TITLE NEWS

OFFICIAL PUBLICATION

The American Title Association

An address given before the California Land Title Association Conference, May 31, 1943

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VOLUME XXIII NUMBER 2

DECEMBER, 1943

THE POWERS AND DUTIES OF THE ALIEN PROPERTY CUSTODIAN

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Mr. President, Ladies and Gentlemen:

We have all read or heard of those soldiers who go ahead of advancing troops to search out mines and booby traps. Their quarry sometimes explodes in their faces. They cannot always take a mine apart and see what makes it tick when they first find it. They often have to send it back to headquarters, for more able and thorough examination and analysis by experts. I am in somewhat the same situation this afternoon. First, because this exposition may blow up in my face before I am through. If so, treat me gently. And, secondly, because I cannot give you many answers. I can only point out a few of the questions; and you will have to take them back to your headquarters for examination and analysis by the experts. The whole subject is timely, but this discussion of it may prove to have been premature, because there are so few answers to the questions which arise.

The present office of Alien Property Custodian was established on March 11, 1942,[1] by executive order of the President of the United States; which order was amended July 6, 1942.[2] That Order recites that it was made by virtue of the authority vested in the President by the Constitution, by the First War Powers Act of 1941,[3] by the Trading with the Enemy Act of October 6, 1917, as amended,[4]

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[1] Executive Order 9095, 7 Fed. Reg. 1971.

[2] Executive Order 9193, 7 Fed. Reg. 5205; U. S. Code, Title 50, Appendix, 1942 Cumulative Pocket Supplement, p. 68.

[3] 55 Stats. 838; U. S. Code, Title 50, Appendix, 1942 Cum. Pocket Supplement, Sec. 601, p. 163, also p. 64.

[4] U. S. Code, Title 50, Appendix, p. 189 et seq., and 1942 Cum. Pocket Supplement, p. 62 et seq.

and as President of the United States. The First War Powers Act, among other things, authorized the President, in substance, to redistribute functions among executive agencies and to that end to make such regulations and to issue such orders as he may deem necessary; and amended Section 5b of the Trading with the Enemy Act. It is in the Trading with the Enemy Act that we find specific legislative authority dealing in terms with the Alien Property Custodian. Section 6 of that Act, as originally adopted in 1917,[5] authorized the President to appoint, prescribe the duties of, and fix the salary (with a maximum limit) of "an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this act." Further provision was made in the section for certain administrative details, such as the furnishing of bond, employment of personnel, and annual reports to Congress.

Subsequent sections of the Trading with the Enemy Act, particularly sections 7, 8, 9, and 12,[6] prescribed a comprehensive set of rules as to the performance by the Alien Property Custodian of his duties. Section 7, for example, covers a number of points relating to the duty of persons holding property for the benefit of or owing debts to enemies to disclose the existence of such property rights and deliver the same to the Custodian; and also among other things, in the second paragraph of subsection (c) provides for the recordation of "requirements" of the Custodian made pursuant to the Act—the term "requirements" possibly including what are now called "vesting orders". (This last mentioned provision for recordation is important to title insurers. It will be discussed further, later in this exposition.) Section 8 provides in substance for the rights and remedies of holders of certain liens on property of an enemy, and tolls the statute of limitations applicable to certain contracts payable against funds in enemy countries. Section 9 relates generally to the rights and remedies of any person claiming an interest in property under the control of the Custodian. (This question is of great importance, involving among other things the method or methods by which a citizen of the United States may assert and defend his rights to property seized by the Custodian under the claim that it belongs to an enemy.) It should be noted that Section 9b contains provisions which obviously can relate only to the situation existing in the First World War—for example, subsection 22 of Section 9b is obviously based on the fact that Italy and Japan

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[5] 40 Stats. 415; U. S. Code, Title 50, Appendix, p. 206.

[6] U. S. Code, Title 50, Appendix, pp. 207-280, 1942 Cum. Pocket Supplement, p. 75.

both were then allies of the United States—and in some respects, therefore, is obsolete. Section 12 outlines the duties and powers of the Custodian with respect to property seized by him; confers the power of sale and prescribes the method thereof; defines the Custodian's position as that of a common law trustee as to all property other than money; and finally contemplates eventual disposition of property at the close of hostilities.

If Section 5b of the Trading with the Enemy Act had not been amended in 1940 and again in December 18, 1941,[7] we should unhesitatingly look for a statement of the powers and duties of the Custodian in the Sections of the Act just now referred to. Section 5b, however, has been amended; and since December 18, 1941, has provided, among other things, that

> "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 from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision."

Other provisions of Section 5b as amended, appear to parallel

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[7] U. S. Code, Title 50, 1942 Cum. Pocket Supplement, p. 64.

in part some of the provisions of Sections 7 to 12 of the Act previously here referred to.

Upon examination of the Executive Order establishing the present office of Alien Property Custodian,[8] it immediately becomes apparent that the President may have been exercising, not the powers conferred on him by Section 6 of the Act, as adopted in 1917, authorizing him to appoint an Alien Property Custodian, but rather the powers conferred by the amended Section 5b, read together with the other provisions of the First War Powers Act (the latter of which, as before stated, authorized the President, in substance, to redistribute functions among executive agencies and to that end to make such regulations and to issue such orders as he may deem necessary). The old office of Alien Property Custodian as established under the authority of Section 6 of the Act in 1917 was abolished on March 2, 1935, by Executive Order, and its functions transferred to the Department of Justice.[9] On February 12, 1942, the President, by memorandum delegated to the Secretary of the Treasury all powers conferred on him by Section 5b of the Act.[10] A month later, by Executive Order, he delegated these powers to the newly established office of Alien Property Custodian,[11] as before stated. The language of the Order appears to create an officer quite different from the one provided for by old Section 6 of the Act. The new Custodian's compensation is provided to be fixed by the President; while the old Custodian's compensation, while fixed by the President, was limited by the statute to $5000.00 a year. The Order establishing the new office expressly provides that there are delegated to the Custodian, or any person, agency, or instrumentality designated by him all powers and authority conferred upon the President by the amended Section 5b of the Act.[12] From this a plausible argument can be made that the present Alien Property Custodian is an entirely different official from the one of that same title created by Section 6 of the Act; that the subsequent sections of the Act before referred to (7, 8, 9 and 12) prescribing the powers and duties of the latter official, do not apply to the present official appointed and holding his authority under a different and independent statutory provision made twenty-five years later in a different war.

This is not an academic distinction. The answer to the question will determine whether citizens claiming property seized by the Custodian may have their day in court or be restricted to an administrative hearing only; whether the statutory provisions of Sec-

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[8] Supra, note [2].
[9] Executive Order 6694.
[10] 7 Fed. Reg. 1409.
[11] Supra, notes [1] and [2].
[12] Paragraph 6, Executive Order 9193, supra note [2].

tion 8 relating to the rights of certain lien holders (and those of Section 9 relating to the rights of persons to whom indebtedness is owed by the alien) may be followed and relied on, or whether such lien holder shall be relegated to administrative procedure under administrative regulations to enforce his lien; whether the method of sales shall be that laid down by Section 12 or some different method prescribed from time to time by regulations; and many other questions.

