OFFICE OF THE
ALIEN PROPERTY CUSTODIAN

FINAL DETERMINATIONS OF THE VESTED PROPERTY CLAIMS COMMITTEE

DECEMBER 1943 TO MARCH 1946

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VESTED PROPERTY CLAIMS COMMITTEE

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[1] Successor of Mr. Leo T. Crowley
[2] Successor of John C. Fitzgerald as of June 1, 1946
[3] Successor of Mr. Charles O. Hardy
[4] Successor of Mr. John Ernest Roe and Mr. A. Matt Werner

PREFACE

Many claims asserting a proprietary interest in property vested by the Alien Property Custodian during World War II were processed by this office within the framework of the Trading with the enemy Act of 1917, its several amendments and related Executive Orders, prior to the approval on March 8, 1946, of Public Law 322. Public Law 322 adds Section 32 to the Trading with the enemy Act and provides in substance for the return of property to eligible nationals as defined therein. Because of the changes effected by Public Law 322, it seems an appropriate time to publish the determinations of the Vested Property Claims Committee which were issued prior to March 8, 1946. Although these determinations are not, of course, in all respects precedents for the allowance or disallowance of similar claims asserted pursuant to Public Law 322, they will be of value to those who anticipate assertion of ownership claims under the new enactment. These determinations relate only to claims which were contested by the General Counsel of this Office. They do not relate to claims disposed of summarily because not presenting issues requiring plenary hearings and they do not relate to creditors' claims. There is now pending legislation authorizing the Alien Property Custodian to dispose of creditors' claims.

JAMES E. MARKHAM,
Alien Property Custodian

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[2] Claims consolidated for hearing.

IN THE MATTER OF

EDGAR AUSNIT, PRESIDENT, CISATLANTIC AND CISOCEANIC CORPORATIONS

Claim No. 26. Docket No. 2

U. S. ORDNANCE ENGINEERS, INC.

Claim No. 676. Docket No. 4

STATEMENT OF THE CASE

This proceeding concerns two claims, both filed pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290), amended on December 11, 1943 (8 Fed. Reg. 16709). The Notice of Claim of Edgar Ausnit, as an individual, and of Cisatlantic Corporation (owned and controlled by Ausnit) was filed September 15, 1942 and assigned serial number 26. It alleges acquisition on the part of Ausnit or Cisatlantic of a four-fifths interest in certain forge plant equipment formerly owned by Industria Romana Mecanica si Chemica, a Rumanian corporation (hereinafter referred to as Iremece). The Notice of Claim of United States Ordnance Engineers, Inc., an Ohio corporation (hereinafter referred to as U.S.O.E.), was filed May 24, 1943, and assigned serial number 676. It alleges ownership of the other one-fifth interest and of a seller's lien for an unpaid balance of the purchase price and for charges incurred up to the date of vesting—an alleged total of $101,398.92. The claims were consolidated and, pursuant to notice (8 Fed. Reg. 12453), a consolidated hearing was held before the Vested Property Claims Committee on October 19 and 20, 1943.

The Alien Property Custodian, by Vesting Order No. 46, dated July 2, 1942 (7 Fed. Reg. 5105) and the supplement thereto dated April 27, 1943 (8 Fed. Reg. 5770) vested, among other things, all right, title and interest of Iremece in the forge plant equipment. The first order recites, among other things, findings that the forge plant is property of nationals of a foreign country as designated in Executive Order No. 8389, as amended, and the supplementary order recites that it is owned by Iremece, a national of Rumania.

Hodges, Reavis, Pantaleoni & Downey, Esqs., by Denis B. Sullivan, Esq., appeared on behalf of United States Ordnance Engineers, Inc.; McMahon, Dean & Gallagher, Esqs., by Brian McMahon and Walter E. Gallagher, Esqs., appeared on behalf of Edgar Ausnit and Cisatlantic Corporation; and A. Matt. Werner, General Counsel, by Irwin L. Langbein and Robert A. Fulwiler, appeared on behalf of the Custodian.

