiorari, the Supreme Court observed that the Alien Property Custodian could seize the assets of a corporation organized in a neutral nation if it was affected with an enemy taint, but stated that:<sup>40</sup>

... [s]uch a governmental seizure requires consideration of the plight of innocent shareholders. ... [Congress] has used no language requiring us

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<sup>34b</sup> *Supra* note 1, 50 U.S.C. APP. § 9(a) (1946).

<sup>35</sup> 343 U.S. 156 (1952).

<sup>36</sup> *Id.* at 157, n.2.

<sup>37</sup> The allegations stated that the conspiracy had as part of its objective "... to conceal, camouflage and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany." *Id.* at 163, n.2(e).

<sup>38</sup> *Societe Internationale v. McGrath*, 90 F. Supp. 1011 (D.C. Cir. 1950).

<sup>39</sup> *Kaufman v. Societe Internationale*, 188 F.2d 1017 (D.C. Cir. 1951).

<sup>40</sup> Citing *Uebersee I*, *supra* note 12.

to hold that innocent interests must be confiscated because of the guilt of other stockholders . . . . 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 . . . . The innocent shareholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies.<sup>41</sup>

Rejecting the Government's contention that nonenemy stockholders should be limited to individual suits for money judgments against the Custodian, the Court held that questions involved in disputes like the one before the Court could best be resolved by the corporate action authorized by Section 9(a) rather than by a multiplicity of individual suits. Since nonenemy stockholders would be bound by judgments in suits brought under this section, it was held that they should have a right to intervene to protect what the Court indicated were their severable interests.<sup>42</sup>

Mr. Justice Reed, with the Chief Justice and Mr. Justice Minton concurring, filed a strong dissent, in which it was urged that while the enunciation of the control test in *Uebersee II* might have left undecided the fate of enemy ownership of a minority interest in a friendly or neutral corporation, it did not leave open any question about the fate of the property of an enemy dominated corporation. Such property was to be held for the satisfaction of war damage claims, as Congress intended.<sup>43</sup>

One of the effects of the *Kaufman* decision can readily be seen in the second point of the Court's holding in *Uebersee II*,<sup>44</sup> decided on the same day as *Kaufman*. After the Supreme Court had remanded *Uebersee I* to the District Court, Uebersee, in addition to attempting to establish its own nonenemy character, asserted the nonenemy status of Fritz von Opel, its principal stockholder, claiming that his interest in Uebersee's assets should be protected even though it might ultimately be decided that Uebersee itself was affected with enemy taint. Because of lack of timely assertion, the district court refused to consider the interest of Fritz von Opel.<sup>45</sup> The court of appeals affirmed. The Supreme Court, in view of the "novel holding" in the *Kaufman Case*, vacated the holding of the district court and remanded the cause " . . . for consideration, in the light of *Kaufman* and this opinion, of any application that may be made on behalf of Fritz von Opel."<sup>46</sup> The *Kaufman* decision may result in the recovery by Uebersee<sup>47</sup> of a proportion of its assets vested in the Alien Property Custodian equivalent to Fritz von Opel's right to 20% of the income of such property. This possibility suggests several difficult problems for which the *Uebersee* and *Kaufman* cases do not provide adequate answers.

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<sup>41</sup> *Kaufman v. Societe Internationale*, *supra* note 35 at 159-160.

<sup>42</sup> See text at note 41, *supra*.

<sup>43</sup> *Supra* note 35 at 164-165, citing *Behn, Meyer & Co. v. Miller*, 266 U.S. 457 (1925).

<sup>44</sup> *Supra* note 32.

<sup>45</sup> *Uebersee v. Clark*, *supra* note 29 at 606-607.

<sup>46</sup> 191 F.2d 327 (D.C. Cir. 1951).

<sup>47</sup> It is a corporate action. See the holding in the *Kaufman* case, text at notes 41-42, *supra*.