To put the question briefly again: Do the sections of the Trading with the Enemy Act, governing the powers and duties of the Alien Property Custodian (particularly Sections 7, 8, 9 and 12) apply only to the old office of Custodian provided for by Section 6 and abolished in 1935; or do they also apply to the present, new office of Alien Property Custodian created by the President under his executive powers to perform the powers and duties conferred on him by Section 5b of the Act? If they apply only to the old official of that name, then, aside from the general statement found in the amended Section 5b, the powers and duties of the present Custodian are to be found only in executive orders, memoranda, regulations, administrative rulings, general orders, interpretations, and the other devices of administrative law, and are subject to change by the stroke of a pen followed by filing of the new regulation with the office of the Federal Register. If, however, these sections apply to and govern the present official bearing the title of Alien Property Custodian, with respect to his exercise of the powers given to the President by amended Section 5b of the Act, we must look to all the provisions of the Act as the basis for our study of the Custodian's powers and duties.

The Custodian has already urged in litigation the point that he is not governed or controlled by Section 9 of the Act, where he seized and vested alleged alien property pursuant to the powers delegated to him under Section 5b. In the case of *Draeger Shipping Co. Inc. et al. v. Crowley as Alien Property Custodian*, in the United States District Court for the Southern District of New York,[13] the plaintiff Draeger, a citizen of the United States, claiming to be the real and beneficial owner of the stock of a steamship company, brought action against the Custodian, asserting his claim, under the authority of Section 9a of the Act, permitting actions in equity for such purpose by third party claimants other than enemies or allies of enemies; the Custodian having seized and vested all the stock and property of the corporation upon his finding that Draeger's ownership of the stock was for the benefit of a German national. The Custodian proceeding to liquidate the corporation, the plaintiff moved in the action for an order (also expressly authorized by

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[13] February 13, 1943, U. S. Distr. Ct. So. N. Y. File No. Civil 19-385; 11 U. S. Law Week 2626.

Section 9a) directing that the Custodian retain custody of the corporation's property until final judgment. The Custodian contended that Section 9a authorizing such procedure did not apply to action taken under Section 5b; and that the plaintiff should pursue the administrative remedies provided by regulation, and that, at least until he pursued these administrative remedies, he could not seek judicial relief. Judge Bondy of the District Court decided against the Custodian's contention and directed him not to liquidate the business or sell its stock until determination of the action. He held that Congress, in amending the Trading with the Enemy Act, Section 5b, showed its intention to make the provisions of the new law a part of an existing statute, rather than a new and independent statute; and that if Section 5b were construed alone, it does not provide any remedy for the return of property claimed by a citizen, and does not even require the administrative procedure of filing a claim, which has in fact been set up; and might be of questionable constitutionality. The *Draeger* decision thus indicates that all the provisions of the Act are applicable to the present Custodian. I am informed that the *Draeger* case has been appealed to the Circuit Court of Appeals, and may yet reach the United States Supreme Court. The question is of such importance and so doubtful, that Congressional action clarifying the situation may be required.

The earlier vesting orders issued by the Custodian recited that they were made pursuant to the authority conferred by Section 5b, as amended, of the Trading with the Enemy Act.[14] Later, as in the vesting order issued in the *Draeger* case just now referred to, the orders have come to recite that they are made pursuant to the authority conferred upon the Custodian under the Trading with the Enemy Act as amended, and Executive Order No. 9095 as amended, and pursuant to law.[15] This change to more general language, however, has apparently not reflected any change in the conception of the Custodian and his counsel as to the source of his powers, since in the *Draeger* case, the vesting order in which used the more general recital, they urged that the vesting was pursuant to Section 5b as amended, and that the Custodian was therefore acting under the delegated powers set forth in that section, and was not amenable to the statutory provisions of Section 9a governing his exercise of those powers. It may be inferred that in thus broadening the recital of the powers invoked, the Custodian meant to rely on any authority possessed by him from any source.

The fact that the Federal District Court in New York, in the *Draeger* case decided against the Custodian's contention and held the provisions of Section 9a applicable to seizure under Section 5b as

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[14] cf. Vesting Order No. 1, 7 Fed. Reg. 2417.

[15] cf. Vesting Order No. 161 (The *Draeger* case, supra, note [13]) 7 Fed. Reg. 8568.

amended, does not yet settle the question; and we must await a determination by the higher court, or Congressional action, to settle the question.

From what has been said to this point, it will be seen that doubt exists, in the absence of final authority, as to whether the Alien Property Custodian is the same official provided for by the Trading with the Enemy Act of 1917, with his powers and duties largely provided by statute; or whether he is a new and different official with the same old name, but purely a creature of administrative law. Certainly, under his broad administrative powers under the First War Powers Act of 1941[16] the President can at any moment abolish the office of Custodian; delegate any or all the Custodian's functions to any other government office or agency; change the Custodian's title; take all his duties back into his own hands personally; exercise the powers of the office over the head of the Custodian in any case; and generally exercise the complete administrative control of the subject matter delegated to him by Congress. Suppose that in his Executive Order creating the Custodian's office[17] the President had designated the Custodian by some other title, for example, the "Administrator of Enemy Property". By the mere use of a different title, the doubt would have been superficially more apparent, as to whether the statutory provisions of Sections 7, 8, 9 and 12 of the Act would govern the functions of such official. As it is, although the title of the official is the same as that used in the Act, the same question is there, but not so obviously: Is the present Alien Property Custodian solely a creature of the President's administrative powers, governed only by the President's or his own regulations; or is he a creature of Congress, bound by its statutory limitations expressed in the provisions of Sections 7, 8, 9 and 12 of the Trading with the Enemy Act?

Until the answer to this question is known, the only safe position for title examiners and insurers to take is that the Custodian is bound by the statute as well as his own regulations. Following this principle for the present, it is in order, in reviewing the Custodian's powers and duties, and in passing on any procedure taken by him, to examine the proceedings in the light of the provisions of the Act, as well as the Custodian's regulations. It should be borne in mind, however, that it may yet be decided by higher courts that the subsequent provisions of the Act (Sections 7, 8, 9 and 12) are inapplicable to the present official, and obsolete; in which event we shall then look only to administrative rules and regulations for our answers.

We come now to consideration of the functions of the Custodian.

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[16] Supra, note [3].

[17] Supra, note [1].

The President's Executive Order creating his office[18] specifies his powers. Those of interest to title men may be summarized as follows:

1. To direct, manage, supervise, control or vest with respect to any of the following property:

(a) Any business enterprise which is a national of a designated enemy country or of any foreign country; and any property owned or controlled by or payable or deliverable to such business enterprise, or evidencing ownership or control of it; and any interest in such business held by a national of an enemy country or foreign country. In other words, the Custodian may seize not only the property of enemy aliens; he may also seize the property of neutral, or non-combatant, or, theoretically, even of friendly aliens, and that of our own citizens residing in enemy territory. But it is provided that in the case of nationals of foreign countries as distinguished from the nationals of enemy countries, the Custodian must, as a condition of his seizure, determine and certify to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either to (i) provide for the protection of the property; (ii) to change personnel or supervise the employment policies; (iii) to liquidate, reorganize or sell; (iv) to direct the management in respect to operations; or (v) to vest.

(b) Any other property within the United States owned or controlled by a designated enemy country or national thereof. This broad category is immediately narrowed, however, by the provision that it does not include cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities, except to the extent that the Custodian determines that such excepted property is necessary for the maintenance or safeguarding of other property belonging to the same enemy and subject to be vested. In other words, this seems to mean, for example, that ordinarily the Custodian may not seize and vest money, credits, exchange or similar property, belonging to enemies, but must leave that type of property subject to the Foreign Funds Control agency of the Treasury Department; but, if he has seized and vested, for example. a parcel of unimproved real property belonging to an enemy, he may also seize and vest a bank account belonging to the same enemy if that be necessary to the maintenance or safeguarding of the real property—for example, to pay taxes on the latter.