Proposed determinations, briefs and reply briefs were submitted by the parties—the last brief having been filed on January 13, 1944. A tentative determination, disallowing the claims, was issued by the Committee on April 3, 1944. The parties notified the Committee of their intention not to file proposals for modification of the tentative determination—the last such notice having been received on June 7, 1944.

No proposals for modification having been received, the Committee hereby adopts its tentative determination as the final determination and accordingly disallows the claims for the reasons hereinafter set forth.

The transcript of the testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

Determination

The issues to be resolved in this proceeding are as follows:

(1) Was an agreement entered into and performed by Cisatlantic Corporation for the purpose of obtaining an interest in the forge plant in question, and

(2) If the agreement was entered into and performed, did Cisatlantic Corporation thereby acquire an interest in the forge plant, and

(3) Was U.S.O.E. the absolute owner of the vested property, or merely the holder of a security interest therein.

Issue 1

The undisputed evidence is that, in 1937, U.S.O.E. entered into a contract with the Rumanian Department of Air and Marine (hereinafter referred to as M.A.M.) to supply bombs to Rumania. The bombs were to be partly manufactured here by U.S.O.E. and completed in Rumania by a corporation (Iremece) to be organized for that purpose. Nothing further was done until 1938 when by modification of the original agreement it was provided that U.S.O.E. was to furnish and install in Rumania part of the equipment needed to manufacture bombs. Also in 1938, Iremece was organized and shortly thereafter it ordered the equipment from U.S.O.E. The original contract was thereafter, on July 28, 1939, again modified to include a completed forge plant for the manufacture of bombs at a price of $766,250. Subsequently an additional $50,000 was added to the purchase price for supplemental engineering services, making the total selling price $816,250.

The forge plant was constructed for U.S.O.E. by the Bethlehem Steel Company, Bethlehem, Pennsylvania, was shipped on December 31, 1940, upon instructions of U.S.O.E., to a warehouse in New Jersey. Afterwards it was transferred to a New York warehouse which issued to U.S.O.E. a non-negotiable warehouse receipt. It appears that Iremece had paid U.S.O.E. a total of $726,303.33, leaving an alleged unpaid balance, as of October 9, 1940, of $64,946.67. An application was made by U.S.O.E., on October 4, 1940, to the Department of State for a license to export the plant to Rumania. The application was rejected on December 13, 1940, and the plant thereafter remained in storage until vested by the Custodian on July 2, 1942.

After the export license was refused, U.S.O.E. contracted to sell the plant to the Netherlands East Indies Government, subject to the reservation that a release be obtained from Iremece of its interest and that M.A.M. approve the release. This sale was never consummated.

It appears that in July or August of 1941, approximately six months after the forge plant had been completed and stored, Ausnit, together with one Theodore Zissu and one Herescu, met B. C. Goss, President of U.S.O.E., in Cleveland and represented that he, Ausnit, was the owner of substantial holdings in Titan-Nadrag-Calan, a Rumanian corporation (hereinafter referred to as TITAN) engaged in the manufacture of steel. The identification of Zissu and Herescu is incomplete. They were not witnesses in this proceeding. It was agreed at the conference that Ausnit would transfer to Iremece 175,000 shares of TITAN in exchange for Iremece's release to U.S.O.E. of its interest in the forge plant. U.S.O.E. also agreed that, if it received the Iremece release, it would pay Ausnit $500,000 out of the proceeds of the proposed sale to the Netherlands East Indies Government. The purchase price in the event

of such a sale was to be $625,000. Later it was agreed that instead of a cash payment of $500,000 by U.S.O.E. to Ausnit, Ausnit would receive four-fifths of the sale price paid by the Netherlands East Indies Government and the balance was to be paid to U.S.O.E.

