

1947

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Francis X. Fallon, Jr.

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Recommended Citation

Francis X. Fallon, Jr., *Enemy Business Enterprises and the Alien Property Custodian, II.*, 16 Fordham L. Rev. 55 (1947).

Available at: <https://ir.lawnet.fordham.edu/flr/vol16/iss1/3>

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ENEMY BUSINESS ENTERPRISES AND THE ALIEN PROPERTY CUSTODIAN, II*

FRANCIS X. FALLON, JR.

D. Other Business Organizations

The Custodian's vesting program in the business enterprise field has not been confined to the vesting of enemy ownership interests in domestic corporations and partnerships. Business organizations of other types have been included, notably United States branches of enemy corporations organized abroad, individual proprietorships, and non-profit institutions or membership organizations of various types.¹¹¹ In the case of United States branches of enemy banking and insurance companies, the Custodian has generally resorted to a rather specialized type of vesting order, according recognition to the jurisdiction and powers of the banking and insurance authorities of the various States. Most if not all of such companies had been in process of liquidation by the state authorities since the outbreak of the war. The Custodian, as the paramount federal authority,¹¹² assumed formal supervision of

*Part I of this Article analyzed § 5(b) of the TRADING WITH THE ENEMY ACT as amended, and EXEC. ORDER No. 9095 as amended, the principal sources of the Custodian's powers, and began discussion of the exercise of the Custodian's powers thereunder. Exercise of the vesting power (a) in the light of the Custodian's findings and determinations, and as applied to (b) domestic corporations and (c) partnerships, has been considered. Part II concludes with consideration of the vesting power as applied to other types of enemy business enterprises, and discussion of some of the other powers exercised by the Custodian in the administration, liquidation and sale of enemy business enterprises, their assets or ownership interests therein.

Since Part I went to press the President by EXEC. ORDER No. 9788, October 15, 1946, 11 FED. REG. 11981, terminated the Office of Alien Property Custodian and transferred all of its property, powers and functions to the Attorney General, who by regulation, created in the Department of Justice the Office of Alien Property to exercise such powers and functions under a Director (11 FED. REG. 12045, 12435-6, 14135, 14155). The transfer made no change in such powers and functions, and the Director of the Office of Alien Property for all practical purposes acts for the Attorney General in his capacity as Alien Property Custodian. For simplicity and convenience in reference, therefore, the former terminology will be continued.

111. CUSTODIAN'S 1945 REPORT 33. See the broad definition of "business enterprise" in § 10(b) of EXEC. ORDER No. 9095 as amended, Part I, note 5 *supra*.

112. Regulation of banks and insurance companies is normally within the State police power, *Noble State Bank v. Haskell*, 219 U. S. 104 (1911). The Custodian powers, however, are in an exclusively federal field, *Stoehr v. Wallace*, 255 U. S. 239 (1921), which he may pre-empt if he chooses. See *Davies Warehouse Co. v. Bowles*, 321 U. S. 144 (1944); *Parker v. Brown*, 317 U. S. 341 (1943); *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 143 (1942), as amended in, 315 U. S. 786 (1942); *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79 (1939); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 Fed. 746 (C. C. A.

the liquidations and of the activities of the state banking and insurance authorities in connection therewith, but vested only the "excess assets" of the companies after completion of the liquidation and payment to domestic creditors or depositors under the applicable state law.¹¹³

For domestic branches of enemy business organizations such as steamship lines,¹¹⁴ and commercial, mercantile and trading concerns,¹¹⁵ the Custodian has almost without exception employed asset or "all property" vestings.¹¹⁶ This type of vesting was not resorted to because of any theoretical or practical difficulties inherent in treating an alien corporation as an "entity" under our law. Generally speaking, state corporation laws accord recognition to foreign corporations whether organized under the laws of another state of the union, or of some foreign state, without substantial distinction.¹¹⁷ But a corporation organized in an enemy country is an "enemy" under the statutory definition, in addition to being an "enemy national" under the Execu-

2d, 1922); *Keppelman v. Palmer*, 91 N. J. Eq. 67, 108 Atl. 432 (1919); *cf.* *Markham v. Allen*, 326 U. S. 490 (1946).

113. *See, e.g.* V. O. 1324, *Yokohama Specie Bank*, 8 FED. REG. 5608; V. O. 1325, 1326, *Sumitomo Bank*, 8 FED. REG. 5609, 5610; V. O. 1082, *Meiji Fire Insurance Co.*, 8 FED. REG. 3646; V. O. 1083, *Sumitomo Marine & Fire Ins. Co.*, 8 FED. REG. 3646. In some of the banking and insurance cases, the Custodian used asset or (where the concern had incorporated domestically) stock vestings: V. O. 195, *Banco di Napoli Trust Co.*, 7 FED. REG. 9466; V. O. 200, *Pilot Reinsurance Co.*, 7 FED. REG. 9361; V. O. 218, *Assicurazioni Generali di Trieste*, 7 FED. REG. 9466; V. O. 1225, *Yokohama Specie Bank (Seattle, Wash., branch)*, 8 FED. REG. 5598. Where stock interests were vested, the corporate entity was preserved, and the banking or insurance concern liquidated under applicable state law. Aside from the type of vesting order, the banking and insurance cases present rather specialized liquidation problems under the banking and insurance laws of the various states, which are beyond the scope of this Article. *See* CUSTODIAN'S 1944 REPORT 57, 87; CUSTODIAN'S 1945 REPORT 54, 86, 93; *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. (2d) 726 (1944); *Orvis v. Bell*, 182 Misc. 616, 46 N. Y. S. (2d) 259 (Sup. Ct. 1944), *aff'd*, 258 App. Div. 851, 50 N. Y. S. (2d) 683 (1st Dep't 1944), *aff'd*, 294 N. Y. 844, 62 N. E. (2d) 395 (1945); *Yokohama Specie Bank v. National City Bank*, 182 Misc. 369, 44 N. Y. S. (2d) 463 (N. Y. City Cts. 1943), *rev'd*, 183 Misc. 610, 52 N. Y. S. (2d) 97 (Sup. Ct. 1944).

114. V. O. 77, *Kawasaki Kisen Kaisha*, 7 FED. REG. 7048; V. O. 126, *Hamburg American Line-North German Lloyd*, 7 FED. REG. 7061; V. O. 135, *Yamashita Lines*, 7 FED. REG. 7063; V. O. 182, *Italia S. A. di Navigazione*, 7 FED. REG. 8569.

115. V. O. 78, *Asano Bussan Co., Ltd.*, 7 FED. REG. 7049; V. O. 105, *Mitsui & Co., Ltd.*, 7 FED. REG. 7057; V. O. 133, *Mitsubishi Shoji Kaisha Ltd.*, 7 FED. REG. 7063.

116. CUSTODIAN'S 1945 REPORT 33 lists, of a total of seventy-three vested enemy business enterprises exclusive of domestic partnerships and corporations, and excess asset vestings, only three cases (unidentified) where "interests" rather than "assets" were vested.

117. N. Y. GEN. CORP. LAW § 13; 17 FLETCHER, *CYC. CORP.* (Perm. ed. 1933) § 8290, *et seq.*

tive Order,¹¹⁸ and the judicial precedents which prevented the seizure of assets of enemy-owned domestic corporations did not apply.¹¹⁹ Indeed, there was no practical alternative open to the Custodian. To embark upon an inquiry into the nature and degree of enemy ownership interests in such concerns would not only have required recourse to enemy law, but also to corporate books and records, usually located at the home office of the enterprise and almost never available to the Custodian.¹²⁰ The "asset" or "all property" vestings therefore employed differed from the stock or interest vestings used in domestic corporation and partnership cases in at least two important respects, with consequent differences in subsequent administration of the vested prop-

118. TRADING WITH THE ENEMY ACT, § 2(a); EXEC. ORDER No. 9095 as amended, § 10, notes 5 and 34, Part I *supra*.

119. *Hamburg-American Co. v. United States*, 277 U. S. 138 (1928); *Behn Meyer Co. v. Miller*, 266 U. S. 457 (1925); CUSTODIAN'S 1944 REPORT 26. CUSTODIAN'S 1945 REPORT 33 lists three cases (unidentified) where "100% assets" of domestic corporations were vested. See Part I, note 69 *supra*, and text. The Hugo Stinnes Corp. stock and/or voting trust certificates there stated to have been "held" by Atlantic Assets Corp. (all of whose stock was vested by the Custodian, V. O. 84, 7 FED. REG. 7051; V. O. 2170, 8 FED. REG. 12763) were vested on the basis of a finding that they were beneficially owned by another enemy national, V. O. 2080, 9 FED. REG. 2504. *But see* V. O. 352, 7 FED. REG. 11033, wherein 80% preferred and 66% common stock interests were vested in International Mortgage and Investment Corp., a domestic corporation; the interests of partners (percentage unspecified, but apparently all) in Bridge Import Co., a domestic partnership, were vested on a finding that such interests were beneficially owned by the corporation, in V. O. 353, 7 FED. REG. 10735; and then certain personal property owned by the partnership was directly vested by V. O. 4754, 10 FED. REG. 3474. All of the stock of Pioneer Import Corp., another domestic corporation, was vested on the basis of findings that it was beneficially owned by International Mortgage and Investment Corp., V. O. 354, 7 FED. REG. 10735; V. O. 4755, 10 FED. REG. 3408; and certain personal property of Pioneer Import Corp. was also directly vested. V. O. 4755, 10 FED. REG. 3408. All of the stock of Equities Development Corp., a domestic corporation in dissolution, was vested, V. O. 1334, 8 FED. REG. 8570, and later, all the property of the corporation, V. O. 4283, 9 FED. REG. 13535. Also vested was certain personal property owned by Siemens, Inc. V. O. 5005, 10 FED. REG. 7064, a domestic corporation, all of whose stock had been previously vested, V. O. 35, 7 FED. REG. 5077. In V. O. 58, 7 FED. REG. 5742, all the stock of Ataka & Co., Ltd., a New York corporation, was vested because beneficially owned by Ataka & Co., Ltd., of Japan. In V. O. 4943, 10 FED. REG. 7503, a bank account was vested as owned by Ataka & Co., Ltd., New York, and/or Ataka & Co., Ltd., Japan. In V. O. 4944, 10 FED. REG. 7544, all the stock of Comet Tools, Inc., a New York corporation, was vested; and in V. O. 4945, 10 FED. REG. 7545, the interests of Comet Tools, Inc. and others in Comet Tools Co., a New York partnership, and all the property of the partnership were vested, on the basis of a finding, among others, that the property and assets of the partnership were beneficially owned by Comet Tools, Inc. The partnership and all of its property were also placed under the Custodian's supervision.

120. See Matter of Engelhard, Final Determinations of A. P. C. Vested Property Claims Committee, 48 (1944).

erty: (1) The enemy entity was stripped of its assets, which became the property of the United States, but was otherwise left, a still existing if somewhat theoretical legal shell;¹²¹ and (2) possible American or non-enemy stock or other ownership interests in the enterprise were of necessity ignored.¹²²

"All property" vestings have been uniformly employed for enemy non-profit organizations in this country,¹²³ but the vesting orders and their findings show a wide variation.¹²⁴ Since unincorporated associations and domestic membership corporations ordinarily do not issue stock or certificates therefor, the use of the stock vesting order, generally employed for domestic corporations, was precluded. In addition to the assets, "the interests of all the members therein" were sometimes vested,¹²⁵ although none of the vesting orders in this type

121. The Custodian also frequently "undertook supervision" of the enterprise whose assets he vested. V. O. 4363, M. Kobayashi Store, 10 FED. REG. 690 (sole proprietorship); V. O. 4133, Carl A. Sonnen, 9 FED. REG. 12297; V. O. 4365, Nikka Life Ins., 9 FED. REG. 14738.