(c) Patent rights, trademarks, copyrights, applications therefor, and any property held in connection therewith, such as royalties and license fees, in which any foreign country or national thereof has any interest. The wording of this provision[19] raises an interest-

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[18] Supra, notes [1] and [2].

[19] Subdivision (d) of Section 2 of Executive Order 9193, supra, note [2].

ing question in passing, as to whether it means that if a fractional interest in a patent is owned by a foreign national, and the remaining interest by a citizen of the United States residing here, the entire interest in the patent, including that of the resident citizen, may be seized and vested by the Custodian. Strictly construed, the language seems to mean just that. The question is not of great relative importance to title men, however.

(d) Any ship or vessel or interest therein, in which any foreign country or national thereof has an interest.

(e) Any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision, or which is in partition, libel, condemnation or other similar proceedings, and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof. (Note that here the power of seizure and vesting is not in terms extended to the property of foreign nationals but only that of enemy nationals; but remember that the term "enemy national" can include a citizen of the United States in enemy territory.)

2. To represent any person within an enemy country or enemy-occupied territory in connection with any court or administrative action or proceeding within the United States, and to take such other and further measures in connection with so representing any such person "as in his judgment or discretion may be in the interest of the United States". In this connection the Custodian may charge any property recovered in such proceeding with his costs and expenses incurred in such representation. Note particularly the provision measuring the right to represent enemy nationals by the extent to which the Custodian shall determine it to be in the interest of the United States.

3. To exercise generally, in carrying out his functions, all the powers and authority conferred on the President by Section 5b as amended of the Trading with the Enemy Act, including without limitation thereto the right to make such investigations and require such reports as the Custodian deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under the Executive order. This is a delegation of power so broad that it is questionable whether it is to be taken at its apparent face value. Section 5b as amended of the Act includes, among other broad powers, the power of the President to "freeze" transactions. It was probably not the intention to delegate that power to the Custodian, but rather to the Secretary of the Treasury. This broad language of the Order should be read in the light of the opening clause reciting that such broad, general power is delegated "to enable the Alien Property Custodian to carry out his functions under this Executive Order." In other words, it seems that the Custodian may not, in any case whatever,

exercise all the powers conferred on the President by Section 5b as amended; but in any case where his functions of controlling enemy or foreign owned property for the interests of the United States are involved, he may, for that purpose only, exercise the President's powers under Section 5b as amended. The particular provision of the amended Section 5b of the Act, touching on the Custodian's powers is the delegation of power to the President, through any agency designated by him, to hold, use, administer, liquidate, sell or otherwise deal with, in the interest of and for the benefit of the United States, any property or interest of any foreign country or national; and to require information, reports and records concerning the same from any person.

4. To prescribe from time to time regulations, rulings and instructions to carry out the purposes of the Executive Order.

5. To appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of the Executive Order, but within the limitations of funds made available for that purpose.

Turning now to the provisions of Section 12 of the Trading with the Enemy Act[20] we find that the powers and duties of the officer therein referred to as Alien Property Custodian may be summarized as follows:

1. Generally, to exercise all the powers of a common-law trustee in respect of all property, other than money, received by him pursuant to the Act;

2. To manage such property under such rules and regulations as the President shall prescribe;

3. To dispose of such property by sale or otherwise;

4. To exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof; (this would seem to include, for example, the right to vote stock, to protest proposed improvement assessments, to enforce restrictive covenants, and exercise other similar rights incidental to the ownership of property seized by the Custodian);

5. To deposit all money received by him in the Treasury of the United States.

Whether we look to the Executive Order or to all the provisions of the Act, it appears that we can generally reconcile them so far as they relate to the Custodian's powers and authority. It seems

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[20] U. S. Code, Title 50, Appendix, p. 278.

safe to say that he is a statutory trustee of any property seized by him; that he holds title to it for the benefit and in the interests of the United States, and also, ultimately, for anyone to whom the United States by some appropriate means or agency, may order it returned. He may manage and control it, exercise all powers of ownership incidental to it, and dispose of it by sale or otherwise. The word "otherwise", coupled with the power of management, seem to imply positively the power to lease. So far, there is no irreconcilable difference in the substance of the powers conferred by the Act and by the Executive Order. There are some points of difference to be noted. The Executive Order does not appear to authorize the Custodian to seize money and credits except as he shall determine such seizure to be necessary to the maintenance or safeguarding of other property of the same person seized by him. The Act, by implication at least, recognizes the power of the Custodian to seize money and credits. There appears no practical difference even here. Under the Executive Order the Custodian need only make a recital in his vesting order that he has determined that money seized by him is necessary for the maintenance or safeguarding of other property of the same person seized by him; and upon such recital his right to seize the money is conclusive. As a matter of fact Section 12 of the Executive Order[21] goes further than that, in providing that any order of the Custodian shall be final and conclusive as to his power; and Section 13 provides that any action issued by him shall be conclusively presumed to have been issued, made or taken after appropriate consultation and after appropriate certification where required. Any number of bank accounts have been seized by the present Custodian. Picking one instance at random, we find that in Vesting Order No. 492, in the case of Bruno Hollender et al,[22] the Custodian first seized and vested three mortgage debts owing to the designated enemy national; and then, finding that a bank account of the same person in the Manufacturers Trust Company, of New York, was necessary for the maintenance and safeguarding of the mortgage debts owned by the same enemy, seized and vested it also. It seems somewhat straining a point to say that money is necessary to maintain and safeguard mortgage debts owed to the owner of the money, although in some cases that would be true, as where advances for taxes, insurance or repairs were necessary. True or not, the recital in the vesting order is conclusive as to such determination.

Another point of difference between the Executive Order and the Act generally, is to be noted. The pertinent sections of the Act subsequent to 5b (7, 8, 9 and 12) refer to seizures of the property of enemies (which by definition can include our own citizens in enemy territory), or allies of enemies. Section 5b as amended, and the

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[21] Supra, note 2.
[22] Dec. 12, 1942, filed with Fed. Reg. April 28, 1943, 8 Fed. Reg. 5596.

Executive Orders made pursuant to it refer respectively to enemy nationals (which may include our own citizens in enemy-occupied territory) and foreign nationals, and in some instances, as has been seen, the power is conferred to seize the property of foreign nationals, not necessarily enemies or even allies of enemies. Enemies and enemy nationals as those terms are used in the Act and the Order respectively, may be taken as synonymous for most purposes. The term "ally of enemy", however, is more narrowly restricted than the term "national of a foreign country." Therefore, in any case in which the Custodian may seize the property of a national of a neutral or non-combatant country not allied with an enemy country, and not residing in enemy territory, he would do so exclusively under the authority of Section 5b as amended, and of the Executive Order. It remains problematical whether the other sections of the Act would control his exercise of his powers in that case.

At this point we come to consider the actual operations of the Custodian. Let us assume that he has acquired knowledge of a parcel of real property owned by a national and resident of Germany.

