Michigan Law Review

Volume 49 | Issue 8

1951

INTERNATIONAL LAW-ALIENS-CONFISCATION OF ALIEN ENEMY PROPERTY-ALIEN ENEMY CHARACTER OF SHINTO SHRINE IN HAWAII

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INTERNATIONAL LAW—ALIENS—CONFISCATION OF ALIEN ENEMY PROPERTY —ALIEN ENEMY CHARACTER OF SHINTO SHRINE IN HAWAII— Plaintiff, a Hawaiian corporation, brought suit under section 9 of the Trading with the Enemy Act[1] for the return of real and personal property vested in 1948 under authority of section 5(b).[2] Evidence was introduced to show that plaintiff's members were largely alien Japanese; that, prior to December 7, 1941, plaintiff operated what purported to be a Shinto shrine in Honolulu where three Japanese gods were worshiped; that the shrine looked like a Shinto shrine and was in some re-

[1] 50 U.S.C. (1946) Appx. §9(a): "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him . . . may file . . . a notice of his claim . . . in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business . . . , to establish the interest, right, title, or debt so claimed. . . ."

[2] 50 U.S.C. (1946) Appx. §5(b): ". . . any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated . . . by the President. . . ." Exec. Order 9095, 50 U.S.C. (1946) Appx. §6 note, delegated this power to the World War II Alien Property Custodian.

spects operated like one. It was further shown that plaintiff's members had no real understanding of the tenets of Shintoism as it existed in Japan; that in Japan Shintoism had been distorted and used as an ideological weapon against Japan's enemies; and that plaintiff had ties of love and affection with the Shintoist organization in Japan. The court found as a fact that plaintiff was not controlled, directly or indirectly, financially or ideologically, by the Japanese government, and that, whatever ties with Japan might have existed before or during the war, MacArthur's order of 1945, providing that Shintoism would no longer be recognized as a state religion, divested the Japanese government of any control over Shintoism anywhere in the world. *Held,* "the plaintiff has proven itself eligible under the Act to have a judicial order directing the Custodian to return to it the vested property . . . it will be so ordered. . . ." The evidence disclosed no enemy taint, and the vesting was a violation of the first amendment of the Constitution of the United States. *Kotohira Jinsha v. McGrath,* (D.C. Hawaii 1950) 90 F. Supp. 892.

Finding the uncertainties of the applicable international law[3] inadequate to deal with the necessities of war, Congress passed the Trading with the Enemy Act of 1917[4] which defined the extent of the government's power to deal with private enemy property and detailed the methods by which the power could be exercised.[5] An objective of the act was to give power to the Alien Enemy Property Custodian to "seize" such property,[6] but under the act corporations characterized as "enemy" were limited to those which were not incorporated in the United States and which were incorporated or doing business in an enemy country.[7] At the begin-

[3] In the absence of significant war-time experience and practice in the century before World War I and the conflicting views of the writers in the field made the status of international law with respect to the right to confiscate enemy property and the limitation of the right inherent in the problem of defining enemy character impossible to determine. A discussion of these problems is found in Lourie, " 'Enemy' under the Trading with the Enemy Act and Some Problems of International Law," 42 MICH. L. REV. 383 (1943). On the problems in international law created by the Trading with the Enemy Act, see Turlington, 36 AM. J. INT. L. 460 (1942).

[4] 40 Stat. L. 411 (1917).

[5] For an analysis and history of the act, see Lourie, " 'Enemy' under the Trading with the Enemy Act and Some Problems in International Law," 42 MICH. L. REV. 205 (1943); also, 18 ST. JOHN'S L. REV. 56 (1943). On the policy of the act see Borchard, "The Treatment of Enemy Property," 34 GEO. L.J. 389 (1946); Sommerich, "A Brief Against Confiscation," 11 LAW & CONTEM. PROB. 152 (1945); Rubin, " 'Inviolability' of Enemy Private Property," 11 LAW & CONTEM. PROB. 166 (1945).

[6] 50 U.S.C. (1946) Appx. §7(c): ". . . property . . . belonging to or held for, by, on account of, or on behalf of, for the benefit of, an enemy or ally of enemy . . . may be seized by the Alien Property Custodian. . . ." Cloaking devices were not ignored under the old act; such companies were blacklisted by the Custodian, but the method was not adequate to deal with the complexities of the situation. 51 YALE L.J. 1388 (1942).

[7] Behn, Miller and Co. v. Miller, 266 U.S. 457, 44 S.Ct. 623 (1925); Hamburg-American Line v. United States, 277 U.S. 138, 48 S.Ct. 470 (1928). The act itself defined the term "enemy" in 50 U.S.C. (1946) Appx. §2(a) as "any individual, partnership, or other body of individuals, . . . 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

ning of World War II, Congress, recognizing that German and Japanese corporations were prepared to evade the seizure provisions of the act through the use of "cloaking" devices, attempted to broaden the area of the act's applicability to corporations by providing the power to vest "any property or interest of any foreign country or national thereof."[8] The Custodian was slow to investigate the amendment's implications,[9] but by 1947, through the Supreme Court's decision in *Clark v. Uebersee Finanz-Korp*,[10] it was clear that the narrow test of the earlier cases had been abandoned. That case involved a vesting of Swiss-owned stock in an American corporation, by hypothesis, property free of any connection with the enemy. Three alternatives were available to the Court: (1) to hold the vesting invalid under the decided cases respecting the corporate entity;[11] (2) to hold the vesting valid under a literal interpretation of section 5(b), thereby allowing the vesting of interests of friendly aliens;[12] (3) to hold the vesting invalid under some intermediate criterion allowing the custodian to "pierce the corporate veil" in some instances but precluding the right to appropriate property identified with friendly nations. The Court chose to adopt the third approach, using what it termed the test of "enemy taint," but, because of the peculiarities of the fact situation, it was unnecessary to define the term.[13] The principal case is the first reported decision, outside of the retrial of the *Uebersee* case, in which an attempt has been made to apply the criterion of "enemy taint" to a specific fact situation. Finding enemy taint in the *Uebersee* case, on retrial, the Court explained that it would "look not only to circumstances which indicate enemy own-