122. Cf. Matter of Engelhard, Final Determinations of A. P. C. Vested Property Claims Committee 48 (1944). Such ownership interests may have been seized by enemy governmental action. PUB. L. No. 322, 79th Cong., 2d Sess. (March 8, 1946), adding § 32 to the TRADING WITH THE ENEMY ACT gives certain rights to return in cases where the stock or other proprietary or beneficial interests in the enemy organized corporation or association were owned 100% by American citizens or corporations. No provision for return is made to foreign (non-enemy) ownership interests, or American partial ownership interests; such cases being left to international negotiation and agreement, and possible further legislation. See CUSTODIAN'S 1945 REPORT 13-14; CUSTODIAN'S TERMINAL REPORT, Oct., 1946; *Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 3750, 79th Cong., 1st Sess. (1945) 55 et seq.*, entitled "Return of Vested Property To Persons Not Hostile To the United States"; SEN. REP. No. 920, 79th Cong., 2d Sess. (1946) 4; H. R. Rep. No. 1269, 79th Cong., 1st Sess. (1945) 4.

123. CUSTODIAN'S 1945 REPORT 33 lists twelve such organizations. Cf. MYRON, *The Work of the Alien Property Custodian*, 11 DUKE LAW & CONTEMP. PROBS. 76, 80-81 (1945).

124. V. O. 215, 7 FED. REG. 9362, found and determined The Nippon Club Inc. to be a New York corporation and an enemy national, and vested all of its property, without further detailed findings or determinations; V. O. 232, 7 FED. REG. 9057, found and determined Japan Institute, Inc. to be a New York non-profit corporation having no capital stock, and an enemy national because controlled by officers and directors who were Japanese nationals, and vested all of its property; German American Bund, V. O. 1640, 8 FED. REG. 11184; V. O. 3568, 9 FED. REG. 5452, was found and determined an unincorporated national association controlled by the Nazi party; Volksbund, V. O. 2704, 9 FED. REG. 1067, a U. S. agency, established under the laws of New York, of a German membership society with headquarters in Berlin and controlled by it. And see notes 125 and 126 *infra*.

125. V. O. 1765, German-American Vocational League, Inc., 8 FED. REG. 11494, a New York membership corporation and a social and trade union organization affiliated with the German Labor Front and controlled by Germany; to the same effect, see: V. O. 2949,

of case attempted to identify individual members as enemies.¹²⁵ And the possibility of non-enemy members having beneficial ownership interests in the enterprise and its property,¹²⁷ analogous to those recognized in non-enemy stockholders and partners, seems to have been disregarded, perhaps because none in fact existed.¹²⁸

The Custodian has also used "all property" vesting orders in all of the sole proprietorship cases.¹²⁹ As was to be expected, these busi-

Federation of Italian War Veterans, 9 FED. REG. 2617; V. O. 3345, Vittorio Emanuele III War Veterans Foundation, 9 FED. REG. 4829. Both were N. Y. membership corporations. No mention of the members was made in the findings or determinations in these vesting orders.

126. V. O. 930, Board of Trade for German American Commerce, Inc., 8 FED. REG. 3639, found that "among the members" were many who resided in Germany and made "substantial contributions" to the Board's income, and on whose behalf the Board acted; V. O. 964, The Japanese Association, Inc., 8 FED. REG. 4202, found that "many members" were enemy internees, that the association performed certain functions for, and was controlled by, the Japanese Government; V. O. 1416, Japanese Chamber of Commerce of N. Y., 8 FED. REG. 7787, found that "substantially all" its members were corporations vested or supervised by the Custodian; that all its officers and directors but one had been interned or repatriated; and that a "substantial part" of its income had been contributed by the Japanese Government, for whom it acted; V. O. 3769, Japanese Chamber of Commerce of San Francisco, 9 FED. REG. 11436, found that 26% of its members had been found enemy nationals by the Custodian, and that 64% of its income came from Japan, for whom it acted. Cf. V. O. 3632, Society for the Care of German Seamen, 9 FED. REG. which was merely found to be controlled by or acting on behalf of Germany or German residents. All of the above were domestic membership corporations, incorporated under state law.

127. The property rights of members in membership corporations and their property have been accorded recognition and enforcement in a variety of situations. Matter of Ulmann v. Thomas, 255 N. Y. 506, 175 N. E. 192 (1931); Keeler v. Hide Exchange, Inc., 231 App. Div. 450, 247 N. Y. Supp. 482 (1st Dep't 1931); Richter v. Sea Gate Association, 120 Misc. 307, 199 N. Y. Supp. 303 (Sup. Ct. 1923); 12 FLETCHER, CVC. CORP. (Perm. ed. 1932) § 5694, 5707 and cases cited. Cf. V. O. 626, D. A. B.-Recreational Resort, Inc., 8 FED. REG. 1694, all of whose stock was vested because beneficially owned by the German-American Vocational League, note 125 *supra*.

128. In such a case, vesting of the enemy membership interests, together with supervision of the non-profit association or membership corporation itself (and perhaps also of its property), would presumably have been sufficient. Of the cases cited in notes 124-126 *supra*, the Custodian, in addition to vesting all of its property, undertook supervision of the organization in the following cases: V. O. 2704, Volksbund, 9 FED. REG. 1067; V. O. 2949, Federation of Italian War Veterans, 9 FED. REG. 2617; V. O. 3632, Society for the Care of German Seamen, 9 FED. REG. 6125. In the following cases the Custodian also took supervision of all its property: V. O. 3345, Vittorio Emanuele III War Veterans Foundation, 9 FED. REG. 4829; V. O. 3709, Japanese Chamber of Commerce of San Francisco, 8 FED. REG. 7787. Cf. notes 170-175 and text *infra*.

129. CUSTODIAN'S 1945 REPORT 33 lists twenty-three sole proprietorships vested. In most cases, the Custodian also vested all right, title and interest of the proprietor in the name under which he did business; e.g., V. O. 75, S. Ishimitsu, 7 FED. REG. 7047; V. O. 127,

ness enterprises were generally small in size. In some of them, the former owners were residents of this country but of enemy citizenship, and had been interned.¹³⁰ Such persons were not enemies under the statutory definitions,¹³¹ and exercise of supervision only, without vesting, might well have been sufficient to tend for the property during the period of internment. Having been vested, however, the property could not very well be returned to its former owner upon his subsequent release from detention camp.¹³² In most cases, internees' property and interests in business enterprises were placed under supervision rather than vested.¹³³

The chief problem which arose with respect to the use of the vesting power in the sole proprietorship cases was the necessity for distinguishing between the assets or property used in the business enterprise, which were vestible, and the internee's other liquid property and assets, which originally were not.¹³⁴ Thus the "business enterprise" definition tended to make an "entity" for the Custodian's purposes out of an individual proprietorship, to which the law generally accords no such recognition for other purposes apart from the individual person of its owner.¹³⁵

E. Vesting of Contracts, Rights and Claims

Vesting action by the Custodian in the business enterprise field has not been confined to stock, ownership interests and property. He has

Japan Tea Buying Agency, 7 FED. REG. 7061; Robert C. Mayer, 7 FED. REG. 10118. Cf. MYRON, *op. cit. supra* note 123.

130. V. O. 386, Diamond Rice Co., 7 FED. REG. 10631; V. O. 395, Prospecting Equipment Co., 8 FED. REG. 1159; V. O. 401, Hashimoto Co., 7 FED. REG. 10631; V. O. 716, W. & F. Produce Co., 8 FED. REG. 2128; V. O. 717, F. S. Sakamaki Co., 8 FED. REG. 3257; V. O. 764, Katsuji Onishi, 8 FED. REG. 2452; V. O. 3519, Oregon News, 9 FED. REG. 11436.

131. See Part I, notes 40 and 55 and text *supra*.

132. See Part I, note 62 *supra*, and U. S. v. 16,572 Acres of Land, 45 F. Supp. 23 (S. D. Tex. 1942).

133. For discussion, see CUSTODIAN'S 1943 REPORT 18, 31-32, 51; 1944 REPORT 7-8, 28, 40, 122; 1945 REPORT 13-14, 57.

134. EXEC. ORDER No. 9095 as amended by EXEC. ORDER No. 9193. See Part I, notes 1, 5 and 6 *supra*. Until the further amendment effected by EXEC. ORDER No. 9567, real and tangible personal property apart from the business enterprise was vestible, but cash, bullion, credit, securities, etc. ordinarily were not. See V. O. 764, Katsuji Onishi, 8 FED. REG. 2452.

135. The Custodian's only other alternative was to identify separately and vest specifically each asset or property used in or forming a part of the business—a cumbersome and time consuming procedure. Cf. V. O. 398, Joseph Ferigo, 7 FED. REG. 10873, amended 8 FED. REG. 13352, 9 FED. REG. 816, 5091; V. O. 475, Paul and Caroline Breitenfelder (Apex Delicatessen), 7 FED. REG. 11036. The "all property" vesting left for later decisions by the Custodian's representatives the particular items of property included. See Part I, notes 57-61 and text *supra*.

also succeeded to a vast variety of creditors' rights, contractual interests, and other intangible rights and choses in action formerly owned and held by enemy nationals. Many of these have been rights against, or with respect to, or creditor or other contractual relationships with, enemy business enterprises in this country, whose stock, other ownership interests or property the Custodian has also vested.¹³⁶ Frequently, the former enemy stockholder or partner was also a creditor of the concern, perhaps its principal one.¹³⁷ The indebtedness (or other non-proprietary interest or relationship) may exist in the form of bonds or notes, secured or unsecured,¹³⁸ security agreements,¹³⁹ or merely as an unsecured liability or account payable on the books of the business enterprise.¹⁴⁰ Its origin may be in cash advances, extensions of credit, or goods sold and delivered. The right, interest or relationship may consist of dividends declared but not yet paid,¹⁴¹ bank accounts carried in the name of the enterprise for the benefit of the enemy owner,¹⁴² physical property in the possession of the enterprise on consignment only,¹⁴³ or stock and option rights of various kinds.¹⁴⁴ The enemy stockholder or partner may also own valuable patents, or rights to the trade name, trade-mark, business and goodwill, secret processes and formulae under which the enterprise is conducting its operations in this country. Usually, such rights are licensed or conveyed by means of

136. Such rights, interests or relationships may be held by enemy nationals who are also owners of proprietary interests in the enterprise, or by others. Such rights and interests were seized in the last war, *Briesen v. A Certain Fund*, 3 F. (2d) 509 (App. D. C. 1925); *Simon v. Miller*, 298 Fed. 520 (S. D. N. Y. 1923).

137. *V. O. 590, Jetter & Scheerer Products, Inc.*, 8 FED. REG. 1294; *V. O. 407, Ferd. Mulhens, Inc.*, 7 FED. REG. 10087.

138. *V. O. 1220, Markt & Hammacher Co.*, 8 FED. REG. 5637, 9 FED. REG. 12055; *V. O. 4123, Heine & Co.*, 9 FED. REG. 12046, 10 FED. REG. 527; *V. O. 2864, Walter Eitelbach & Co., Inc.*, 9 FED. REG. 2616; *V. O. 2173, 5041, American Hyalcol Corp.*, 9 FED. REG. 10211, 10 FED. REG. 7348.

139. *V. O. 3936, Walter Eitelbach & Co., Inc.*, 9 FED. REG. 9175.

140. *V. O. 179, 2545, United Ocean Transport Co.*, 7 FED. REG. 8667, 8 FED. REG. 15628; *V. O. 478, 2815, Uchida Investment Co.*, 8 FED. REG. 1294, 17311; *V. O. 2875, Paul Hollender, Inc.*, 9 FED. REG. 3247 (preferred stock); *V. O. 3099, Nippon Dry Goods Co.*, 9 FED. REG. 1839 (unsecured claim).

141. *V. O. 3186, Arushee Co.*, 9 FED. REG. 2807; *V. O. 3850, Lansec Corp.*, 9 FED. REG. 7588, 13535; *V. O. 4624, Empire State Properties & Trading Corp.*, 10 FED. REG. 2320.

142. *V. O. 4943, Ataka Corp.*, 10 FED. REG. 7503; *V. O. 5041, American Hyalcol Corp.*, 10 FED. REG. 7348.

143. *V. O. 2886, J. C. Muller, Inc.*, 9 FED. REG. 6266.