Upon learning of such property, and its apparent or purported ownership by an enemy national, the Custodian issues a document known as a vesting order. About fifteen hundred of these vesting orders have been issued to this date. You may find one or more in almost any issue of the Federal Register picked at random since about April, 1942. A typical vesting order recites in substance that pursuant to the authority conferred on him by the Trading with the Enemy Act as amended, and pursuant to Executive Order No. 9095, and pursuant to law, the Custodian finding that the property described in the order is owned by, or payable or deliverable to, or claimed by, as the case may be, a national of a designated enemy country, and having made all determinations required by law, vests the property described, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States. It then directs that the property shall be kept in a special account or accounts pending further determination by the Custodian, reserves the power of the Custodian to return the property or its proceeds or pay compensation therefor if it be determined that either should be done; and provides for the filing with the Custodian of claims to the property by any person other than a national of a designated enemy country, within one year from the date of the order or such further time as may be allowed by the Custodian.

When such a vesting order is issued and filed with the Division of the Federal Register its effect is to transfer title from the former owner. The title thus transferred appears to vest in the Custodian rather than the United States; but it is held by him in the interest of and for the benefit of the United States. At least two Federal

District Courts, although disagreeing with each other as to the full effect of this transfer of title, agree with one another that by the vesting order the title vests in the Custodian.[23] And this is apparently the view of the Custodian, since in the case of *Crowley v. Allen*,[24] filed on April 6, 1943, to establish title to the interest of certain alleged enemy nationals in the *Estate of Alvina Wagner*, deceased,[25] pursuant to a vesting order theretofore made,[26] he alleged in his complaint, among other things, that:

> "By virtue of the Vesting Order, the plaintiff became the owner of, and entitled to receive in distribution, the entire net estate of the late Alvina Wagner, after payment of expenses of administration, inheritance and estate taxes, if any, and debts of the decedent."

Although the title concededly passes to the Custodian, it is a disputed point as to whether this leaves any residue of interest in the former owner, concerning which such former owner has enforcible rights. For example, actions were brought by the United States to declare forfeited certain foreign vessels wilfully damaged by their owners shortly prior to the entry of the United States into the war. In due time the Alien Property Custodian issued vesting orders on some of these vessels. He then moved in one of the cases (that of the vessel "Pietro Campanella")[27] for an order substituting him as defendant in place of the original defendants. His motion was denied, the court stating that the title which passed to the Custodian "is not the absolute title and ownership of the vessels but only the conditional ownership thereof if the claim of the United States to forfeiture is adjudged invalid"; that "it may still be important to the claimant to establish that the vessels were not subject to forfeiture and therefore the interests therein of the claimants taken over by the Alien Property Custodian constituted the full value of the ships"; and in this connection reference was made by the court to the possibility under other provisions of the Trading with the Enemy Act that the property might be returned to the former owner after the war (the court's theory apparently being that this possibility gave the former owner some potential right roughly analogous to a future interest, or something like a possibility of reverter). The court further pointed out that if the Custodian were substituted he would have control of the litigation so far as the defendants' in-

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[23] U. S. v. Italian Steam Vessel "Pietro Campanella", (Oct. 13, 1942) U. S. Distr. Ct. Md.—11 U. S. Law Week 2318; U. S. v. Vessel "Antoinetta" (March 8, 1943) U. S. Distr. Ct. E. Pa. 11 U. S. Law Week 2723.

[24] U. S. District Ct. No. Calif., File No. 22563G.

[25] Estate of Wagner, Superior Court, City and County of San Francisco, File No. 90121.

[26] Vesting Order No. 762, 8 Fed. Reg. 1252.

[27] U. S. v. Italian Steam Vessel "Pietro Campanella," supra, note [23].

terests were concerned and could even consent to a decree of forfeiture without contest; with the result that with the United States and one of its officers as plaintiff and defendant respectively, there would be no adverse interests and no real adjudication.

If this view is adopted by the higher courts, it may well lead to the conclusion that, for example, no decree in an escheat action under our California Alien Property Act, or in a condemnation action under the power of eminent domain would be insurable unless the former owner were joined as a defendant and served with process in one of the manners prescribed by the California law. In fact we may go further and say that the case throws doubt on any decree rendered in any kind of action involving property seized by the Custodian, unless the former owner is joined and served; even though Section 5 of the Executive Order, as amended, creating his office[28] expressly empowers the Custodian to represent enemy nationals in pending litigation, including the acceptance of service of process on their behalf.

But another Federal District Court has reached a conclusion directly contrary to that stated in the "Pietro Campanella" case. In U. S. v. Vessel "Antoinette"[29], which involved virtually identical facts, the court expressly referred to the "Pietro Campanella" case and stated that it did not agree with that decision. The court's argument in the "Antoinette" case was that the vesting order had "the legal effect of transferring completely to the Custodian the property interests of the claimant"; that the claimant's right to defend the forfeiture action rested solely on his claim to the property; that when the claimant lost the title and right to possession of the vessel he lost also the right to defend, his right to possession being the basis of his right to defend the forfeiture libel; that there is not only no objection to the idea of the Custodian acquiring control of the litigation, even though he be an officer of the United States, by being substituted as defendant in action brought by the Unites States, but in fact that is the exact result intended by Congress in the Trading with the Enemy Act. The same court reached the same conclusion in three other cases involving similar facts.[30]

The Federal District Court in Puerto Rico has adopted a view midway between the "Pietro Campanella" and "Antoinette" cases. In *U. S. v. A Certain Motor Vessel et al*,[31] that court decided that it would permit the Custodian to become a party, but would not substitute him in place of the former owner as defendant, since despite the seizure by the Custodian, the former owner still had

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[28] Executive Order 9193, Section 5, supra, note [2].

[29] Supra, note [23].

[30] Commerce Clearing House "War Law" Service, par. 9790.

[31] Dec. 9, 1942, CCH—"War Law" Service, par. 9765.

possible interests to protect, and should be permitted to remain as a party. A similar view was adopted by the Federal District Court for the Eastern District of New York in *U. S. v. Vessel S. S. San Leonardo.*[32]

Along somewhat the same theory it has been held in the New York state courts that the Custodian may not substitute his own attorneys in a probate matter for an enemy whose interest in the estate has been vested, in place of attorneys theretofore lawfully appearing, since the enemy had interests which were entitled to protection.[33]

Going back to the Executive Order creating the office of Custodian, for further light on this question, we find that Section 5 thereof authorizes the Alien Property Custodian "to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States." Notice carefully those words "in the interest of the United States." They appear to be the measure and limit of the power of the Custodian under the Order to represent the former owner, even though title has passed to the Custodian. Since in virtually any case involving property the former owner has potential future interests to protect, is he not a necessary party to every such action? In a condemnation case, for example, where the Federal Government seeks to take land, the Custodian, in representing the alien owner, may be best protecting the interest of the United States by stipulating to a low figure for an award. But is not the alien owner entitled to his day in court for the purpose of urging all possible facts and arguments in support of a higher award by reason of his possible expectancy that at the end of hostilities the property or its proceeds will be returned to him? Cases may be multiplied where there may be conflict of interests between the United States and the alien. If we construe the Executive Order according to its apparent plain meaning, the Custodian must, in "representing" the alien, favor the interest of the United States (which is proper and as it should be, and no criticism of such a course is implied or intended). This, however, leaves for solution the question whether the alien should have his day in court, with a chance to be represented by counsel of his own choosing; or, putting it another way, whether the requirement of due process of law does not demand some process other than service on the Custodian.