*Corporation Law Problems*

What is the nature of the nonenemy "interest, right or title" to be protected in property vested in the Alien Property Custodian? The Supreme Court in the *Kaufman* case interpreted these words of Congress to mean that a nonenemy stockholder in an enemy tainted corporation has a severable interest which is entitled to protection. This interpretation is at variance with well established concepts of corporation law.<sup>48</sup> The Court explicitly recognized this by stating that the holding was "... not based on any technical concept of derivative rights appropriate to the law of corporations."<sup>49</sup> In orthodox corporation law the shareholders have no present interest in specific corporate property and, therefore, cannot be said in any sense to be "owners" of a severable "interest, right or title."<sup>50</sup> The Court's interpretation of this statutory phrase seems dubious, especially when considered in the light of the most recent expression of Congressional intent in Section 32 of the Trading with the Enemy Act in which the President is given the right to return "any property or interest" vested in the Custodian provided that he determines that the "owner" is not a foreign corporation which at any time after December 7, 1941 was controlled by, or 50% of whose stock was owned by enemies.<sup>51</sup>

The Court cites no authority for its conclusion other than to quote a statement in its holding in *Uebersee I* that the purpose of Congress was "... not to appropriate friendly or neutral assets ..."<sup>52</sup> But in that case the Court was considering only the friendly or neutral character of the corporation itself and not of its stockholders. It may be questioned whether the corporate entity should be disregarded without some more positive indication of congressional intention than the language of Section 9(a) which gives any person, not an enemy "... claiming any interest, right or title in any money or other property ..." vested in the Custodian the right to maintain suit for its recovery. If Congress had intended to make complete departure from orthodox corporation law by giving the nonenemy shareholders present interests in the corporate property, it probably would have expressed its intention in a much more explicit fashion. Indeed, it is within the bounds of reason to conclude that Congress intended to leave the protection of nonenemy interests to the President in accordance with the provisions of Section 32, rather than to impose an undue burden on the district courts with the great number of cases which must inevitably arise. The Executive has a large and experienced administrative organization to deal with such cases, as well as the responsibility for negotiation and administration of international agreements for the protection of nonenemy interests and the administration of the reparation fund. That these programs should be co-ordinated is obvious. Nonenemy interests should not suffer

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<sup>48</sup> BALLANTINE, CORPORATIONS § 119 (1946).

<sup>49</sup> *Supra* note 35 at 160.

<sup>50</sup> *Supra* note 48.

<sup>51</sup> See text at note 21, *supra*.

<sup>52</sup> *Supra* note 12, at 485.

from the seizure of enemy property, but the problems involved in their protection, due to the complexity of the modern system of interests in property, are of a type that could perhaps best be dealt with by quasi-judicial administrative agencies capable of exercising, as the courts are not, the congressional directive that vested property should only be returned when such returns "are in the interest of the United States."<sup>53</sup>

It seems impossible that the district courts will be able to give non-enemy shareholders the protection which the *Kaufman* case calls for without violating fundamental principles of corporation law. Reasoning solely on the basis of those principles, the conclusion is inevitable that the non-enemy shareholder is not entitled to recover any part of the assets of an enemy tainted corporation, but must be considered as having accepted, as part of the risk of his investment, the possibility that the corporation might become controlled by enemies. If as a matter of policy, and apart from corporation law, the nonenemy shareholder in an enemy corporation is to receive some protection for his investment, it certainly is not self-evident that the holding in the *Kaufman* case provides a more desirable or more workable solution than that provided in Section 32 of the Trading with the Enemy Act.<sup>54</sup>