144. *V. O. 3696, Fuji Sake Brewing*, 9 FED. REG. 6272, 10 FED. REG. 8146; *V. O. 1593, 1881, Original Laminated Patent Barrel Co.*, 8 FED. REG. 10333, 11401, 17528; *CUSTODIAN'S 1945 REPORT 48*. On stock options exercisable against the Custodian, *See Bourne v. Miller*, 4 F. (2d) 1006 (C. C. A. 2d, 1924).

agreements in effect between the enterprise and the enemy national.¹⁴⁵ To destroy the last vestige of enemy interest in or relationship with the enterprise, the Custodian vests all such rights, and every enemy interest therein.¹⁴⁶ Thus, with respect to a single business enterprise, the Custodian may and often does occupy the various positions and capacities of stockholder, owner of partnership or other proprietary interest, or owner of all its property, and bondholder, noteholder, preferred, secured or unsecured creditor or debt claimant, consignor, optionee, patent or trade-mark owner and licensor.¹⁴⁷ By succeeding to

145. V. O. 109, 4157, Riedel - De Haen, 7 FED. REG. 7058, 9 FED. REG. 5940, 13815 (trade-mark and license); V. O. 37, Bisleri Co., Inc., 7 FED. REG. 5078, 10 FED. REG. 1059 (stock and trade-mark); V. O. 733, American Felsol Co., 8 FED. REG. 2131, 10 FED. REG. 60 (trade-mark and agreement); V. O. 4490, De Nobili Cigar Co., 10 FED. REG. 1461 (rights to name, trade-mark, business, goodwill and licenses); V. O. 1590, Ferd. Mulhens, Inc., 8 FED. REG. 14489 (rights to trade-marks, business and goodwill, secret processes and agreement relating thereto); V. O. 1328, Pyrene Minimax Corp., 9 FED. REG. 6894 (stock royalties and contract *re* formation of new corporation); V. O. 4139, Resinous Products & Chem. Co., 9 FED. REG. 11913 (contract *re* corporate capitalization); V. O. 1583, Batzouroff & Co., 8 FED. REG. 9076 (rights to partnership name); V. O. 3340, East 21st Street Lighter Corp., 9 FED. REG. 5450 (stock and royalties payable). *Cf.* § 8 of the Statute, permitting abrogation of certain contracts between enemies and U. S. citizens or corporations, by written notice to the Custodian.

146. Typical language used in vesting orders COVERING DEBTS: "All right, title, interest and claim of any name or nature whatsoever of the aforesaid (named enemy nationals), and each of them, in and to all indebtedness, contingent or otherwise and whether or not matured, owing to them or either of them by the said (named enemy business enterprise), including but not limited to all security rights in and to any and all collateral for any or all of such indebtedness and the right to sue for and collect such indebtedness." COVERING CONTRACT RIGHTS: "All interests and rights (including all royalties and other monies payable or held with respect to such interests and rights and all damages for breach of the agreement hereinafter described, together with the right to sue therefor) created in (named enemy national) by virtue of an agreement dated (including all modifications thereof and supplements thereto, if any) by and between (named enemy national) and (named enemy business enterprise), which agreement relates, among other things, to (U. S. Patent or Trade-mark)." COVERING TRADE-MARKS, BUSINESS AND GOODWILL: "All right, title and interest of whatsoever kind or nature, including without limitation any reversionary interest, under the statutory or common law of the United States and of the several states thereof, of (named enemy national) in and to any and all goodwill of the business in the United States of (named enemy business enterprise), and in and to any and all registered trade-marks (including but not limited to Registrations Nos., dated, etc.) and unregistered trade-marks and trade names appurtenant to said business, and in to every license, agreement, privilege, power and right of whatsoever kind or nature arising under or with respect thereto."

147. The vast majority of the so-called debt and contract vestings have dealt with patent and trade-mark contracts and licenses, and debts of sufficient significance or size to be considered ". . . an interest in the enterprise" or ". . . necessary for the maintenance or safeguarding of other property," such as stock, partnership interests, etc., belonging to the same enemy national, under § 2(a), (c) and (d) of EXEC. ORDER No. 9095 as amended.

all such interests, and exercising the respective rights, powers and privileges of each, in addition to those he may exercise as owner of stock or other proprietary interests in the enterprise, or as owner of all its property, the Custodian increases immeasurably the facility and flexibility with which the enterprise, its property and assets, can be subsequently administered.

Exercise of the Custodian's Powers: Administration

A. Sources and Types of Administrative Powers

Such analysis and delineation as may be made of the sources of the Custodian's powers of administration, and his manner and method of exercising them, would seem to indicate that such powers are of three general kinds: (1) proprietary, (2) regulatory, and (3) supervisory.¹⁴³

This was because of the limitations on the jurisdiction delegated to the Custodian before EXEC. ORDER No. 9567, amending § 2(c). See Part I, notes 6 and 7 *supra*. For other miscellaneous contract vestings, see CUSTODIAN'S 1944 REPORT 130; 1945 REPORT 152; and V. O. 2025, Pierdmenges-Dulken Agreement, 8 FED. REG. 14868, 14871; V. O. 3415, Saureschulzgesellschaft, 9 FED. REG. 4487 (contract ~~re~~ "Haveg Corp." to be formed); V. O. 284, Certain Contracts with German Nationals, 7 FED. REG. 9754, 9 FED. REG. 1038, 8269. Contractual interests were seized in the last war, *Wood v. Deutsche Ton*, 67 F. (2d) 375 (App. D. C. 1933), but such interesting questions as the effect of the vesting or seizure on contractual rights and liabilities of the parties, performance, breach, impossibility or frustration, etc., have so far had little attention from the courts. Cf. CUSTODIAN'S 1945 REPORT 48, and Part I, note 80 *supra*; and A. P. C. Prospectus for sale of vested stock in, *J. C. Muller & Co., Inc. (Tobacco Machinery Corp.)* 1945, at p. 5. On the vesting of enemy rights in patent license agreements, see also *Sarazin v. Wright Aeronautical Corp.*, 54 F. Supp. 244 (S. D. N. Y. 1944); *Standard Oil Co. v. Markham*, 57 F. Supp. 332 (S. D. N. Y. 1944), 61 F. Supp. 813 (S. D. N. Y. 1945), 64 F. Supp. 656 (S. D. N. Y. 1945); *Polaroid Corp. v. Markham*, 148 F. (2d) 219 (App. D. C. 1945); CUSTODIAN'S 1945 REPORT 115-119, 1944 REPORT 104-108; SARGEANT & CRAEMER, ENEMY PATENTS, 11 LAW & CONTEMP. PROB. 92, 102-105; *Hearings*, Part I, note 15, *supra* 594-595.

143. Constituting a possible fourth category are the various specific statutory powers given the Custodian by the World War I sections of the TRADING WITH THE ENEMY ACT. Because of the all-inclusiveness of the powers conferred by the FIRST WAR POWERS ACT of 1941 (amending § 5(b) of the old Act), the earlier powers are seldom expressly invoked. See, for example, the licensing powers for trading with the enemy in § 3(a), (Part I, note 22 *supra*); the licensing of enemy insurance companies doing business here, provided for by § 4, *Swiss Nat. Ins. Co. v. Crowley*, 136 F. (2d) 265 (App. D. C. 1943), *cert. denied*, 320 U. S. 763 (1943); the requirement of lists of enemy officers, directors or stockholders of corporations in the U. S. in § 7(a), now supplanted by the more general reporting provisions of § 5(b); the demand and seizure powers of § 7(c), replaced by the vesting power; the little-used "voluntary turnover" provisions of § 7(d); the patent, trade-mark and copyright, and licensing provisions of § 10, now inapplicable (Part I, note 21 *supra*); the Custodian's powers in holding, managing and selling enemy property, in § 12, as to which compare § 5(b) and A. P. C. GENERAL ORDER 26, 8 FED. REG. 7628 (1943). Other than these specific statutory powers, the Custodian did not possess broad regulatory or supervisory powers in World War I. Cf. Part I, note 29 *supra*.

As the owner of vested stock, property or interests, the Custodian is clothed with all the rights, powers, privileges and immunities of the former owner with respect thereto.¹⁴⁹ Thus, his *proprietary* status (whether as stockholder, owner of partnership or other property interest in a business enterprise, or as owner of all its property; or as lienor, creditor, licensor, claimant, or holder of other contractual interests or rights in, against or with respect to the business enterprise) and its incidents are measured by the usual application of the rules of private domestic law.¹⁵⁰ But by vesting, the Custodian also succeeds to the *regulatory* powers previously exercised by the Treasury with respect to the property, interest or enterprise.¹⁵¹ Such powers are not limited in application to the precise enemy property or interest vested, any more than when exercised by the Treasury; they extend to the entire property or enterprise, although not all interests therein may be vested; and may include the enterprise itself as an entity, even though all its property be vested; and all its property, even though all ownership interests in the enterprise be vested. Finally, the Custodian may exercise his *supervisory* powers, by determining in a given instance, that exercise of the negative, passive and largely permissive Treasury regulatory power is not enough: exercise of additional affirmative, active and directive powers of management and control is also needed.¹⁵² Of the three, the Custodian's proprietary powers may be laid to one side, not only because of limitations in space, but also because, in the main, they have been adequately dealt with in the World War I decisions and by recourse to the generally

149. *Cummings v. Deutsche Bank*, 300 U. S. 115 (1937). See Part I, note 62 and text *supra*.

150. Part I, note 64 and text *supra*; *Kahn v. Garvan*, 263 Fed. 909 (S. D. N. Y. 1920). In some respects, the Custodian's proprietary powers may even be greater, since the "enemy" disability no longer exists. Cf. *Nord Deutsche Ins. v. Dudley*, — Misc. —, 169 N. Y. Supp. 303 (Sup. Ct. 1918), *aff'd*, — App. Div. —, 169 N. Y. Supp. 1106 (1st Dep't 1918); *Rothbarth v. Herzfeld*, 179 App. Div. 865, 167 N. Y. Supp. 199 (2d Dep't 1917), *aff'd*, 223 N. Y. 578, 119 N. E. 1075 (1918).

151. Both Treasury and the Custodian derive their jurisdiction and powers from § 3(a) and 5(b) of the Statute. The delegation to the Treasury is through EXEC. ORDER No. 8389 as amended, and § 3, 4 and 12 of EXEC. ORDER No. 9095 as amended. The Custodian's derive principally through the latter Executive Order, and not through EXEC. ORDER No. 8389 as amended, but are broader than those given the Treasury. See Part I, notes 1, 2 and 4 *supra*.

152. The order typically recites that the Custodian: ". . . hereby undertakes the direction, management, supervision and control of (named enemy business enterprise or property) to the extent deemed necessary or advisable from time to time by the Alien Property Custodian." The issuance of a supervisory order does not affect title to the property or interests in the enterprise. CUSTODIAN'S 1943 REPORT 17; MYRON, *op. cit. supra*, note 123.

applicable principles of private domestic law. The Custodian's regulatory and supervisory powers deserve closer attention.

The Executive Order provides, in general terms, for release of control by the Treasury on notification by the Custodian, whenever the latter determines to exercise any of the powers and authority conferred on him;¹⁵³ and forecloses attack on any order, ruling or regulation issued by either agency on the ground that it was within the jurisdiction of the other.¹⁵⁴ It refers, however, only to transfer of control of "property", and is silent as to business enterprises,¹⁵⁵ although Treasury jurisdiction, like the Custodian's, extends to business enterprises and interests therein as well as to property and interests therein.¹⁵⁶ The Treasury's public pronouncements on the subject have been literally consistent with the Executive Order, in that they refer only to release of control of any property or interest vested by the Custodian.¹⁵⁷ But the Order shows a clear general intent to give priority to the Custodian, and it must therefore be assumed that when-

153. EXEC. ORDER No. 9095 as amended, § 2, last paragraph: "When the Alien Property Custodian determines to exercise any power or authority conferred upon him by this section with respect to any of the foregoing property over which the Secretary of the Treasury is exercising any control and so notifies the Secretary of the Treasury in writing, the Secretary of the Treasury shall release all control of such property, except as authorized or directed by the Alien Property Custodian."

154. *Ibid.* § 12.

155. The contradistinction between the terms "property" and "business enterprise" in the Executive Order, especially § 2, seems deliberate.