Now General Order No. 6[34] of the Custodian provides among

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[32] Nov. 18, 1942, CCH—"War Law" Service, par. 9767.

[33] Estate of Renard, Feb. 9, 1943, Surrogate's Court, N. Y. County, 109 N. Y. L. J. 552, CCH—"War Law" Service, par. 9791.

[34] Aug. 3, 1942, 7 Fed. Reg. 6199.

other things, that in any court or administrative action or proceeding within the United States in which service of process or notice is to be made upon any person in any designated enemy country or enemy-occupied territory, the receipt by the Alien Property Custodian of a copy of such process or notice sent by registered mail to the Custodian at Washington, shall be service of process upon any such person, if, and not otherwise, the Custodian within sixty days from the receipt thereof shall file with the court or administrative body issuing such process or notice, a written acceptance thereof. But it is further provided (note this carefully), that "such process or notice shall otherwise conform to the rules, orders or practice of the court or administrative body issuing such process or notice." What does this last quoted provision mean? It has been suggested that it means merely that the kind of process to be sent to the Custodian shall be the same kind that would have been required if the process could have been sent to the alien. For example, if service of a summons is required, then a summons, and not a citation, or order to show cause, or an informal notice, must be sent to the Custodian. That suggestion has weight and merit, and may be correct. But it is submitted that it may just as plausibly, if not more so, mean that in addition to mailing the process to the Custodian, the regular formalities of process must be followed with respect to the alien defendant. Thus, in a petition for probate of a will, this latter interpretation would require that notice must be sent to the Custodian if there is an enemy heir or legatee; but also that in addition notice must not only be published, *but mailed to the enemy, even if he resides in enemy territory and it is certain that the postoffice will return the notice immediately;* or, that in a quiet title action, where a non-resident alien is a defendant, the mere sending of a copy of the summons and complaint to the Custodian, followed by his appearance, is not sufficient, but in addition there must be not only publication of the summons, but also, if the address of the alien be known, mailing to the alien, even though such mailing is an empty and futile gesture. There is a line of cases, arising out of Civil War conditions in this country, annotated in 137 A. L. R. 1361, 1365, which establish the principle that even if it be impossible for the substituted service in such case to bring notice to the defendant, nevertheless, the mere strict compliance with the procedural law of process, laid down by the State, meets the requirements of due process and bases a valid judgment. The same note in A. L. R. also shows another line of cases to the contrary, holding that where publication and mailing could not possibly bring notice of the action across the enemy lines to the defendant, it is futile and a judgment based on such process does not bind the defendant. The first mentioned line of cases appear preferable from the point of view of giving a sovereign power the control which it should have over property within its territory.

It will be said that the law should not require futile acts. But

merely because a mailed notice or summons will not pass through the mails to enemy territory does not mean that the whole procedure of substituted service is futile. It is a combination of methods apparently found from experience to be most likely to give the defendant an opportunity to appear and be heard, even if for no other purpose than to procure a stay. In one instance the publication may be the important element; in another the mailing. The State has not seen fit to dispense with mailing in war time where mail communication stops (as New York apparently has in Rule 50 of its Rules of Civil Procedure). The substituted process, whatever its required form may be in the particular case, may be the means of bringing into court attorneys seeking and obtaining a stay on behalf of the alien defendant, as happened in *Murray Oil Products Co. Inc. v. Mitsui & Co. Lim.* (Feb. 4, 1942)[35] and in *Spreckels Co. v. S. S. Takaoka Maru*[36].

It may also be suggested that mailing to an enemy is a violation of the Trading with the Enemy Act, entailing penalties. It is true that the Act forbids communication with the enemy (if that term includes the mechanical act of dropping a paper in the mail, when it is certain to be returned by the postal authorities). It is suggested that General License 30A,[37] issued October 23, 1942, under Executive Order 8389, may have the effect of generally licensing the mailing of notices to enemies, in probate proceedings, as a necessary part of the proceedings for administration of estates, where: (a) the decedent was not a national of a blocked country at the time of his death; or (b) was a citizen of the United States and a national of a blocked country at the time of his death solely by reason of his presence in a blocked country as a result of his employment by or service with the United States Government; or (c) the gross value of the assets within the United States does not exceed $5000.00. It must be noted, however, that a publication of the Treasury Department dated March 30, 1943, entitled "Documents Pertaining to Foreign Funds Control," on page 40, calls attention to General Ruling No. 11, which imposes an additional restriction on every license by prohibiting any transaction thereunder which directly or indirectly involves any trade or communication with an enemy national as therein defined. This may have the effect of absolutely prohibiting the mailing of notices, despite the apparent permission of General License No. 30A. In any event, cases of decedents' estates not falling within one of the classes mentioned in General License No. 30A, and cases involving mailing of summons, do not appear to be generally licensed; and it appears necessary in

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[35] Feb. 4, 1942, N. Y. Supreme Court, 33 N. Y. S. (2d) 92.

[36] Feb. 4, 1942, U. S. Distr. Ct. So. Distr. N. Y., 44 F. Supp. 939, see note in 140 A. L. R. 1521.

[37] U. S. Treasury Dept. Publication "Documents Pertaining to Foreign Funds Control," March 30, 1943, p. 39.

those cases (and perhaps in all probate proceedings if General License 30A is construed not to permit mailing), either to obtain a special license to permit mailing, or mail without such special license and thereby incur the danger of being guilty of violating the Trading with the Enemy Act, or dispense with the mailing and rely solely upon process sent to the Custodian and appearance made by him pursuant to his General Order No. 6.

In view of the doubt which exists as to whether the Custodian has power to represent the enemy fully and completely, even though title passes to the Custodian on the vesting order; and in view of the decisions of the various courts of first instance which I have referred to, most of which recognize to some extent a residue of interest in the alien entitling him to be and stay in court, I suggest that there is danger in the practice of insuring titles based on decrees rendered on process against defendants consisting solely of mailing to the Custodian, followed by appearance by him. If it is feared that mailing to the enemy will render one subject to criminal penalties, and no special license can be obtained, then is not the indicated procedure to hold the proceeding in abeyance for the duration? It is not intended to suggest that notice should not be sent to the Custodian as required by General Order No. 6. That seems mandatory to obtain jurisdiction over the Government's interest in the alien's property. But I think it is doubtful whether such notice to the Custodian will procure a decree binding on the alien.

We have been considering the effect of the vesting order as a transfer of title, and some problems as to the extent of the rights it confers on the Custodian. Let us now consider as of what time these rights accrue. We can start by saying that as between the Custodian and the alien there appears no reason why the vesting order should not be effective as at the moment of its signing and issuance by the office of the Custodian.

But when does it charge third parties with notice of it, so as to cut off possible bona fide purchasers or encumbrancers (assuming that there could be any)? Perhaps upon its recordation in the county where the particular property is located. There is some doubt whether there is statutory authority for the recordation of a vesting order. If Section 7 (c) of the Trading with the Enemy Act applies to the present Custodian, there probably is. That section provides, among other things, for the recordation of "requirements" of the Custodian (the term "requirements" being, from the context, subject to the interpretation that it includes the document now known as a vesting order); and that such recordation shall impart the same notice as if a duly executed conveyance to the Custodian had been executed. If Section 7 (c) is inapplicable (and as we have seen, it may be), then we can probably find authority for the recordation of vesting orders in the general power of the Custodian

to vest, control, manage and sell property. He could not do this unless he had the necessarily implied power to acquire and convey a marketable *record* title.