### *Creditors' Rights*

What should be the extent of the protection of the nonenemy stockholder? The simple rule of protection according to the proportion which the nonenemy shares bear to the total shares is suggested by the *Kaufman* case.<sup>55</sup> It has also been incorporated in international agreements<sup>56</sup> and in the decisions of international arbitral tribunals.<sup>57</sup> However, this rule is open to the objection that it fails to take account of creditor interests and that the shareholder, who on liquidation would be entitled to his proportional share only after payment of the corporate debts, receives a windfall. To ask or require the creditor to pursue the individual nonenemy shareholders on the theory that they have been unjustly enriched would impose an unjustifiable burden on him, and would raise the new and difficult problem of determining the extent of the unjust enrichment. It has been suggested that the creditor interests can be ignored unless the other assets of the corporation are inadequate to meet the debts.<sup>58</sup> But this solution, in many cases, would enrich the nonenemy stockholder (assuming, of course, that the principles of liquidation are followed and that the stockholder is en-

<sup>53</sup> 50 U.S.C. APP. § 32(a)(5) (1946).

<sup>54</sup> *Supra* note 4.

<sup>55</sup> See text at note 41, *supra*.

<sup>56</sup> See notes 65, 67, 68, 69, *infra*.

<sup>57</sup> See NEILSEN, *INTERNATIONAL LAW APPLIED TO RECLAMATIONS* 58-61 (1933); WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1683 (1943); 2 HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 903-904 (2d ed. 1945); FELLER, *THE MEXICAN CLAIMS COMMISSION 1923-1934* 117 (1935); REPORT TO SECRETARY OF STATE, *AMERICAN-MEXICAN CLAIMS COMMISSION* 500, 523, 560, 610, 638, 649 (1948); Jones, *Claims on Behalf of Nationals Who are Shareholders in Foreign Companies*, 26 BRIT. Y. B. INT'L L. 225, 246-247, 252, 257 (1949).

<sup>58</sup> Maurer, *supra* note 2, at 432.

titled only to a proportional share of the net corporate assets after deduction has been made for corporate obligations) at the expense of the reparation funds of various Allied Governments, and thus ultimately of individuals having valid war damage claims.

Another possible solution would be a paper liquidation to determine the proportionate interests of shareholders and creditors in particular enemy assets.<sup>59</sup> This would seem to be the most equitable solution, since creditors would be protected and nonenemy shareholders would receive only a proportionate share of the net assets.<sup>60</sup>

### *Problems of Proof*

The Court's holding in the *Kaufman* case did not indicate whether the alleged nonenemy stockholder of an enemy tainted corporation must bear the burden of proving his nonenemy character. Even assuming that the burden rests on the claimant shareholder, the test must be in part a subjective one and, as the dissent observed, the reliability of an individual's self-serving evidence is questionable.<sup>61</sup> Although this danger is present in almost every action, it will be magnified in this type of case because of the great difficulty the Government will have in obtaining rebutting evidence. The activities and connections of shareholders in corporations engaged in worldwide commercial dealings during the war and prewar years are not matters of public record and are known, in many instances, only to the interested individuals themselves. For example, should the trial court accept at face value Fritz von Opel's citizenship of the Principality of Liechtenstein? What sort of evidence is likely to be available to the Government for use in rebuttal? The difficulty of judicial determination of questions which ultimately depend in part upon the subjective attitude of the individual involved during a definite period of time is obvious. The countervailing evidence which the Government will be able to offer will of necessity be limited to evidence of overt acts which can be said to express an enemy character which, in the case of most shareholders who are not active in the affairs of the corporation, will be very difficult to unearth.

### IMPLICATIONS OF THE UEBERSEE CASES

If the nonenemy character of Fritz von Opel could be proven and his proportionate interest (as defined in the *Kaufman* case) in the assets of Uebersee recovered, it is unlikely that the German and Swiss courts would disregard the normal incidents of corporate ownership. The assets recovered would be corporate assets and would belong to Uebersee, admittedly an enemy tainted corporation. Further, such assets, at least from the point of view of the law of Germany or Switzerland if not of the United States, would still be impressed with the usufruct in favor of a German national,

<sup>59</sup> See Mason, *Conflicting Claims to German External Assets*, 38 GEO. L. J. 171, 181-182 (1950).