156. Note 151 *supra*. The term "business enterprise" does not appear in EXEC. ORDER No. 8389 as amended, but comes within the terms "person" and "national" as there defined. See Part I, notes 33-36 *supra*. Since the definitions are retroactive, vesting of the enemy national interest in an enterprise or property does not remove the jurisdictional basis for subsequent exercise of the Custodian's regulatory or supervisory powers over the enterprise or property. Part I, notes 37 and 66 and text *supra*. Business enterprises are not ordinarily subject to Treasury jurisdiction unless the foreign national interest therein is substantial (§ 5E (ii) of EXEC. ORDER No. 8389 as amended), and the Custodian does not ordinarily undertake supervision of an enterprise unless this is also the case. EXEC. ORDER No. 9567 (Part I, notes 1 and 6 *supra*) will result in the vesting of an increasing number of insubstantial ownership interests, without supervision of the enterprise (CUSTODIAN'S 1945 REPORT, 31-32).

157. Treasury Foreign Funds Control General Ruling 19, 10 FED. REG. 14775 (1945) as amended, 11 FED. REG. 8350 (1946); and Public Circular 31, issued August 2, 1946, 11 FED. REG. 8351. These refer only to release of Treasury control of property or interests vested by the Custodian. No reference is made to release of Treasury control of property not directly vested, but in which the Custodian has vested an interest or interests; of enterprises not directly vested, but some or all of whose property, or ownership interests, the Custodian has vested; nor of property or enterprises of which the Custodian undertakes supervision without vesting. Moreover, the ruling and circular are limited to property and interests of German and Japanese nationals. In other cases, the Treasury issues specific releases of control, which are not published.

ever the Custodian takes action with respect to a business enterprise, whether by vesting all or some of its property or ownership interests, Treasury control of the enterprise as well as of the precise property or interest vested is released to him upon request.¹⁵⁸

At an early date,¹⁵⁹ the Custodian assumed regulatory authority over all property and business enterprises control of which had been released to him by the Treasury. This was done through issuance of a blanket prohibition of all transactions involving any such property or enterprise unless authorized by the Custodian's office.¹⁶⁰ Thereafter, the necessary authorizations are issued, in form and content quite similar to Treasury licenses, permitting the carrying on of such function and operations by the enterprise, or transactions with respect to property, as are approved by the Custodian's office.¹⁶¹ Assumption and exercise of the Custodian's more affirmative powers of supervision has been in the form of specific supervisory orders, directed to the particular property or business enterprise. The Custodian may undertake supervision of specific property, whether or not he has also vested an interest therein; and of a business enterprise, all, some or none of whose property or ownership interests have been vested.

In a substantial number of early cases of property or business enterprise vestings, the Custodian undertook supervision by means of separate, unpublished supervisory orders. His more recent general practice, wherever the vesting power is also exercised, is to incorporate the usual

158. CUSTODIAN'S 1943 REPORT 11; 1944 REPORT 2-3. The whole scheme of jurisdiction and authority envisioned by EXEC. ORDERS NOS. 8389 and 9095 precludes any reasonable inference that simultaneous control of the same property or business enterprise by both agencies was ever contemplated.

159. A. P. C. Certificate of Appointment, Oct. 30, 1942, and subsequent amendments, now embodied in A. P. C. GENERAL ORDER 31; 7 FED. REG. 8910 (1942); 8 FED. REG. 6694, 9088, 12839 (1943) 9 FED. REG. 3479, 3522, 4485, 7739, 8975, 14573 (1944); 10 FED. REG. 9914 (1945); 11 FED. REG. 1586, 2313, 9989, 10698, 12436, 14155 (1946).

160. Unless authorized by the Custodian, or an agent, delegate or supervisor appointed by him, GENERAL ORDER 31 prohibits: "(1) All transactions involving any property, control of which has been released by the Secretary of the Treasury, subject to the power and authority conferred upon the Attorney General (Custodian)," and "(2) All transactions by, or with, or on behalf of, or pursuant to the direction of, any business enterprise of which the Attorney General (Custodian) or his predecessor has undertaken supervision, or which has been vested, or assets of or interests in which have been vested, or involving any property in which such business enterprise has any interest, control of such property or business enterprise having been released by the Secretary of the Treasury." The language is to be compared with that in the Treasury announcements, note 157 *supra*.

161. Form A. P. C.-10. See CUSTODIAN'S 1943 REPORT 55, 1944 REPORT 43, 1945 REPORT 32. Unlike the Treasury special license, a specific application is not ordinarily required for the issuance of an A. P. C. Authorization.

supervisory language in the vesting order.¹⁶² Where supervision without vesting is assumed, however, the order remains unpublished, as does any subsequent order providing for termination of supervision.¹⁶³ Assumption of supervision, like vesting, lies in the Custodian's discretion.¹⁶⁴ Unless there has been a published vesting order expressly incorporating supervisory powers over the business enterprise, persons dealing with the enterprise may be uncertain whether or not the Custodian has undertaken its supervision, in addition to vesting interests therein, unless they have actual notice of the fact.¹⁶⁵ And in cases of vesting where supervision of the enterprise is not undertaken, the published regulations of the Treasury and the Custodian have failed to make clear the precise extent to which regulatory control of the enterprise has been released by the former and assumed by the latter.¹⁶⁶

The Custodian undertakes supervision without vesting, of property, interests and enterprises owned by internees, nationals of enemy-occupied countries, and in some cases, American citizens temporarily resident in enemy territory.¹⁶⁷ The property, interests and enterprises involved represent a small minority of the total amount subject to the Custodian's jurisdiction, however;¹⁶⁸ and with the liberation of the enemy-occupied countries, the cessation of hostilities, release of in-

162. CUSTODIAN'S 1943 REPORT 19, 51; 1944 REPORT 11, 28; MYRON, *op. cit. supra* note 123.

163. Part I, note 43 *supra*.

164. Part I, note 4 *supra*.

165. It follows that such persons, when engaged in business transactions with the management of a supervised enterprise, would not seem liable under § 5(b) of the Statute for participation in any acts by such management which disregarded or violated orders or directions of the Custodian. There is no public announcement by the Treasury of release of control of business enterprises, nor of property or interests vested other than those of German and Japanese nationals (note 157 *supra*). A. P. C. GENERAL ORDER 31 (note 160 *supra*) begs the question whether Treasury control has been released and A. P. C. supervision undertaken; and A. P. C. GENERAL ORDER 33 (*infra* note 171) deals only with supervision of property and interests which are vested.

166. Notes 156-160 *supra*. Assume, for example, that the Custodian vests only a 10% enemy national stock interest in a domestic corporation, but does not undertake supervision of the enterprise. The concern has previously been subject to Treasury jurisdiction because of the existence of a majority foreign (non-enemy) national stock interest. Does control of the enterprise remain with the Treasury, or do its transactions after vesting of the 10% interest come within the prohibition of A. P. C. GENERAL ORDER 31, unless authorized by the Custodian? Only the terms of the Treasury's specific release of control can provide the answer. The Custodian may not have requested release of control of the enterprise. *Cf.* notes 156 and 158 *supra*.

167. CUSTODIAN'S 1943 REPORT 17-20, 31, 50-52; 1944 REPORT 6-11, 91, 118, 122; 1945 REPORT 11-12; MYRON, *op. cit. supra* note 123.

168. CUSTODIAN'S 1943 REPORT 50; 1944 REPORT 15, 22, 40, 57; 1945 REPORT 28-29, 56-57.

ternees and repatriation of our own nationals detained abroad, supervision has been terminated in most if not all of such cases.¹⁶⁹

The Custodian also undertakes supervision, as a preliminary and incidental safeguard, of property and interests which are vested.¹⁷⁰ A general regulation of the office, making vesting orders effective as of the time of their filing with the Federal Register, provides in effect that prior actual notice of the vesting order constitutes notice that the Custodian has undertaken supervision of the property or interest which is the subject of the vesting.¹⁷¹ An increasing number of "business enterprise" vesting orders issued both prior and subsequent to such regulation,¹⁷² where the property of the enterprise is vested and supervision of the enterprise undertaken, provide in express terms that supervision is also undertaken of the property vested.¹⁷³ Since the Custodian possesses complete powers of ownership and dominion over vested property, this additional step would appear superfluous, except that the Custodian deems it necessary to effectuate his control pending the passage to him of actual title to the vested property.¹⁷⁴

169. CUSTODIAN'S REPORT 18; 1944 REPORT 8, 12, 42; 1945 REPORT 11-12, 28-29, 56-57.

170. CUSTODIAN'S 1943 REPORT 19, 50; 1944 REPORT 10-11, which also refers to use of the supervisory order "to facilitate investigation". But the requirement of findings and determinations as to enemy nationality and ownership imposed by the Executive Order as the basis for vesting (Part I, p. 231 *supra*), apply equally as a prerequisite for undertaking supervision (Part I, note 4 *supra*). The statement can only mean, then, that the Custodian has been content, as a temporary and preliminary matter, with little or no factual basis for such findings or determinations in a supervisory order issued to facilitate a pending investigation whose function it is to discover if facts exist to support the order. If so, vesting presumably ensues; if not, supervision is presumably terminated with no "irreparable" injury, since the owner was not divested of title to his property. Absent the exigencies of war, an administrative practice of this nature might well be open to question.

171. A. P. C. GENERAL ORDER 33, 10 FED. REG. 1363 (1945).

172. The order is expressly applicable to all vesting orders theretofore or thereafter issued, and is not limited to those vesting orders expressly incorporating supervisory powers.

173. SOLE PROPRIETORSHIPS: V. O. 3400, Honolulu Pharmacy, 9 FED. REG. 6270; V. O. 3519; Oregon News, 9 FED. REG. 11436; V. O. 4363, M. Kobayashi Store, 10 FED. REG. 690. PARTNERSHIPS: V. O. 93, Kilyono Nurseries, 7 FED. REG. 6609, 9 FED. REG. 5613. MEMBERSHIP CORPORATIONS: V. O. 3709, Japanese Chamber of Commerce, of San Francisco, 9 FED. REG. 11436; V. O. 3345, Vittorio Emanuele III War Veterans Foundation, Inc., 9 FED. REG. 4829. FOREIGN (ENEMY) CORPORATIONS: V. O. 4365, Nikka Life Ins. Co., Ltd., 9 FED. REG. 14738; V. O. 4366, Nippon Fire Ins. Co., Ltd., 9 FED. REG. 14738.

174. These cases, and those in note 176 *infra*, are probably in the minority. When the Custodian vests "all property" of a business enterprise, he usually undertakes supervision of the enterprise, but not of the property vested. It is difficult to say whether the orders in note 173 *supra*, and others like them, represent his more recent general prac-

Finally, supervision may be undertaken as an adjunct to vesting: a use which covers the great majority of cases. When the Custodian vests all, or a substantial part of the ownership interests in specific property or a business enterprise, or all of the property of the enterprise, he generally also undertakes supervision of the specific property or enterprise itself.¹⁷⁵ And in an increasing number of cases, where the Custodian has vested some or all of the stock or other ownership interests in a business enterprise, but has not vested the property of the enterprise, he has undertaken supervision not only of the enterprise, but also of its property.¹⁷⁶ In this manner, the Custodian assumes broader powers with respect to the property or enterprise, than his proprietary interest in the enterprise (which may be less than 100%), measured by the usual incidents of private domestic law, might ordinarily entitle him to.¹⁷⁷ These cases represent the most significant area and function of the Custodian's supervisory powers, as concerns domestic corporations and partnerships and other business organizations.

To what extent does the Custodian assume responsibility for the management of business enterprises whose supervision he has undertaken?¹⁷⁸ Authority on the question is almost entirely lacking, and the

fice, or only those cases where the vesting order was served prior to its filing with the Federal Register. Cf. A. P. C. GENERAL ORDER 33, note 171 *supra*; and MYRON, *op. cit. supra* note 23.