I am informed that it is the general practice and policy of the Custodian to record vesting orders where they cover specifically described real property;[38] but not where they cover interests in estates or trusts (which may include real property). There have been a number of vesting orders describing the vested property by general omnibus descriptions, such as all the property of a designated alien.[39] I am informed that these are not recorded unless the actual existence of specific real property be actually known.

It would appear momentarily that until recordation of a vesting order affecting real property, bona fide purchasers and encumbrancers from the former owner would be protected under the general principles of equity. But a serious question arises as to whether the mere filing of the order with the Division of the Federal Register imparts constructive notice. All such orders are published in the Federal Register. It has been suggested that under Section 7 of the Act of Congress of 1935 establishing the Federal Register[40], the mere publication of the vesting order in the Federal Register gives constructive notice of its contents to all the world. The section in question provides among other things, concerning the filing of a document with the Federal Register, that:

> ". . . . unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this chapter, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby . . . . The contents of the Federal Register shall be judicially noticed. . . ."

The Attorney General of the United States has rendered an opinion that the constructive notice provided by this statute operates

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[38] There appears, however, to be some confusion on this point, and it is not clear that the practice of recording such vesting orders has been uniformly followed, or can be said to be a uniform policy in all the local offices of the Custodian. Some instances are reported by the Executive Secretary of your Association where vesting orders made some time ago, covering specifically described real property have not yet been recorded. This may be merely the result of delay occasioned by the enormous task of organizing the Custodian's office; or it may evidence failure yet to adopt a uniform practice.

[39] cf. Vesting Orders Nos.: 71, 7 Fed. Reg. 7046; 75, 7 Fed. Reg. 7047; 77, 7 Fed. Reg. 7048; 78, 7 Fed. Reg. 7049; 79, 7 Fed. Reg. 7049; 80, 7 Fed. Reg. 7049; 81, 7 Fed. Reg. 7050; 105, 7 Fed. Reg. 7057.

[40] U. S. Code Title 44, Section 307.

from the filing of the document with the Division of the Federal Register and its availability for public inspection; and not from its later publication.[41] It may be, therefore, that the moment a vesting order is filed with the Federal Register, affecting a parcel of land in your particular county, you, in examining the title, and all others dealing with the property, are charged with constructive notice of the order and of the transfer of title resulting therefrom, in the same way and to the same extent as if the order had been recorded in your county at the moment of its filing with the Federal Register.

I am aware that it has been the practice of the Executive Secretary of your Association to notify the respective member companies when vesting orders are issued which affect property in their respective counties, or in which it appears they may be interested. In the majority of cases this will probably protect you adequately. Instances may be conceived, however, where reliance solely on such practice might not protect you. For example, suppose the case of a person with an American name, such as Henry Wilson, residing at Chicago, who holds record title to a parcel of land in Santa Barbara County, which in fact he holds as a "dummy" or on a trust, undisclosed of record, for the benefit of Max Müller, a German national, who has been interned. (Any resemblance to actual persons living or dead is unintended and is purely coincidental.) The Custodian learns that Wilson holds property in trust for Müller, but not being certain as to the exact nature or extent of it, issues a vesting order covering all the property of Max Müller in general terms, reciting that the same stands in the name of Henry Wilson, residing at Chicago; but makes no specific reference to the Santa Barbara County property. As I understand the practice, your Secretary, upon noting the vesting order in the Federal Register, would probably not notify any member of the Association, since there would be no indication on its face that it involved any local property. While we may concede that the vesting order in such case did not make a record title in Santa Barbara County, it may be that any purchaser or encumbrancer from Henry Wilson, the record vestee, after the moment of filing the vesting order with the Federal Register, would be charged with constructive notice thereof and take subject to the rights of the Custodian. While you might not be liable in such cases on standard form policies issued to the purchaser or encumbrancer, insuring only the record title, you might be in a different position under the so-called A. T. A. policy. Of course, you are somewhat protected in such cases by the affidavits you are now requiring, but it is conceivable that the fictitious character Henry Wilson might swear falsely that he was not acting on behalf of a foreign national.

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[41] 38 Opinions of Attorney General 359.

Furthermore, even in those cases where the vesting order would be caught by your Secretary and reported to you, there is, necessarily, a time lag of several days. From the time the order is filed with the Federal Register until the issue in which it is published reaches the Coast, several days will pass in any event, which is a period of possible danger for you. Then, if you rely upon notice from your Secretary, as efficient and prompt as his office is, additional time is required to check the issues of the Register and circularize you. This additional delay, although not in any way the fault of your Secretary's office, increases the period of possible danger.

It is therefore suggested for your consideration that each company might well establish in its plant a new general alphabetical index, of vesting orders, showing the name of every person, any property or interest of whom has been vested. Opposite each name would be shown the number of the vesting order and the book and page of the Federal Register in which it appears. To the extent that it describes specific real property in your county it can be posted directly to the appropriate account in your plant. In examining any title you would then have an additional general alphabetical index to run; and such a system would involve subscription to the Federal Register and careful examination of each issue thereof for the noting of all vesting orders. As previously stated, approximately 1500 vesting orders have to this date, appeared in the Register. Even allowing for the fact that some of them affect several persons, the length of the list at present would not be so great as to render unduly difficult the task of setting up an index at this time. Once set up, it would involve perhaps a total of one, or perhaps two hours a week for one person to check the issues of the Register as they arrive, make up a card on each vesting order and insert it in an alphabetical card index file.

Some other questions present themselves as of particular interest to title men.

Both Section 7 of the Trading with the Enemy Act (if it be applicable), and General Order No. 5 of the present Custodian[42] require in substance that all persons holding property for an enemy national shall report the existence thereof to the Custodian. General Order No. 5 expressly extends this duty to executors, administrators, guardians, committees, curators, trustees under wills, deeds or settlements, receivers, trustees in bankruptcy, assignees for the benefit of creditors, United States Marshals, sheriffs, commissioners, persons acting under trust agreements, and all other persons or officers acting in a similar capacity. The Order further provides that the term "designated national" shall mean any person in any place under the

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[42] Aug. 3, 1942, 7 Fed. Reg. 6199.

control of a designated enemy country or in any place with which, by reason of the existence of a state of war, the United States does not maintain postal communication. And the burden of reporting is placed by the Order on all the specified persons with respect to "any property or interest in which there is reasonable cause to believe a designated enemy country or a designated national has an interest."

Since it is routine practice for title companies to hold escrows and act as trustees under deeds of trust; and many of them hold title to real property under holding agreements; and some have trust departments authorized under the Bank Act to carry on trust business; it is important to consider their duties under this requirement. For example, you may be trustee under a deed of trust securing a note payable to an American citizen interned in the Philippines. Or you may hold title to real property, some interest in which has passed to an alien enemy. The thought even occurs that the meaning of a "designated national" as stated in the Order is so broad as to include American citizens in the armed forces who have become prisoners of war. It may be advisable to ascertain the position of the Custodian with respect to American prisoners of war in custody of the enemy. No general statement can be made as to your procedure; but it would be well for you to review carefully all transactions in which you have custody or control of any property for others. You may discover a duty to report to the Custodian. Forms for such reports, known as Form APC-3, may be obtained from the office of the Custodian at Washington, and presumably, from his nearest local office (there being one, for example, at 417 Montgomery Street, San Francisco).