incorporated within any country other than the United States and doing business within such territory." On the development of this doctrine and a comparison with contemporaneous development on the subject in England see Norum, "Determinattion of Enemy Character of Corporations," 24 AM. J. INT. L. 310 (1930). The act as interpreted was declarative of the common law with respect to the enemy character of corporations. 20 TEX. L. REV. 746 (1942).

[8] Supra note 2. 55 Stat. L. 838 (1941). For discussion of the relationship between this act and the original act of 1917 see Bishop, "Judicial Construction of the Trading with the Enemy Act," 62 HARV. L. REV. 721 (1949); 56 YALE L.J. 1068 (1947); 55 YALE L.J. 836 (1946); Dulles, "The Vesting Powers of the Alien Property Custodian," 28 CORN. L.Q. 245 (1943). In Draiger Shipping Co. v. Crowley, (D.C. N.Y. 1943) 49 F. Supp. 215, it was held that section 9(a) (supra note 1), giving non-enemies a right of action to recover in cases of wrongful seizure, applied to vestings under section 5(b) despite the inconsistency in language. The act was originally held constitutional because an opportunity for judicial review was provided: Stoehr v. Wallace, 255 U.S. 239, 41 S.Ct. 293 (1921). On this point see McNulty, "Constitutionality of Alien Property Controls," 11 LAW & CONTEM. PROB. 135 (1945); Wechsler, "Constitutionality of Alien Property Controls: A Comment on the Problem of Remedies," 11 LAW & CONTEM. PROB. 149 (1945). The Draiger decision is accepted in the principal case.

[9] See Berman, "Cartels and Enemy Property," 11 LAW & CONTEM. PROB. 109 (1945); 18 ST. JOHN'S L. REV. 56 (1943); Lourie, "'Enemy' under the Trading with the Enemy Act and Some Problems of International Law," 42 MICH. L. REV. 383 (1943).

[10] 332 U.S. 480, 68 S.Ct. 174 (1947).

[11] See note 7 supra.

[12] Note 2 supra.

[13] See discussion of the Uebersee case in Bishop, "Judicial Construction of the Trading with the Enemy Act," 62 HARV. L. REV. 721 at 749-753 (1949).

ership or control, but also to connections or association with enemy interests."[14] Yet in the principal case it was decided that certain connections with Japan were immaterial in the absence of proof of enemy control. Despite the express rejection of control as dogma in the first case and the failure directly to acknowledge it as the determinant in the second, the two decisions indicate the use of a test of control familiar in other areas of the law dealing with corporations,[15] viz., the rejected alternative in the early American decisions,[16] long accepted in England in dealing with corporations and enemy property.[17] A different approach to this problem has been suggested in other recent cases.[18] Suits under section 9(a) are suits in equity; the theory is that the use of cloaking devices constitutes a misuse of property in an attempt to defraud, and by analogy to the clean-hands doctrine the aid of a court of equity cannot be invoked to enforce rights in such property. The use of the control test has the advantage of allowing a direct decision on the merits on the basis of a familiar, if (characteristically) nebulous concept. The application of the standard to the principal case indicates that an ideological affinity with the enemy is not enough to constitute control without some manifestation of power, economic or political, to direct the use of the disputed property to its own ends. In finding a violation of the first amendment, the case follows the *Uebersee* decision in holding that an extension of the Custodian's power to non-enemy aliens is not justified under the act and would be an infringement of rights guaranteed to aliens under the United States Constitution.

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[14] Uebersee Finaz-Korporation v. Clark, (D.C. D.C. 1949) 82 F. Supp. 602. The court found that German nationals had a usufructuary interest in the property and that the genuineness of the alleged neutral interest had not been shown to its satisfaction.

[15] A closely analogous situation in which the control test is used is in prize cases in admiralty. See Norem, "Determination of Enemy Character of Corporations," 24 AM. J. INT. L. 310 at 325-330 (1930).

[16] See note 7 supra.

[17] The test was first adopted by judicial decision in Daimler Co. v. Continental Tyre and Rubber (Great Britain) Co., [1916] 2 A.C. 307 and was later enacted by Parliament in The Trading with the Enemy Act of 1939, 2 & 3 Geo. VI., c. 89, §2. On the English law, see LAUTERPACHT, OPPENHEIM ON INTERNATIONAL LAW, 6th ed., 219-222 (1940); Parry, "The Trading with the Enemy Act and the Definition of Enemy," 4 MOD. L. REV. 161 (1941). On the use of the control test in South America, see Domke, "Western Hemisphere Control over Enemy Property: A Comparative Survey," 11 LAW & CONTEM. PROB. 3 (1945).

[18] Kind v. Clark, (2d Cir. 1947) 161 F. (2d) 36, cert. den. 332 U.S. 808, 68 S.Ct. 107 (1947); Standard Oil Co. v. Clark, (2d Cir. 1947) 163 F. (2d) 917, cert. den. 333 U.S. 873, 68 S.Ct. 901 (1948); Bishop, "Judicial Construction of the Trading with the Enemy Act," 62 HARV. L. REV. 721 at 754-758 (1949).