175. CUSTODIAN'S 1943 REPORT 19, 50-51; 1944 REPORT 10-11, 16, 43; 1945 REPORT 12, 31-32.

176. DOMESTIC CORPORATIONS: V. O. 2875, Paul Hollender, 9 FED. REG. 3247; V. O. 72, 3341, Johann Maria Farina, Inc., 7 FED. REG. 6504, 9 FED. REG. 3265; V. O. 2180, Empire State Properties and Trading Corp., 8 FED. REG. 15619, 9 FED. REG. 4514; V. O. 3343, Regens Lighter Corp., 9 FED. REG. 5317; V. O. 3340, East Twenty-first Street Lighter Corp., 9 FED. REG. 5450; V. O. 3454, The National Seed Co., Inc., 9 FED. REG. 5451; V. O. 3631, Alfol Insulation Co., Inc., 9 FED. REG. 5451. V. O. 3188, Musashiya Shoten, Ltd., 9 FED. REG. 6269. PARTNERSHIPS: V. O. 4301, Motoshige Boychi, 10 FED. REG. 2450; V. O. 4134, Standard Garage, 10 FED. REG. 1941; V. O. 4485, Kaimulke Inn, 10 FED. REG. 1107. Cf. the cases in note 173 *supra*, and V. O. 378, The Ohmi Co., 7 FED. REG. 10630, where the Custodian vested a 50% interest in a domestic partnership, and undertook supervision of the business enterprise (partnership) and all its property. By later amendment, 8 FED. REG. 12764 (1943), the Custodian found the vested former enemy interest to be 50% of the income and 100% of the assets of the partnership, and thereupon vested all its property. The sole difference between the cases in note 173 *supra* and those immediately above is that, in the former, the Custodian also vested all the property of the respective business enterprises. Where such property is not vested, A. P. C. GENERAL ORDER 33 presumably does not apply. The reasons for undertaking supervision of the unvested property of business enterprises in some cases and not in others are not apparent.

177. Note 175 *supra*.

178. See note 164 *supra*. Where regulatory power only, pursuant to A. P. C. GENERAL

Custodian's own statements on the subject are somewhat inconsistent. The language of the orders undertaking supervision seeks carefully to make the extent to which supervision, once undertaken, is actually exercised (and, therefore, responsibility assumed), entirely a matter of the Custodian's discretion.¹⁷⁹ By the same token, they leave persons dealing with the business enterprise somewhat at a loss to know whether to look to the management or to the Custodian for authority in particular transactions. The Custodian at first announced that his office "assumes complete responsibility for the operations of vested and supervised enterprises", which it exercised "by assuring continuous and satisfactory management".¹⁸⁰ Later statements indicate that the Custodian considers his control to be more limited.¹⁸¹

The statute provides no remedy, administrative or judicial, with respect to the exercise of the Custodian's regulatory or supervisory powers.¹⁸² In *Matter of Machinery Builders, Inc.*,¹⁸³ a proceeding to set aside an election of directors of a New York corporation under the Custodian's supervision, the Custodian's power and authority was

ORDER 31 (note 160 *supra*) is assumed, it seems clear that the Custodian assumes no such responsibility.

179. See note 42 *supra*. Orders undertaking supervision usually contain this additional language: "This order shall not be deemed to limit the power of the Alien Property Custodian to vary the extent of or terminate such direction, management, supervision or control. . ."

180. CUSTODIAN'S 1943 REPORT 55.

181. CUSTODIAN'S 1944 REPORT 16: "It should be borne in mind, of course, that the Custodian's position in relation to the property under his control is not comparable to that which would be occupied by a private individual or corporation in control of the same property. The degree of active participation by the Custodian in the management of the property under his control depends upon the manner in which the public interest can best be served and varies widely according to a complex of circumstances. For example, the Custodian does not interfere with the normal course of business of most enterprises controlled through supervisory orders; rather he confines his interest to extraordinary transactions and leaves to the management of each firm the normal conduct of the business." See also *id.* pp. 43-44. CUSTODIAN'S 1945 REPORT 32: ". . . it is by the second, or supervisory, action that the Office acquires immediate though limited control. The Office has not, by supervisory action, changed the management of the company or interfered with its normal operations unless it was necessary to the war effort. But it observes the activities of the company and requires it to obtain specific authorization from the Office for changes in its capital structure, declaration of dividends, and other extraordinary transactions." With the area of the Custodian's supervisory authority thus, apparently expanding in the business enterprise field (notes 173 and 176 *supra*), the degree of responsibility he thereby assumes appears to be contracting.

182. See Part I, notes 66 and 67, and text *supra*.

183. — Misc. —, 44 N. Y. S. (2d) 198 (Sup. Ct. 1943); — Misc. —, 47 N. Y. S. (2d) 735 (Sup. Ct. 1944).

referred to but apparently not called into question.¹⁸⁴ On the administrative side, the Custodian has promulgated an official form of "Notice of Claim Arising as a Result of Supervisory Order",¹⁸⁵ and some such claims have been filed with his office, although none appear to have been decided.¹⁸⁶ As a practical matter, termination of supervision, a decision entirely within the Custodian's discretion, would seem to make any such claims moot in the particular case.¹⁸⁷

B. Domestic Corporations—Stock Vestings

In the administration of the affairs of domestic corporations in which the Custodian has vested stock interests, the corporate entity and management structure, with its usual relationships between officers, directors and stockholders, are preserved and utilized to the fullest extent possible.¹⁸⁸ Whether such administration takes the form of operation as a going concern or liquidation, the Custodian in general occupies the status of stockholder, calling into operation his overriding governmental powers only in those instances where his powers as stockholder under private domestic law are insufficient to accomplish his policies in the national interest, or to facilitate speedy, effective and flexible administration of the enterprise in the interest of other creditors or stockholders as well as his own.¹⁸⁹ As has been noted, supervision of the corporation itself is undertaken only in those cases where the vested enemy stock interest is a majority, or at least a substantial minority.¹⁹⁰ Thereafter, supervision is exercised only as the circum-

184. *But cf.* Claim S772 by Gerhard F. Kullack, listed in CUSTODIAN'S 1943 REPORT 139. Apparently there has been some litigation involving supervisory orders. *See* CUSTODIAN'S 1944 REPORT 145, and suit by Osvaldo Cocco against the Custodian and others, filed in the U. S. District Court in New Jersey, N. Y. Times, Sept. 15, 1945, p. 17, col. 4; and Sept. 20, 1945, p. 4, col. 6; and Claim S2303 by Osvaldo Cocco with respect to SUPERVISORY ORDER 188, listed in CUSTODIAN'S 1945 REPORT 225. The Custodian's powers under a supervisory order might be tested by ignoring a specific order or direction issued by him thereunder, requiring the Custodian to bring a summary proceeding under § 17 of the Statute (Part I, note 60 *supra*) for its judicial enforcement. However, such disregard might also be a violation of the criminal provisions of § 5(b).

185. Form A. P. C.-6, Manual of Official Forms (1943).

186. CUSTODIAN'S 1943 REPORT 134; 1944 REPORT 136-137, 217; 1945 REPORT 224.

187. Note 169 *supra*. CUSTODIAN'S 1944 REPORT 42 states that the Treasury is notified before supervision is terminated, and unless that agency does not "assume jurisdiction, complete control reverts to the former owners (sic) as soon as the termination order is put into effect." *Cf.* MYRON, *op. cit. supra* note 123. Unless the Treasury recumes the control it once released, however, it would appear that the Custodian's regulatory authority over the enterprise continues under GENERAL ORDER 31 (note 160 *supra*).

188. CUSTODIAN'S 1943 REPORT 37, 55, 56; 1944 REPORT 16, 42-43; 1945 REPORT 31-32.

189. Note 188 and *see* Part I, notes 63 and 64 and text *supra*.

190. Note 156 *supra*: CUSTODIAN'S 1943 REPORT 37; 1944 REPORT 9, 25; 1945 REPORT

stances require.¹⁹¹

The use of governmental powers to establish the Custodian's status as a stockholder after vesting is fully established.¹⁹² He is entitled to direct and require that the corporation cancel any and all outstanding certificates for the vested stock and issue new certificates therefor to him, even though all technical requirements of state law or the corporate charter or by-laws cannot be met; as, for example, when the outstanding certificates cannot be located within the jurisdiction for physical surrender and cancellation,¹⁹³ or the necessary corporate officers are unwilling or unavailable to affix their signatures to the new certificates to be issued for the vested stock.¹⁹⁴ The Custodian issues proxies to his representatives to attend and vote the vested stock at corporate meetings, and usually employees or other representatives of his office are elected directors and officers of the corporations in which he is a stockholder.¹⁹⁵ Such representatives or employees may

31-32. Supervision of the enterprise may be undertaken, however, although the stock vested is a small minority, where additional stock interests sufficient to aggregate a majority are owned by internees. V. O. 3696, 4364, Fuji Sake Brewing, Ltd., 9 FED. REG. 6272, 10 FED. REG. 1107, 8146; or to secure control of subsidiary corporations, stock in whose parents has been vested; MYRON, *op. cit. supra* note 123, *cf.* V. O. 2079, Kallo, Inc., 8 FED. REG. 13937, and V. O. 4249, Karl Liebernecht, Inc., 10 FED. REG. 1614, and S. O. No. 245, April 5, 1944 (unpublished).

191. Regulatory authority by the Custodian of the enterprise comes into application regardless of supervision, by virtue of A. P. C. GENERAL ORDER 31, notes 159-161 *supra*.

192. In this connection, assumption of supervision is often referred to as a device to effectuate the Custodian's control over the enterprise in which he has vested substantial stock interests, pending establishment of his status and control as stockholder through issuance to him of stock certificates, and election of directors and officers of his choice. CUSTODIAN'S 1943 REPORT 50, 1944 REPORT 10-11; MYRON, *op. cit. supra* note 123. Actual title to the vested property would technically have passed to the Custodian, however, upon execution and filing of the vesting order. Note 171 *supra*. This function of supervision is to be contrasted with its use where title to the enemy property has not yet vested in the Custodian. Notes 170-174 *supra*.

193. TRADING WITH THE ENEMY ACT, § 7(c) and § 12, prior to its amendment by Act of March 28, 1918, c. 28, § 1; Silesian American Corp. v. Markham, 156 F. (2d) 793 (C. C. A. 2d, 1946); CUSTODIAN'S 1944 REPORT 27; A. P. C. General Counsel's Opinion F-12, Feb. 6, 1946; A. P. C. Prospectus for Sale of Vested Stock, American Potash & Chem. Corp. p. 16; and cases cited in Part I, note 64 *supra*.

194. If necessary, resort may quite appropriately and legitimately be had, under the authorities in note 193 *supra*, to a "bootstrap lifting" device which might otherwise be questionable: The Custodian, after vesting, calls a stockholders' meeting at which the recalcitrant officers or directors are removed; new officers and directors are elected, who execute and issue the necessary stock certificate to the Custodian, who thereupon as stockholder, ratifies their action.

195. CUSTODIAN'S 1943 REPORT 54-55, 56, 82; 1944 REPORT 43; MYRON, *op. cit. supra* note 123; A. P. C. General Counsel's Opinion, F-6, Aug. 31, 1942. State law, charter or by-law sometimes requires that directors be stockholders. Matter of St. Lawrence Steam-

constitute a minority, a majority or all of the officers and directors of the corporation, depending upon whether the vested stock interest is a minority, a majority or 100%, and depending also on what circumstances may require in the particular case.¹⁹⁶ The Custodian's supervisory power may be exercised to prevent the election, by the votes of others, of officers or directors he deems unsuitable, to remove such persons from office, or to require the election of others who meet his approval.¹⁹⁷ Such prerogatives would be used sparingly, however, and only when the national interest made it imperative; cases of actual exercise of such powers have not come to attention.¹⁹⁸

Officers and directors who are employees or representatives of the Custodian, and were elected at his instance, must nevertheless serve the interests of the corporation as a whole, and of all of its stockholders.¹⁹⁹ In accordance with their fiduciary obligations, they must cause the corporation to file claim, or if necessary, bring suit against the Custodian if in their judgment the Custodian has acted wrongfully in vesting property of the corporation.²⁰⁰ And in cases of conflict between

boat Co., 44 N. J. L. 529 (1882); *Matter of Ringler & Co.*, 204 N. Y. 30, 97 N. E. 593 (1912); 2 FLETCHER CYC. CORPS. § 299, *et seq.* (Perm. ed. 1931). Under the authorities in note 193 *supra*, the Custodian, where necessary, may disregard such a requirement; e.g., where compliance would involve giving (or selling privately for a nominal consideration) Government property in the form of qualifying shares of the vested stock to the directors elected by him. *Cf.* Keppelman v. Palmer, 91 N. J. Eq. 67, 108 Atl. 432 (1919), *cert. denied*, 252 U. S. 531; A. P. C. General Counsel's Opinion F-7, Sept. 21, 1942; *Complaint, Republic Filters, Inc. v. Gerwick Realty Corp.*, N. J. Chancery Ct., Paterson Dist., Docket No. 148-167 (1944).