Another problem that will cause title men particular concern relates to the rights of lien holders on property of persons subject to the vesting powers of the Custodian. Section 8 of the Trading with the Enemy Act provides, among other things, with certain provisos, that anyone not an enemy or ally of enemy holding a lawful mortgage, pledge or lien, or other right in the nature of security in property of an enemy or ally of enemy, which, by law or by the terms of the instrument creating such mortgage, pledge or lien, or right, may be disposed of on notice or presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the Custodian in accordance with regulations. If applicable, this appears on its face to authorize trustees' sales under deeds of trust on property vested by the Custodian, and sales under power, in mortgages, and pledge sales. Section 9 (a) provides for claims by persons claiming any interest in the seized property, and authorizes a person claiming any interest, right or title in any money or property seized by the Custodian, or to whom any debt may be owing

from an enemy or ally of enemy whose property shall have been seized, to institute a suit in equity in the Supreme Court of the District of Columbia or 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 which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property or the interest therein to which the court shall determine the claimant to be entitled. By a broad and liberal interpretation, and standing alone, this section, if applicable at all, might be construed to permit the bringing of foreclosure actions against the Custodian, but in the federal courts only. Section 9 (f) restricts actions against seized property to those permitted in the section, and no other, by providing that except as in the Act provided, the seized property "shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." It is thus clear that if foreclosure actions on liens on seized real property are permitted at all by the Act, they must be brought under Section 9 (a), in the Federal Court.

Furthermore, it is doubtful, as already pointed out, whether Sections 8 and 9 apply at all to property vested by the present Custodian. Certainly the terms of these Sections, referring to property of an enemy or ally of enemy do not appear to include nationals of neutral countries, whose property, as has been seen, may be vested by the present Custodian.

It appears therefore, that the right to bring foreclosure actions at all against the Custodian is at present problematical. If they can be brought, it is probable that only the Federal Court has jurisdiction.

In this connection the problem arises whether the Custodian takes, or can sell, title free of the lien, subject to the filing of a claim based on the lien, payable out of the property or its proceeds in due course of administration by the Custodian; or whether the Custodian takes only the equity of the former owner, subject to the lien. For example, can the Custodian, as bankruptcy courts may, sell the property free of the lien, transferring the lien to the proceeds?

These questions as to liens, and the connected ones of the rights of creditors, particularly attachment or execution holding creditors, are open, and not subject to solution at the moment. Here, again, either decisions of the higher courts, or legislative clarification by Congress will be necessary. In the meantime, it is suggested that consideration be given to the provisions of General Order No. 1,

which is Regulations Part 501 (Secs. 501.1(a) to (h)).[43] This regulation provides for the filing with the Custodian of claims to property vested by him. A form known as Form APC-1 is prescribed, to be filed in triplicate. All such claims are passed on by a committee established by the Regulation, known as the Vested Property Claims Committee, which is empowered to subpoena witnesses and compel the production of documents. Hearings before the Committee are held on notice unless notice is waived, and parties are entitled to be represented by counsel. A transcript of the hearing is made up and submitted, with the findings and recommendations of the Committee, to the Custodian, who makes the decision as to the rights of the claimant, giving notice thereof, and taking appropriate action to effectuate his decision. (In this connection it is to be noted that in at least one instance[44] the Custodian has divested himself of property and directed its return to the claimant who had filed a claim on Form APC-1.) It is suggested that any lien holder on property vested by the Custodian, including mortgagees, and beneficiaries and trustees under deeds of trust, may possibly lose valuable rights if he fails to file Form APC-1 setting forth his claim of lien, within the time limited. The vesting orders provide as a routine matter, for the filing of claims on Form APC-1 within one year from the date of the order. On March 13, 1943, however, the Custodian, by General Order 21,[45] directed that "without limitation by reason of any provision as to a specified claim period in any vesting order heretofore issued, any person, except a national of a designated enemy country, asserting any claim arising as a result of a vesting order, may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, at any time up to and including September 1, 1943, or within such further time as may be provided in such order or on application or otherwise." At present therefore (on the assumption that all vesting orders have prescribed a one-year period), the time to file claims with respect to any vesting order issued prior to September 1, 1942, has been extended to and including September 1, 1943; and the time to file claims with respect to any vesting order issued after September 1, 1942, will expire on the date prescribed in such order (which, as stated, appears to be in all cases, one year from the date of the order); and all these time limits may possibly be further extended by further general order or on special application. It is suggested that you pay special attention to those transactions in which your company has been named trustee under any deed of trust, covering vested property, to determine the advisability of (and perhaps your company's responsibility for) filing

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[43] March 25, 1942, 7 Fed. Reg. 2290.

[44] Divesting Order No. 1, April 19, 1943, 8 Fed. Reg. 5276; (see also 8 Fed. Reg. p. 7053—issue No. 104, dated May 27, 1943, received after delivery of this exposition, showing Divesting Order No. 2).

[45] 8 Fed. Reg. 3245.

claims on such deed of trust with the Custodian, or at least, of calling the matter to the attention of the beneficiary.

Another problem which may cause us some trouble is that of sales by the Custodian. According to press and radio announcements the Custodian will shortly offer for sale a great amount of property, and we shall all probably be called on to insure many titles made by his sales. A few sales have already been held by him. I am informed that in the sales so far held, as a matter of precaution, he has conformed to the requirements of Section 12 of the Trading with the Enemy Act, in spite of the grave doubt as to whether that section applies to him. It provides in effect that he may sell only to the United States or to American citizens, at public auction, to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President, stating the reasons thereof, in the public interest shall otherwise determine. The Custodian, on the order of the President stating the reasons thereof, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the Custodian for an undisclosed principal, or for re-sale to or for the benefit of a non-citizen of the United States, is guilty of a misdemeanor and subject to a fine or imprisonment or both; but there appears no provision invalidating the sale in such case. It occurs to me, however, that the Custodian could on general principles of equity, have such an unlawful sale cancelled and set aside at least in some cases; and therefore title examiners should bear this possibility in mind in examining sale proceedings.

If Section 12 of the Act shall be held inapplicable to the present Custodian, then the procedure as to sales will have to be found either in such regulations as he may adopt, or in clarifying legislation. Until that time, we should apply to sales the test, not only of such regulations as the Custodian may promulgate, but also the provisions of Section 12.[46]

It is my present opinion that the recitals contained in a deed by the Custodian, showing compliance with the law holding the sale, would establish of record a presumption of their truth, based not only on the general presumptions of regular and fair dealing, and of due and regular performance of official duty, but also under Section 12 of Executive Order 9193 (Order 9095 as amended)[47] creat-

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[46] Subsequent to the preparation of this address regulations of the Custodian with respect to sales of property were promulgated on May 29, 1943, and filed with the Federal Register on June 8, 1943, as General Order No. 26. See 8 Fed. Reg. 7628, issue of June 9, 1943.

[47] Supra, note [2].

ing the office of the Custodian. That Section has the effect of declaring, among other things, that "actions issued or taken" by the Custodian shall be final and conclusive as to his power. This is very general language, but I think it is subject to the interpretation that it gives finality to the recitals in deeds made by the Custodian. If the Executive Order could be further amended so to give conclusive effect to the recitals in deeds and other muniments of title executed by the Custodian or in his name, it would be very helpful.