<sup>60</sup> But a paper liquidation would be the most time consuming method, especially where the assets and creditors of a particular corporation are distributed over several countries.

<sup>61</sup> *Supra* note 35 at 162.

Wilhelm von Opel's widow, for the remainder of her life. These possibilities, if realized, would certainly frustrate the intention of Congress not to return vested enemy assets but to retain them for satisfaction of war damage claims.<sup>62</sup> Further, the fact that Fritz von Opel might be declared to be a nonenemy while Uebersee, in which he is the principal stockholder, has been declared to be enemy tainted suggests some of the ludicrous results to which the *Kaufman* case may lead. In addition it may also produce a possible conflict with the control test as enunciated in *Uebersee II*. One of the four major reasons given in that holding for ascribing an enemy taint to Uebersee was the direct and indirect domination and control of Uebersee by Wilhelm von Opel. Thus the control test of the enemy character of corporations is not limited by the actions or sentiments of its shareholders or their representatives. Therefore, it might be at least theoretically possible in situations similar to that presented by the *Uebersee* cases for the corporation to be found to be enemy controlled and yet all of its property which had been seized and vested in the Custodian to be recovered by its shareholders, all of whom might be proved to be nonenemies whose activities and sentiments formed no part of the findings on the basis of which the corporation itself was found to be enemy tainted. As the *Uebersee* cases demonstrate, this theoretical possibility does not require a very great stretching of the imagination. If such undesirable results are to be avoided under the present state of the law, the district courts must display considerable discernment in dealing with the cases brought before them, or Congress must re-examine the statutes and indicate its intention more clearly.

Although the *Uebersee* cases were the first steps toward bringing American jurisprudence in line with international law practice<sup>63</sup> and the practice of the President since World War II, the *Kaufman* decision extended the concept of "enemy" (and thus of nonenemy) far beyond its usual application in the domestic jurisprudence of other states<sup>64</sup> and in international agreements. The Paris Reparation Agreement of January 14, 1946<sup>65</sup> called

<sup>62</sup> War Claims Act of 1948, 62 STAT. 1246 (1948), 50 U.S.C. APP. 2011 (Supp. 1952): No vested Japanese or German assets "... shall be returned to the former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." The Act set up a War Claims Commission to inquire into war damage claims and report to Congress its recommendations for dealing therewith. Such claims will, insofar as possible, be paid from vested Japanese and German assets. The Commission's report is to be found in H. R. Doc. No. 580, 81st Cong., 2d Sess. (1950).

<sup>63</sup> See 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 702-705, 839-845 (1941); 6 MOORE, DIGEST OF INTERNATIONAL LAW 644, 648 (1906); 2 HYDE, *op. cit. supra* note 57, at 904-908; BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 622 (1925); FELLER, *op. cit. supra* note 57, at 117; REPORT TO SECRETARY OF STATE, *op. cit. supra* note 57, at 8; JONES, *supra* note 57, at 225; DOMKE, *supra* note 13; and note Article 78(4)(b) of the Italian Peace Treaty of 1947, *supra* note 3. But cf. the arbitral decision in the *Standard Oil Company Tankers* case, *supra* note 7, which was based on principles of domestic corporation law, and is a questionable interpretation of the treaty provisions there under discussion. See Maurer, *supra* note 2, at 423, n.80; and Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1135, n.31 (1948).

<sup>64</sup> *Supra* notes 5, 13.