196. Where a minority stock interest is vested, the Custodian may be content with a single representative on the board of directors, and no representative among the officers of the corporation. *See* Karl Liebernecht, Inc., A. P. C. Prospectus for Sale of Vested Stock, p. 51. On the other hand, where the vested stock interest is 100% and the business is to be liquidated, the corporation may be completely "restaffed" with employees of the Custodian's office, with resulting economies in the expenses of liquidation. CUSTODIAN'S 1944 REPORT 52; 1945 REPORT 50, 189.

197. *Cf.* § 2(b) of EXEC. ORDER No. 9095 as amended, Part I, note 1 *supra*.

198. Notes 188, 190 and 195 *supra*.

199. *Hun v. Cary*, 82 N. Y. 65 (1880); CUSTODIAN'S 1944 REPORT 43; MYRON, *op. cit.* *supra* note 123. They cannot, however, approve of payment by the corporation for services rendered for the sole benefit of the former stockholder. *Cf.* Katz & Sommerich v. Amerlux Products Corp., N. Y. C. Munic. Ct., 1944, referred to in CUSTODIAN'S 1945 REPORT 266.

200. *Cf.* *Isenberg v. Trent Trust Co.*, 26 F. (2d) 609 (C. C. A. 9th, 1928), *rehearing*, 31 F. (2d) 553 (C. C. A. 9th, 1929), *cert. denied*, 279 U. S. 862 (1929); A. P. C. Prospectuses for Sale of Vested Stock, Kalio, Inc., p. 16, and De Nobili Cigar Co., p. 7. *Cf.* *De Nobili Cigar Co. v. Commissioner*, 143 F. (2d) 436 (C. C. A. 2d, 1944); *Synthetic Patents Co. v. Sutherland*, 22 F. (2d) 491, 494 (C. C. A. 2d, 1927). As to whether the corporation is an "enemy national" ineligible for return of vested property, see Part I, note

the interests of the Custodian as stockholder and those of other stockholders, or the best interests of the corporation as a whole,²⁰¹ only a specific order or directive from the Custodian would seem to protect them from possible subsequent liability for their conduct.²⁰²

In the liquidation of corporations, the Custodian, by means of subordination and dissolution orders, has made frequent use of his supervisory powers in at least two typical situations to facilitate and expedite administration in the interest of all.²⁰³ Where in addition to vested stock, the Custodian holds creditor's rights against the enterprise, formerly belonging to the same enemy national,²⁰⁴ and the circumstances of the corporate obligation are such as to indicate that the advance or credit was in the nature of a capital contribution,²⁰⁵ he may direct that it be subordinated to the claims of other creditors of the enterprise.²⁰⁶ With the second type of order, he may expedite dissolu-

72 *supra* and § 32(a) of the Statute; *Uebersee Finanz Korporation v. Markham*, — F. (2d) —, (App. D. C. Oct. 21, 1946), *cert. granted*, — U. S. — (1947). *Cf.* note 119 *supra*.

201. As, for example, when the Custodian is the majority stockholder and, as a matter of policy, determines on liquidation of the corporation and sale of its assets, against the wishes of the minority. The fiduciary obligation of majority to minority stockholders would seem to apply (*Pepper v. Litton*, 308 U. S. 295 (1939)) unless considerations of national interest prevail.

202. Part I, notes 29 and 61 *supra*. Subsequent stockholders purchasing from the Custodian, however, under familiar principles would seem to be bound by corporate action which had been directed, approved or ratified by the Custodian as stockholder. *Goss & Co. v. Goss*, 147 App. Div. 698, 132 N. Y. Supp. 76 (1st Dep't 1911), *aff'd*, 207 N. Y. 742, 101 N. E. 1099 (1913); *Welch v. Importers & Traders' Nat'l. Bank*, 122 N. Y. 177, 25 N. E. 269 (1890). *Cf.* A. P. C. Prospectuses for Sale of Vested Stock, The Korfund Co., Inc. and Cork Foundation Co., Inc., pp. 9, 12-17, 22-33 (1945); and *Republic Filters, Inc.*, pp. 3-4 (1943).

203. CUSTODIAN'S 1944 REPORT 13, 214-215; 1945 REPORT 50, 223. These orders are usually employed only in cases where the Custodian is the 100% stockholder.

204. CUSTODIAN'S 1944 REPORT 127; 1945 REPORT 150-151; notes 136-147 *supra*.

205. *S. E. C. v. Chemery Corp.*, 318 U. S. 80 (1943); *Consolidated Rock Products v. Dubois*, 312 U. S. 510 (1941); *Pepper v. Litton*, 308 U. S. 295 (1939); *Taylor v. Standard Gas & Electric*, 306 U. S. 307 (1939). Depending on the circumstances of a particular case, a subordinated claim may be treated as a junior creditor with respect to all or only some of the other classes of creditors, or may be placed on a par with preferred or common stockholders. A debt claim is not given priority as a claim of the United States merely because it has been vested by the Custodian. TRADING WITH THE ENEMY ACT as amended, § 32(h) (Aug. 8, 1946).

206. A typical A. P. C. SUBORDINATION ORDER, No. 9, *M. Hensoldt & Sons, Inc.*, 10 FED. REG. 8485, recites that the Custodian has vested all the capital stock of the corporation, and an indebtedness on its books and owing by the corporation to the same enemy national former owner, and that the corporation is being liquidated and dissolved; finds that the corporation was owned, and completely dominated and controlled by the enemy national; that the indebtedness resulted from contributions of capital and merchandise; and that the assets of the corporation are insufficient to pay all claims against it in full;

tion and final liquidation of the enterprise by directing its officers and directors to pay over the remaining assets to him, after payment of taxes, expenses and known claims, and without waiting for the expiration of the time period under state law after which creditors' claims are barred.²⁰⁷ Claims of subsequent creditors are thereafter filed with the Custodian rather than with the corporation in dissolution.²⁰⁸ In both cases, the corporate fiduciaries are exculpated from possible personal liability under state law by compliance with the order of the Custodian.²⁰⁹

determines that it is equitable and in the national interest to subordinate the vested claim to those of other creditors of the corporation; specifically directs the named officers and directors of the corporation to do so, and to pay any assets remaining thereafter to the Custodian on account of such claim; and exculpates them from any and all liability for doing so.

207. A typical A. P. C. DISSOLUTION ORDER, No. 19, *Lansac Corp.*, 10 FED. RES. 8025, recites that the Custodian has vested all the capital stock of the corporation and undertaken its supervision, that the corporation has been substantially liquidated under the Custodian's supervision; finds that the claims of all known creditors have been paid, ". . . except such claim if any as the undersigned may have for monies advanced or services rendered to or on behalf of the corporation"; and having determined that it is in the national interest for the corporation to be dissolved and its assets distributed and a certificate of dissolution having been filed under state law; specifically directs the named corporate officers and directors to continue the dissolution proceedings, under state law, and to wind up the corporation's affairs and distribute its assets, first, in payment of current expenses and the reasonable and necessary charges of winding up and dissolution; second, in payment of all known federal, state and local taxes and fees owed by the corporation; and finally, to pay over the remainder to the Custodian, to be applied first in satisfaction of any claim by him for monies advanced or services rendered to or on behalf of the corporation; and second, as a liquidating distribution of assets to him as sole stockholder. The order further provides that nothing contained therein shall prejudice the rights of any persons under state law having claims against the corporation (but shall not be construed as creating in them any additional rights), except that any such claims shall be filed with the Custodian within the time prescribed by state law; and exculpates the corporate officers and directors from any and all liability in following the Custodian's order.

208. *Cf.* N. Y. STOCK CORP. LAW §§ 105, 106; DEL. REV. CODE (1935) § 2075, 2035; *Metropolitan Rubber Co. v. Place*, 147 Fed. 90, 94 (C. C. A. 2d, 1906).

209. Part I, notes 29 and 61 *supra*. Without the Custodian's dissolution order, the corporate officers and directors would become personally liable to corporate creditors if they distributed to the stockholders before paying all corporate debts, unless such creditor's claims have been barred under state law. By providing that unpaid unbarred creditors may file their claims with the Custodian, their rights under state law are protected. *Koch v. United States*, 138 F. (2d) 850, 852 (C. C. A. 10th, 1943); *McWilliams v. Excelsior Coal Co.*, 298 FED. REG. 884, 886 (C. C. A. 8th, 1924); *Kelly v. Andalusia Brick Co.*, 222 Ala. 203, 131 So. 559 (1930); 16 FLETCHER, *CYC. CORPS.* (1942) §§ 8127, 8157-8158, 8161. Recent amendments to the TRADING WITH THE ENEMY ACT in P. L. 671, 79th Cong., 2d Sess., August 8, 1946, would appear to cut down the rights of such creditors under state law. Section 34 provides that property vested in or transferred to the Custo-

Other circumstances may well arise in the administration of vested or supervised business enterprises which call for the exercise of the Custodian's overriding governmental powers in the national interest. He may, for example, direct the nullification²¹⁰ of contracts, agency arrangements, employment relationships, sales, etc. in whole or in part, or perhaps require the making of new contracts, arrangements or relationships by the enterprise.²¹¹ Persons complying with such orders are exculpated from liability by the Custodian, but it is by no means clear that the Custodian thereby assumes liability to third persons affected by his order.²¹² The most recent general instance of exercise of governmental powers in the national interest was in the promulgation of a regulation²¹³ providing that only "American Nationals"²¹⁴ shall be qualified to become owners or holders of vested stock in "key corporations",²¹⁵ and making any subsequent transfer or acquisition

dian is to be equitably applied by the Custodian in payment of debts of the former owner, but allows only debt claims filed by the American citizens, corporations and residents; permits the Custodian to fix a bar date (up to two years); and establishes a system of priority of payments. To the extent that such provisions conflict with state law by excluding certain types of creditors, establishing a different time period for barring claims, and varying the order of priority to creditors in the event of insolvency, federal law must of course prevail. Creditors of the corporation prevail under state law over creditors of the stockholders (cases cited *supra* this note) and presumably should be barred first. A. P. C. Bar Order No. 1, however, issued under the statute (12 F. R. 1448), fixing June 1, 1947, as a bar date for the filing of debt claims arising with respect to property vested in or transferred to the Custodian during the period December 18, 1941, to December 31, 1946, makes no distinction between the two classes of creditors.

210. Cf. the language of § 5(b) of the Statute, Part I, note 29 *supra*.

211. In such cases, the Custodian usually exercises his powers by special orders, which have seldom been published. See A. P. C. Special Order No. 14, Karl Liebernecht, Inc., Feb. 25, 1946; CUSTODIAN'S 1943 REPORT 133, 1944 REPORT 13, 214; A. P. C. Prospectus for Sale of Vested Stock, American Potash & Chem. Corp., p. 1. The nullification orders referred to in 1944 REPORT 13, 215 were actually divesting orders, and were later so named.

212. See A. P. C. Special Order No. 14, Karl Liebernecht, Inc., Feb. 25, 1946; notes 182-187 and text *supra*. Compare the dissolution orders, where the Custodian permits and directs that creditors' claims against the dissolved corporation be filed with him instead. Notes 203-209 and text *supra*.

213. A. P. C. GENERAL ORDER NO 35, 11 FED. REG. 9924 (1946).

214. American Nationals are defined by subparagraph (c) of the order to mean, subject to certain exceptions: (1) the United States or any state, territory, subdivision, agency or instrumentality thereof; (2) persons who are both citizens and residents of the United States; (3) partnerships, corporations, associations or other organizations organized and having their principal places of business in the United States, and which are 75% owned and controlled by persons in (2) above.