The parties by a series of communications then outlined the proposal to Iremece and urged Iremece to execute the release and obtain the approval of M.A.M. On November 8, 1941, Iremece cabled U.S.O.E. to the effect that official authorization had been granted to Iremece to dispose of the forge plant in accordance with the terms proposed by Ausnit and U.S.O.E. This was followed by a letter dated December 4, 1941 from the Rumanian Legation in Washington to U.S.O.E., transmitting Iremece's advice that appropriate authorization to transfer the forge plant had been obtained and that the transfer was to be made upon the following conditions:

(1) The forge plant to be turned over to Cisatlantic upon delivery to Iremece in Bucharest of "175,000 shares of stock in the Titan-Nadrag-Calan Company (to wit, 167,867 shares owned by Cisatlantic Corporation and 7,133 shares owned by Bessler Waechter, Ltd.)", and

(2) upon the payment by Iremece to U.S.O.E. of $78,000, and

(3) that U.S.O.E. and Cisatlantic confirm by cable that the terms were acceptable.

Goss, Ausnit and others conferred in New York on December 7, 1941 and on December 8, 1941 entered into an agreement, which provided, among other things, (1) that Cisatlantic take any action necessary to secure the release of the forge plant, (2) that in the event of a sale the purchase price received should be divided in the proportion of one-fifth to U.S.O.E. and four-fifths to Cisatlantic, and (3) that if the sale to the Netherlands East Indies Government should not be consummated the plant could be sold elsewhere and the proceeds divided as indicated, provided the sale elsewhere received the written consent of both parties. U.S.O.E. and Cisatlantic then attempted by various communications to cause the transfer to Iremece of 175,000 shares of TITAN stock and to obtain approval from the Rumanian Government of the release of Iremece's interest in the forge plant. One of the communications was a cable, dated December 8, 1941, from Cisatlantic to Iremece. This cable was specifically referred to in the December 8th agreement and was attached thereto as "Exhibit C". The cable stated:

"Urgently required stop firstly cable confirmation directly from MAM through Roumanian Legation to USOE approving agreement you cabled Legation stop secondly your confirmation to USOE through the American Legation Bucarest which is very important and if impossible through the foreign office to Roumanian Legation that you meantime received 175,000 TNC shares or that you received guarantees satisfactory to you for delivery of above shares stop thirdly to arrange immediate payment of balance 78,000 stop arrange also American Legation Bucarest confirm USOE MAMS approval of agreement you cabled Legation Washington."

It may clarify the issue to point out that if U.S.O.E. and Cisatlantic had, prior to November 8, 1941, communicated an offer to Iremece, the November 8th cable from Iremece to U.S.O.E., coupled with the letter dated December 4, 1941 from the Rumanian Legation, did not constitute an acceptance of the offer because it was not unconditional. Assuming then that the November 8th cable coupled with the December 4th letter was a counter offer, the December 8th cable from Cisatlantic to Iremece was not an acceptance of the counter offer because it imposed further terms. Some

of the conditions recited in the December 8th cable apparently were intended to prescribe the method of acceptance of the proposal on Cisatlantic's part to transfer 175,000 TITAN shares in return for the release of Iremece's interest in the forge plant. The prescribed approval of the release of Iremece's interest was important because the parties here were aware of the fact that the Netherlands East Indies Government had refused to perform a purchase agreement partly because of the lack of satisfactory evidence of M.A.M.'s approval. For this reason the December 8th cable specifically prescribed that M.A.M. confirm to U.S.O.E. directly through the Rumanian Legation and that M.A.M. also confirm to U.S.O.E. through the American Legation at Bucharest. The confirmation sought from M.A.M. was imperative not only because of the attitude of the Netherlands East Indies Government but also because Iremece was a corporation created by and under the control of the Rumanian Government.[1]

Shortly after December 8, 1941 four cablegrams were exchanged apparently for the purpose of assuring the receipt by Iremece of the December 8th offer and for the purpose of expediting Iremece's compliance with the new conditions prescribed in that offer. Two of the cablegrams were transmitted over the signature of one Mann of New York and the two in reply thereto were transmitted from Switzerland over the signature of one Wright. Counsel for U.S.O.E. identified Mann as an agent of the law firm representing the claimant in this proceeding and identified Wright as a correspondent of Mann. Neither was a witness in this proceeding. The cables, even if viewed in a light most favorable to the claimant, fail to reveal compliance with the conditions prescribed in the December 8th offer. Even if one should assume that the cable of December 8th was an unqualified assent to the terms of Iremece's counter offer of December 4th, thus bringing a contract into existence at that time, we may well observe that the Mann-Wright cables by no means establish performance thereof by Cisatlantic.