<sup>65</sup> For the text and a comment on the Paris Reparation Agreement, see Howard, *The Paris Agreement on Reparation from Germany*, 14 DEP'T STATE BULL. 1023 (1946). The Agreement did not come into effect until January 24, 1951 for lack of Congressional authorization. 64 STAT. 1079 (September 28, 1950).

for the exemption from reparation use of property of Allied nationals, "... whether wholly owned or in the form of a shareholding of more than 48 per cent."<sup>66</sup> A committee of experts created under the Paris Reparation Agreement, Part I, Article 6F, recommended the calling of a conference to draft a multilateral convention which would provide, among other things, for the protection of nonenemy shareholders in enemy corporations. This conference led to the Brussels Intercustodial Agreement of December 5, 1947, Parts III and IV of which attempt to limit the various Allied Governments' rights to retain seized enemy property to that proportion of the property in their jurisdiction which corresponds to the proportion of enemy ownership.<sup>67</sup> More recently, there have been other intercustodial agreements between the Allied Governments<sup>68</sup> and accords between neutral and Allied Governments,<sup>69</sup> all of which provide, in one form or another, for some protection of nonenemy interests in enemy corporations. All of these agreements limit protection to cases where the nonenemy share ownership is substantial. None of them go as far as the *Kaufman* decision in guaranteeing protection regardless of the proportionate size of the nonenemy share ownership.

Alan W. Ford\*

<sup>66</sup> 64 STAT. 1079, Resolution 3, Annex. It should be noted that this Agreement does not go as far as the *Kaufman* case in extending protection to nonenemies. It limits the exclusion of the property of enemy or enemy controlled corporations from reparations use only when such corporation is wholly or more than 48% owned by nonenemies, whereas the *Kaufman* case excludes the property of such corporations from reparations use in proportion (however small) to the nonenemy ownership.

<sup>67</sup> For the text and a comment on the Brussels Intercustodial Agreement, see Maurer and Simsarian, *Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets*, 18 DEP'T STATE BULL. 3, 6 (1948). And see Mason, *supra* note 59 at 171, 178; Mann, *German External Assets*, 24 BRIT. Y. B. INT'L L. 238, 245-247 (1947); Cohn, *supra* note 13, at 396; Maurer, *supra* note 2, at 425-427.

<sup>68</sup> United Kingdom-France Intercustodial Agreement of July 15, 1948, Treaty Series No. 74, Cmd. 7551 (1948); United Kingdom-Netherlands Intercustodial Agreement of September 20, 1949, Cmd. 7803 (1949). Although both France and Britain took part in the discussions which lead to the Brussels Agreement, *supra* note 67, neither has become a party to that Agreement. Their bilateral agreement cited here, and the United Kingdom-Netherlands Agreement, have provisions paralleling those of Part II of the Brussels Agreement.

There is also an intercustodial agreement of limited scope between the United States, United Kingdom and Canada which has not yet been published. See Mason, *Settling Intercustodial Claims to Vested Property*, 123 N.Y.L.J. 1824 (1950).

Cf. the American Agreements on Compensation for Nationalization of American assets with Poland, Czechoslovakia, and Yugoslavia which specifically provide for compensation to American stockholders of corporations which are incorporated in those countries and have been nationalized. The Agreement with Poland, concluded on April 24 and December 27, 1946, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1516 (1947), 16 DEP'T STATE BULL. 28 (1947); the Agreement with Czechoslovakia, concluded on November 14, 1946, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1569 (1946), 15 DEP'T STATE BULL. 1004 (1946); and the Agreement with Yugoslavia, concluded on July 19, 1948, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1803 (1948), and 19 DEP'T STATE BULL. 137 (1948). See Rubin, *Nationalization and Compensation, A Comparative Approach*, 17 U. CHI. L. REV. 458, 466-467 (1950); Maurer, *supra* note 2, at 426-427, 430-431.

<sup>69</sup> Allied-Swiss Accord, 14 DEP'T STATE BULL. 1121 (1946); Allied-Spanish Accord, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1773 (1948); Allied-Swedish Accord, TREATIES AND OTHER INTERNATIONAL ACTS SERIES 1657 (1946). See Maurer, *supra* note 2, at 427.

\* LL.M., January 1953.