215. American Bosch Corp., Schering Corp., and General Aniline & Film Corp. have U. S. thus far been designated by the Custodian as "key corporations." 11 FED. REG. 9990, 12782. Prior to the issuance of GENERAL ORDER No. 35, General Aniline sold its 50% stock interest in Winthrop Chemical at public auction. Sterling Drug, owner of the other

of such stock by others prohibited, null and void,²¹⁶ with certain limited exceptions.²¹⁷ The regulation further provides for appropriate inscription of notice of the regulation on all stock certificates issued by "key corporations", and requires amendment of their corporate charters and by-laws whenever directed by the Custodian to give effect to the regulation.²¹⁸

Substantial vested stock interests in domestic corporations are sold by the Custodian at public sale, pursuant to the provisions of the statute²¹⁹ and a general regulation of the Custodian's office.²²⁰ Sales are made on the basis of sealed bids, to qualified purchasers²²¹ who are the highest bidders, pursuant to notice and terms and conditions of sale published in advance by the Custodian's office. Notice of the sale is usually accompanied by the preparation and issuance of a prospectus, describing in considerable detail the enterprise and the stock interest therein offered for sale.²²² Unfortunately, however, these pros-

50% interest, was the sole bidder and acquired the shares. As a condition of the sale, imposed by the Custodian and the Attorney General, a Delaware voting trust was established with the Custodian as trustee, effective for ten years, as a measure to prevent control of Winthrop falling again into alien hands. CUSTODIAN'S 1945 REPORT 68-69. 216. Cf. *American Bosch Magneto Corp. v. Robert Bosch Magneto Co., Inc.*, 127 Misc. 119, 215 N. Y. Supp. 387 (Sup. Ct. 1926).

217. Subparagraph (d). Persons who are not American Nationals, but receive such stock by bequest, inheritance, descent, or operation of law, and persons who cease to be American Nationals, are given two years in which to dispose of it.

218. Subparagraphs (e) and (f). Cf. N. Y. GEN'L. CORP. LAW § 14(5). As to restrictions on the transfer of stock generally, see 12 FLETCHER, CYC. CORPS. (Perm. ed. 1932) § 5458.

219. TRADING WITH THE ENEMY ACT § 12; *United States v. Chemical Foundation*, 272 U. S. 1 (1926); A. P. C. General Counsel's Opinion F-12, Feb. 6, 1946. Securities representing insubstantial interests are generally sold on the open market. CUSTODIAN'S 1944 REPORT 126, 1945 REPORT 148.

220. A. P. C. GENERAL ORDER No. 26, 8 FED. REG. 7628 (1943). The statute and regulation do not apply to sales by corporations in which the Custodian has vested stock interests, but are nevertheless generally followed. See note 215 *supra*, and Prospectus for Sale of Stock in Connecticut Lace Works, Inc., by Rondak Corporation. See also sale of real estate and machinery by Butte Farm Land Co.

221. The statute, § 12, provides that, unless otherwise determined, sales shall be made only to American citizens, and forbids purchase on behalf of an undisclosed principal or for resale to a non-citizen. The regulation, GENERAL ORDER No. 26(d) (1) states: "Unless the Custodian shall otherwise direct, no person or business organization shall be qualified to bid for or purchase property if he or it is on the Proclaimed List of Certain Blocked Nationals [see Part I, note 36 *supra*] or is not an American citizen or is not a business enterprise controlled by American citizens and organized under the laws of the United States, or any State or Territory thereof."

222. See notes 147, 196, 200 and 202, and Part I, notes 76 and 81 *supra*. The prospectuses are quite like those generally issued for public offering and registration under the SECURITIES ACT of 1933, although that statute is not generally applicable to sales

pectuses have given little information as to the precise extent of control that the Custodian has exercised over the enterprise or its management,²²³ and almost never make reference to the fact that the Custodian has expressly undertaken its supervision.²²⁴ Nor is any promise or representation made that supervision will be terminated upon sale of the vested stock interest to a qualified purchaser. Indeed, A. P. C. General Orders 31²²⁵ and 35²²⁶ are indication enough that the Custodian's jurisdiction is not surrendered in all cases, nor for all purposes,²²⁷ after sale of his vested stock interest.

C. Partnerships—Interest Vestings

Originally the Custodian's policy regarding domestic partnerships seemed limited to vesting the interests of the enemy partners and undertaking supervision of the enterprise.²²⁸ In the majority of such

by the Custodian direct to the public, unless the sale is made through underwriters, which requires registration. Cf. A. P. C. Prospectus for Sale of Vested Stock, American Potash & Chemical Corp., p. 16.

223. The prospectuses disclose the percentage of vested interest, and identify the officers and directors elected at the instance of the Custodian, and rarely go further, except in the case of minority interests, where lack of control is sometimes asserted in the prospectus. G. Bruning Tobacco Co. (33%), p. 6; Frederick Pustet Co., Inc. (38%), p. 5 (*but see* annexed VESTING ORDER No. 635, 8 FED. REG. 1296, expressly undertaking supervision of the enterprise); Oriental Show-You Co. (17% pfd., 39% common) p. 7 and annexed V. O. 479, 8 FED. REG. 242, undertaking supervision; American Wine Co. (52% and one of seven directors) p. 7, and V. O. 2162, 8 FED. REG. 14868, undertaking supervision.

224. A. P. C. Prospectus for Sale of Vested Stock, Riedel-DeHaen, Inc., p. 12, is an exception. In cases where the vesting order incorporates supervisory language, prospective purchasers are of course deemed on notice thereof. Cf. V. O. 1220, Markt & Hamacher Co., 8 FED. REG. 5637, 9 FED. REG. 12055, and Prospectus, pp. 9, 32: A minority stock interest vested and sold; minority non-officer representation on the board of directors; the vesting order also undertook supervision of the enterprise, a fact not mentioned in the prospectus. Copies of the vesting orders are frequently annexed to the prospectuses. A copy of contract annexed to the A. P. C. Prospectus for Sale of Vested Stock, The Korfund Co., Inc. and Cork Foundation Co., Inc., p. 29, discloses in its recitals the issuance of A. P. C. Supervisory Orders with respect to the two enterprises. Where there has been a separate, unpublished supervisory order, however, unmentioned in the prospectus, prospective purchasers can scarcely be considered on notice of the fact.

225. Note 160 *supra*.

226. Note 213 *supra*.

227. Since the "enemy national" definitions, upon which the regulatory and supervisory, as well as the vesting jurisdiction of the Custodian is based are retroactive (note 170, and Part I, note 37 *supra*), sale of the vested stock does not automatically free the enterprise from the Custodian's control. It is at least doubtful that prospective purchasers are fully aware of this fact and its implications.

228. CUSTODIAN'S 1943 REPORT 35, 1944 REPORT 26-27, 1945 REPORT 33; note 176 and Part I, notes 99-110 *supra*. Cf. V. O. 353, Bridge Import Co., 7 FED. REG. 10735 (no supervision).

cases, however, all of the partners were enemy nationals, and "interest" vestings were soon supplemented by "asset" or "all property" vestings, whereby the property of the partnership as well as the interests of the partners was vested by the Custodian.²²⁹ This additional step was apparently taken in an effort to eliminate possible doubts as to the scope and effect of the vesting order upon the partnership as an "entity".²³⁰ and the Custodian's title to the partnership property,²³¹ and thus to facilitate subsequent liquidation or sale of the enterprise or its assets.²³² The field left to interest vestings has since been almost entirely confined to those partnerships having both non-enemy and enemy partners, only the interests of the latter being vestible.²³³

Partnerships in which the Custodian vested enemy interests were theoretically dissolved, at least in the sense that the Custodian by vesting did not succeed to the status of partner in a going concern.²³⁴ When the remaining partners desired to continue the enterprise as a going concern, presumably an accounting without liquidation would be had, to determine the value of the enemy partner's interest in the enterprise, and this amount paid to the Custodian.²³⁵ Otherwise, the remaining partner or partners would liquidate the enterprise, usually under the Custodian's supervision, sell the assets, collect all debts due the enterprise, and after payment of creditors distribute the remaining

229. Note 228 *supra*; V. O. 2865, Hiyama Shoten, 9 FED. REG. 3467; V. O. 2393, Deutscher H. & W., 8 FED. REG. 15621; V. O. 53, Hara & Co., 7 FED. REG. 5740, 8 FED. REG. 15615, 9 FED. REG. 2806 (no supervision); V. O. 169, 4611, O. Yoshizawa, 7 FED. REG. 8813, 10 FED. REG. 2320 (no supervision).

230. See Part I, notes 88-95 and text *supra*.

231. See Part I, notes 56-62 and text *supra*.

232. The Custodian found it much easier to sell, and purchasers more willing to buy, vested property rather than a vested but undetermined "interest" therein. Note 231 and *cf.* V. O. 494, Russ Estate Co., Part I, note 76 *supra*. "Asset" or "all property" vesting, taken up below, created other problems of administration, however.

233. Supervision of the partnership was also generally undertaken. See partnership cases note 176 *supra* and Part I, note 110, *supra*; V. O. 2534, The Hakabundo, 9 FED. REG. 223; V. O. 2680, Teikoku Co., 9 FED. REG. 6265; V. O. 2699, Holly Bakery, 9 FED. REG. 740. In many of these cases, the unvested partnership interests were held by internees. *Cf.* note 130 *supra*, and V. O. 342, Ohmi Shoten, 8 FED. REG. 12104, 13949; V. O. 164, 4728, Rikimaru Bros. & Co., 7 FED. REG. 8666 (Part I, note 105 *supra*), 9 FED. REG. 14344, 10 FED. REG. 3041, where internees' partnership interests were vested. In other cases, either supervision of the enterprise was not undertaken, or the supervisory order was not published, by incorporation in the vesting order or otherwise: V. O. 192, Fujita & Co., 7 FED. REG. 8668; V. O. 628, Pieroni Bros., 8 FED. REG. 14867. Notes 162-165 and text *supra*.

234. Part I, notes 88, 90, 95 and text *supra*.

235. *Cf.* UNIFORM PARTNERSHIP ACT § 41-43; M & C Creditors Corp. v. Pratt, 172 Misc. 695, 17 N. Y. S. (2d) 240 (Sup. Ct. 1938), *aff'd*, 255 App. Div. 838, 7 N. Y. S. (2d) 662 (1st Dep't 1938), *aff'd*, 281 N. Y. 804, 24 N. E. (2d) 482 (1939).

assets to the non-enemy partners and the Custodian in accordance with their respective interests.²³⁶

D. *Asset or All Property Vestings*

It is in this field, which includes virtually every type of business enterprise and organization with the possible exception of domestic corporations,²³⁷ that the Custodian has encountered most, if not all, of his legal, technical and sometimes somewhat theoretical difficulties in the administration, liquidation and sale of business enterprises and their property.²³⁸ Under the present statute,²³⁹ in contrast to the original World War I statute,²⁴⁰ vested property becomes government property,²⁴¹ “. . . just as much as the golden dome on the courthouse”. When it became necessary to administer, either by way of liquidation or operation as going concerns, literally hundreds of enemy corporations (or their U. S. branches), non-profit organizations, partnerships, sole proprietorships or other concerns all of whose property had been vested, a host of questions arose. Did vesting strip the enterprise of its assets in favor of the Custodian, or did the Custodian himself become the enterprise?²⁴² Should the Custodian operate the business as a going concern, or liquidate it, under his own name, the United States, or that of the enterprise?²⁴³ Should (or could) federal, state and local taxes, and debts of the former owner be paid in the course of such operation or liquidation?²⁴⁴ Should (or could) the Custodian operate a business, in competition with private enterprise, without making such payments? If debts and taxes were to be paid, should not a distinction be made between those accruing prior and those subsequent to the

236. See note 234 *supra*.

237. See note 119 and text and Part I, notes 69-73 and text *supra*.

238. Included in this discussion are 100% interest vestings in partnerships, where no “entity” is involved. See note 228 and Part I, note 100 *supra*.

239. Section 5(b) of the TRADING WITH THE ENEMY ACT as amended, added by the FIRST WAR POWERS ACT of 1941, Part I, note 9 *supra*.

240. Section 12 of the TRADING WITH THE ENEMY ACT prior to its amendment (note 193 *supra*) merely gave the Custodian the powers of a common law trustee. *United States v. Chemical Foundation*, 272 U. S. 1 (1926).