In passing, it may be noted that you may run upon deeds, and other documents issued in the Custodian's name by his deputies. Various appointments of deputies for various purposes appear in the Federal Register to date. For example, Mr. James E. Markham[48] appears to have full powers as Deputy. Messrs. S. James Crowley and Edward C. Tefft,[49] Francis J. McNamara, Homer Jones, and Howland H. Sargeant[50] have been delegated various duties. No attempt is here made to determine or state their powers and authority. You are referred to the respective orders of appointment on file in the Federal Register.

One further word of warning about sales made by the Custodian (and, for that matter, about any other dealings or transactions by him): General Order No. 8[51] provides among other things, in effect, that no person connected directly or indirectly with the Office of Alien Property Custodian shall effect or cause to be effected for personal profit or benefit any sale or purchase of, or other transaction in, or otherwise deal or participate in any property or interest therein concerning which the Custodian has acted or may hereafter act. Employees of the Office are considered to have a beneficial interest in transactions of their husbands or wives, and such transacitons are therefore deemed to come within the Order.

Another problem which must not be passed without notice arises in connection with the effect of the Alien Land Act of California on vestings made by the Custodian, where the vesting order contains a finding that the property is owned by or held for a national of Japan. It would appear that any vesting order so finding would, while vesting the interest of the Japanese national, at the same time and by the same token, raise on the record at least a presumption that the title so vested, despite its former record condition, was in fact subject to forfeiture by the State of California and to escheat

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[48] 7 Fed. Reg. 2363, March 19, 1942; further specific powers to execute proxies, Oct. 30, 1942, 7 Fed. Reg. 8911.

[49] Oct. 30, 1942, 7 Fed. Reg. 8910.

[50] May 8, 1943, 8 Fed. Reg. 6694.

[51] Sept. 17, 1942, 7 Fed. Reg. 8377.

proceedings under the Alien Land Act. It has been suggested on behalf of the Custodian that title does not pass under the escheat provisions of the Alien Land Act until the entry of the judgment, and that if the Custodian has vested before that time, he acquires a title free of the State's right of escheat; on the theory that if the property goes into lawful hands before escheat, it is not thereafter subject to escheat. It seems to me, however, that this suggestion overlooks the provision of the Alien Land Act that the escheat, when decreed, is effective by relation back to the date of unlawful acquisition by the alien. You have heard Mr. Otis express his view that upon the title returning to a citizen the State's right of forfeiture is cut off. As he stated, the point is undecided. I am inclined the other way. It seems to me that the provisions of the Act providing that the escheat shall take effect by relation back to the time of unlawful acquisition may have the effect of preventing the right of forfeiture from being cut off on acquisition by a citizen. To be sure, *Mott v. Cline*[52] stated that when the title to property owned by an ineligible alien goes back into lawful channels, it is not subject to escheat. But the provisions of the Alien Land Act for escheat by relation back to the date of unlawful acquisition were put into the Act after the time as of which *Mott v. Cline* spoke; and I take it that we have no final determination on the question whether property subject to escheat becomes free of the State's right of escheat upon returning to eligible hands. There is so much to be said in favor of the view that the relation-back provisions of the Act cause the title to remain subject to escheat even after returning to eligible hands, that in our office we have taken the position a number of times that we will not insure against the possibility of escheat under the Alien Land Law in such a case, until the title has been back in undoubtedly eligible hands for more than ten years, after which time, we have, on occasion, insured in reliance on the provisions of Section 315 of the Code of Civil Procedure binding the State not to sue to recover real property unless its rights accrued within ten years prior to action brought, or it has received rents and profits of the land within that time. At the moment, and in the absence of convincing authority, there appears no reason why the same position should not be taken (if you take it ordinarily) where the title goes from the ineligible alien to the Custodian as where it goes from the alien to a private citizen. It therefore seems the part of caution, until the point is authoritatively decided, to insert an exception in the policy of title insurance in such cases, noting the possibility that the title acquired by or through the Custodian's vesting order is subject to the possible rights of the State to escheat under the Alien Land Act.

Another point which should be referred to is the effect of General

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[52] (1927) 200 Cal. 434, 448-9.

Order 20 of the Custodian.[53] This forbids payment, transfer or distribution of any property of any nature whatever, to or for the benefit of any designated enemy country or designated national, unless

1. The Alien Property Custodian has issued to the designated national a written consent; or

2. (a) Filed a written statement in the court or administrative action or proceeding in connection with which the payment, transfer or distribution is proposed, that he has determined not to represent the designated national; or

(b) Represented the national in such action or proceeding by the appearance therein of a representative on behalf of the designated national, and such representative has been served by the designated person with written notice of the proposed payment, transfer or distribution, and ninety days have expired without the exercise of any other power or authority by the Alien Property Custodian in respect to such property.

Even if one of the above requirements is complied with, no such payment or transfer or distribution may be made if it violates the so-called "freezing orders" issued by the President.

This order applies to property in the control or custody of executors, administrators, guardians, committees, curators, trustees under wills, deeds or settlements, receivers, trustees in bankruptcy, assignees for the benefit of creditors, United States marshals, sheriffs, commissioners, persons acting under trust agreement, and all other persons or officers acting in a similar capacity.

Thus it would appear advisable for you to watch carefully all deeds, reconveyances, payments out of escrow and other transfers made by you, to see that none go to any enemy national, without consent of the Custodian. And, remember the possibility of American citizens being enemy nationals in certain cases. Furthermore, no probate decree of distribution or order settling a trustee's account and directing distribution should be passed if it contains a provision for distribution to an enemy national, unless the requirements of General Order 20 have been complied with.

One last point which should not be overlooked, is connected in some degree with some of the questions raised by General Order No. 20 just now referred to. It arises out of the provisions of Sections 259, 259.1 and 259.2 of the Probate Code as enacted in 1941. Those sections provide in effect that where any foreign country does not permit citizens of the United States to take property by

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[53] February 10, 1943; 8 Fed. Reg. 1780.

inheritance or testamentary disposition, or does not permit them to receive payment of any such inheritance or legacy, in money, in this country, the citizens of that country will not be permitted to inherit or take by testamentary disposition in this State. The burden of proof is on the alien to prove his right to take, in this State, under these provisions; and, if no "heirs" are found to whom the property goes, the property is disposed of as under the Code provisions on escheat. The question has arisen in a number of pending cases whether the Superior Court, sitting in probate, may determine the applicability of these sections as against the claims of the Alien Property Custodian. The question whether these Code sections have cut off the Alien Property Custodian's rights to a legacy or inheritance which would otherwise go to an enemy national, appears to be one within the jurisdiction of the Court having jurisdiction of the administration of the estate. The Custodian, however, has raised the question whether his rights can be cut off by the court sitting in probate; and apparently is inclined to the view that the Federal District Court has jurisdiction of all such questions. A case is now pending in the Federal Court in San Francisco, arising out of the Alvina Wagner Estate there[54] (which I have already referred to) which may involve and eventually decide this question. For the present, it appears the conservative practice to pass decrees of distribution or decrees settling trustees' accounts and directing distribution, and perhaps, decrees determining heirship, only when the provisions of General Order 20 have been complied with. It may be observed, that the Superior Court sitting in probate, if it denies distribution to the alien, and makes alternative distribution to other heirs (or perhaps to the residuary legatees, if that be determined to be the effect of the code sections), has not violated General Order 20, even if the Order has not been complied with, because it has not made distribution to an enemy national. It seems better practice, however, to be sure that the Custodian has had the required opportunity to appear and assert the interests of the United States.

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[54] Supra, notes [24] and [25].