241. Part I, note 62 *supra*.

242. See note 121 and text *supra*.

243. Cf. Part I, note 100 *supra*.

244. Section 9 of the Statute permitted the filing and payment of debt claims against the Custodian by non-enemy creditors of the former enemy owner whose property had been seized by or transferred to the Custodian; *Markham v. Cabell*, 325 U. S. 847 (1945). Section 24 authorized payment by the Custodian of all taxes “. . . heretofore or hereafter lawfully assessed . . .” against such property. As to taxes on government property, see *U. S. v. Allegheny County*, 322 U. S. 174 (1944).

vesting;²⁴⁵ and in favor of those which arose out of operations or obligations bearing some direct relationship to the enterprise and its property, and to the necessity for present liquidation or continued operation?²⁴⁶ Or should all tax and debt claims of the former owner be paid from the vested property, whatever their date, nature or source? Was the Custodian limited to his own staff, or to the Civil Service rolls, in the use of employees to liquidate or operate the enterprises?²⁴⁷ As to employees, what of social security, and state unemployment insurance taxes, benefits and contributions? Could the Custodian (or the enterprises) carry insurance? What was to be done with existing contractual obligations of the enterprise, such as leases, employment agreements, etc.? Were pending litigation and administrative proceedings by or against the enterprise automatically continued by or against the Custodian, and if so, in his name or that of the enterprise?²⁴⁸ Should private counsel formerly representing the enterprise in connection with such litigation or proceedings continue to be retained, or must the Attorney General now represent the Custodian in connection with all such matters?²⁴⁹ Did the Custodian dare to ignore such proceedings or litigation and make no appearance therein, and refuse to honor any claims except those filed with and passed upon in separate administrative proceedings within his own office?²⁵⁰ Or was there danger that the results in such litigation or proceedings might subsequently be held *res judicata* in proceedings against the Custodian?

To those charged with the day-to-day administration of the vested business enterprises in the Custodian's field offices, such questions as these and many more clamored frantically for definite and speedy answers. The Statute and the Executive Order constituted a grant of authority to the Custodian to vest, administer, liquidate and sell, in the broadest possible terms.²⁵¹ Indeed, the terms were so broad as to

245. Debts accruing subsequent to vesting were paid as expenses of administration.

246. Section 9(e) allowed debt claims by non-citizens only if they arose ". . . with reference to the money or other property held . . ." by the Custodian.

247. Section 6 of the Statute seems to require that employees of the Custodian's office be hired exclusively from the Civil Service rolls. A distinction was made in administrative practice, however, between employees of the Custodian and employees of the vested enterprises.

248. *Cf. United States v. The San Leonardo*, 51 F. Supp. 107 (E. D. N. Y. 1942).

249. *Cf. Murray Oil v. Mitsui*, 55 F. Supp. 353 (S. D. N. Y. 1944), *aff'd*, 146 F. (2d) 381 (C. C. A. 2d, 1944), (Part I, note 84 *supra*); EXEC. ORDER No. 9142, § 5, 7 FED. REG. 2985 (1942).

250. The remedies against the Custodian provided by § 9 of the Statute were meant to be exclusive; *cf. § 7(c)*, *Sturchler v. Sutherland*, 19 F. (2d) 999 (E. D. N. Y. 1927); the United States, in the person of the Custodian, cannot be sued without Congressional consent. *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591 (1924).

251. See Part I, notes 17-19, 29 *supra*.

leave in doubt the continued applicability of various provisions of the original statute which might have furnished some of the answers.²⁵² The all inclusiveness of the new statute, with its differences in definitions and terminology, resulted in contentions on the Custodian's behalf that the new statute was autonomous, that the old statute in fact had been supplanted rather than amended, and that the Custodian consequently lacked authority in such cases to pay debts or taxes, or to carry insurance on vested property without further specific authorization from Congress.²⁵³ The necessary additional legislation was not passed, however, until last year.²⁵⁴ Administration of the vested enterprises continued in the interval, however, and in at least two cases, where 100% interest and asset vested enemy partnerships were operated and sold by the Custodian as going concerns, theoretical difficulties seemingly yielded to the practical realities and necessities of the respective situations.

Pettingell Machine Co.,²⁵⁵ a Massachusetts partnership composed of four non-resident enemy partners, was a small machine shop which had been run for some twenty-five years by a local manager on behalf of the partners. The Custodian retained the manager, made no changes in personnel or management policy, and the business continued to be operated much the same as before. So far as appears, the partnership debts and the general expenses of running the business were paid without regard to whether they accrued prior or subsequent to the Custodian's vesting. Insurance also seems to have been continued in effect, although no taxes apparently were paid. The Company was sold by the Custodian as a going enterprise, including cash, bank accounts, accounts receivable, etc., and subject to all accrued liabilities (including taxes). All changes in assets and liabilities since the date of the last financial statements were at the risk of the purchaser. Another partnership, Semmes (Kiyono) Nurseries,²⁵⁶ was vested, operated and sold

252. See notes 243-245 *supra*. In stock vestings, where the corporate entity is preserved, none of such questions could arise. Notes 188, 189 *supra*.

253. *Markham v. Cabell*, 325 U. S. 847 (1945); *Draeger v. Crowley*, 49 F. Supp. 215 (S. D. N. Y. 1943); CUSTODIAN'S 1944 REPORT 23-24, 140-141; 1945 REPORT 50, 170; *Hearings before Subcommittee I of the House Judiciary Committee* on H. R. 4840, 78th Cong., 2d Sess (1944) entitled "*Administration of Alien Property*" and on H. R. 5089, 79th Cong., 2d Sess. (1946), *passim*.

254. PUB. L. No. 671, 79th Cong., 2d Sess. Aug. 8 1946 adding §§ 33 to 37 to the TRADING WITH THE ENEMY ACT as amended, authorizing the payment of debt claims, taxes and the procuring of insurance by the Custodian.

255. For an analysis of the vesting orders, see Part I, notes 99 and 100 and text *supra*. The facts are taken from the A. P. C. Prospectus for Sale of the Vested Property (1944).

256. Note 255 *supra*.

by the Custodian in much the same manner, except that the Custodian entered into a fresh employment contract with the manager of the nurseries, to expire on sale of the enterprise, and the sale was made free and clear of federal and state income taxes, which apparently were to be paid by the Custodian out of the proceeds of the sale.

It is difficult to reconcile these cases with the Custodian's public statements regarding the limitations on his authority and powers.²⁵⁷ On the other hand, continued operation of these enterprises as going concerns was obviously the course dictated by sound business judgment, designed to preserve property values and goodwill, and to realize the highest possible return for the vested property. Theoretical considerations to the contrary, the Custodian could scarcely have acted otherwise and avoided reasonable criticism.²⁵⁸

Many of the remaining questions in this field of administration still lack authoritative statutory or judicial answer. For example, it seems clear that the Custodian has power to void or nullify leases or other contracts of business enterprises whose assets he has vested,²⁵⁹ but not so clear that they are automatically voided by the vesting.²⁶⁰ And the Custodian's powers to intervene in pending proceedings on the plaintiff's side have been frequently exercised,²⁶¹ but it is doubtful that he can be made a party to litigation against the business enterprise in the capacity of a defendant.²⁶² The statutory provision permitting the Custodian to procure insurance²⁶³ contains no definition or limitation as to the nature or types of insurance intended, but liability insurance is probably not included, in the absence of clear language permitting suit against the Government in tort.²⁶⁴

257. Note 253 *supra*. Recourse to the "entity" theory (note 230 *supra*) does not solve the difficulty. If there was no partnership "entity", vesting of all the partners' interests was equivalent to vesting the assets of the enterprise, and debts previously incurred could not be paid. If there was a partnership entity, the subsequent direct vesting of the assets prevented the payment of debts incurred prior thereto. See Part I, note 100 *supra*.

258. Section 34 of the Statute, presently in effect, would have permitted payment of debts of the partnership accrued prior to vesting, without regard to their relationship to the vested property, but would have prevented payment to other than United States citizens and residents.

259. *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923); *Mawhinney v. Millbrooks Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921).

260. *Cf. Alexivicz v. General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S. (2d) 713 (Sup. Ct. 1943); *Chase Nat'l. Bank v. Onishi*, N. Y. L. J., Feb. 19, 1943, p. 689, col. 2.

261. *Cf. Sarazin v. Wright Aeronautical Corp.*, 54 F. Supp. 244 (S. D. N. Y. 1944).

262. See note 250 *supra*. *Cf. Polaroid Corp. v. Markham*, 148 F. (2d) 219 (App. D. C. 1945).

263. Section 37, note 254 *supra*.

264. *Schillinger v. United States*, 155 U. S. 163 (1894); *Von Bruning v. Sutherland*, 29 F. (2d) 631 (App. D. C. 1928).

Conclusion

Vesting and its companion, the supervisory power, were new and untried tools, of unprecedented scope and flexibility, but in an age of total economic warfare against enemies all too familiar with our previous methods, nothing less would suffice. The Custodian, faced with an urgent necessity as sudden and all-embracing economically as it was militarily, has used them extraordinarily well. The Statute and Executive Order in many respects left far behind the precedents of the previous war. New paths had been blazed, and the urgency was too great to permit gradual progress by cautious experimentation. Particularly in the business enterprise field, a wholly new and untried governmental agency had to spring full-blown, as it were, to take over with a sure hand large and vital segments of our operating war economy. Here and there, mistakes and inconsistencies, infringement or curtailment of the rights of our citizens or allies, were inevitable; the wonder is that they were not more numerous.

The vesting and administration of enemy business enterprises by the Custodian is by now largely completed, although a considerable number of them remain to be sold or otherwise finally disposed of. In the light of the experience already gained, a more leisurely reappraisal of the Custodian's powers and policies in this field at least, would indicate some need for clarification and improvement, if only in the following respects:

1. The "business enterprise" definition in the Executive Order has no comparable all-inclusive counterpart in our private domestic law. This lack has of necessity involved the Custodian in many difficulties and inconsistencies, some of them highly technical and theoretical. The Custodian by vesting appears to identify himself with the enterprise for some purposes but not for others.²⁶⁵ Distinctions between stock, asset and interest vestings have only compounded the confusion, and widely different consequences ensue from the form of vesting, depending on the historical accident as to the legal form adopted by the enemy enterprise. Either the definition should be abolished, or it should be rewritten and constituted a separate and distinct "entity" in federal law, under the Trading with the Enemy Act, to be accorded recognition by the states.

2. There no longer appears to be any necessity for leaving such crucial terms as "enemy national" entirely to administrative definition. Its retroactive effect, and the ease with which it lends itself to "bootstrap-lifting", are no longer justified by the times.

265. There is no such identification with the legal entity of the domestic corporation in stock vesting cases, of course. Note 252 *supra*.

3. The supervisory power needs clearer and more precise limitation and definition, and a statutory remedy for its exercise should be provided. Now that hostilities are over, the power needs a habitat more orthodox and traditional than the vast uncharted sea.

4. Serious consideration should be given to broadening the Custodian's liability in the administration of business enterprises to include tort, or at least to make clear that such enterprises, whether in operation or liquidation, shall be no less liable therefor by virtue of the Custodian's vesting. Where stock is vested, the domestic corporation remains liable for its torts; the result should be no different for business enterprises having other legal forms.

5. As applied to business enterprises, the present debt claims statute, restricting claims to those of American citizens and residents, discriminates unfairly against foreign creditors of enterprises whose assets are vested. Again, where stock is vested, the domestic corporation remains liable to all its creditors; the result should be no different for business enterprises having other legal forms.

FORDHAM LAW REVIEW

Published in March and November

VOLUME XVI

MARCH, 1947

NUMBER 1

Subscription price, \$2.00 per year

Single issue, \$1.00

Edited by the Students of the Fordham Law School

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Editorial and General Offices, 302 Broadway, New York 7, N. Y.

CONTRIBUTORS TO THIS ISSUE

LOUIS C. HAGGERTY, A.B., 1912, Georgetown University; LL.B., 1915, Fordham University. Member of the New York Bar. Lecturer in Law, Fordham University, School of Law, 1920-1923. Author of *Some Practical Considerations in Connection With The Making of Gifts*.

JAMES N. VAUGHAN, A.B., 1923, Holy Cross College; LL.B., 1927, M.A., 1933, Fordham University. Member of the New York Bar. Lecturer, New York Law School, 1938 to 1941.

FRANCIS X. FALLON, JR., A.B., 1933, University of Notre Dame; LL.B., 1936, Columbia University School of Law. Member of the New York Bar. Former Assistant General Counsel in charge of the legal staffs in Alien Property Custodian field offices.

EDWARD CASSIN, A.B., 1910, Adelphi College; LL.B., 1906, New York University; Justice, Municipal Court, City of New York.