In December, 1941 the Swedish Legation in Washington was representing the Rumanian Government, which had declared war on the United States on December 12, 1941. U.S.O.E. received a letter dated December 30, 1941 from the "Legation of Sweden, Department of Roumanian Interests, Washington", which was signed "Tor Hugo Wistrand, Counsellor, Charge of Roumanian Interests". This letter is heavily relied upon by both claimants to show the existence and performance of a contract. The letter is as follows:

"The Swedish Legation having taken over the protection of Romanian interests in the United States as of December 17, 1941, I have been asked to transmit to you, with reference to your letter of December 8 to the Royal Romanian Legation, the following communication:

'Industria Romana Mecanica si Chimica, 5 Strada Atena, Bucuresti, confirms receipt of documents dated December 11, concerning 157,500 shares of Titan-Nadrag-Calan, as well as satisfactory guarantees that an additional 17,500 shares of Titan-Nadrag-Calan will be remitted upon payment of $78,000 to the U. S. Ordnance Engineers, Inc., Cleveland.

[1] It is further observed that before and for sometime after Ausnit was informed by Zissu of Iremece's interest in the plant, Zissu endeavored to obtain from U.S.O.E. and the Netherlands East Indies Government authority from Iremece to represent it in the sale, but without success. The correspondence of Zissu, U.S.O.E., and Iremece during this period discloses their purpose in seeking formal confirmations of Iremece's release as prescribed in the December 8th cable from Cisatlantic to Iremece.

'The Romanian Ministry of Air and Navy (MAM) approves the arrangement suggested in the Romanian Legation's letter No. 5162/P–98 of December 4, and also considers that your and Cisatlantic Corporation's cables of December 10, transmitted to the Romanian Ministry of Foreign Affairs through the Romanian Legation's cables Nos. 181/5249, 182/5251 and 183/5252, together with the communication contained in the first part of this letter constitutes an agreement to be executed immediately.'

"Furthermore, for your information, I enclose copies of letters I addressed today to the National City Bank, 51st Street Branch, New York, N. Y., asking them to pay from the 'Romanian Government Special Account' the sum of $78,000, and the letter asking for a license authorizing this payment.

"Your confirmation of this letter will be appreciated."

It is significant that the letter states "I have been asked to transmit to you, with reference to your letter of December 8th to the Royal Romanian Legation, the following communication:" without further mention of the source of the information or without disclosing who had made the request to the Swedish Legation to transmit it. The letter, in other words, does not explicitly state that either Iremece or M.A.M. had requested the transmittal of its contents. We note also that the letter refers to a letter dated December 8th addressed to the Rumanian Legation. This letter was not offered in evidence. It is apparent that the Iremece and M.A.M. confirmations contained in the December 30th letter from the Swedish Legation were not such confirmations as were requested in the December 8, 1941 cable from Cisatlantic to Iremece. The December 8th cable requested three confirmations: (1) that M.A.M. confirm, through th Rumanian Legation to U.S.O.E., approval of the agreement, (2) that Iremece confirm, through the American Legation at Bucharest, to U.S.O.E. that it had received the shares or satisfactory guarantees of delivery of them, and (3) that the American Legation at Bucharest confirm to U.S.O.E. M.A.M.'s approval of the agreement. While the December 30th letter purported to cover Iremece's confirmation of the receipt of some of the shares and satisfactory guarantees of the delivery of an additional number and also M.A.M.'s confirmation of the agreement, it does not purport to cover an Iremece confirmation through the American Legation at Bucharest and it does not purport to cover a confirmation by the American Legation at Bucharest to U.S.O.E. of M.A.M.'s approval of the agreement.

The Committee is of the opinion that the letter of the Swedish Legation and the cables exchanged by Mann and Wright are subject to the objections applicable to any hearsay evidence, but the Committee has, however, given them such consideration as seems reasonable in the premises.

An application was in fact made by the Swedish Legation to the Treasury Department for a license to pay to U.S.O.E. the sum of $78,000 out of blocked Rumanian funds on deposit with the National City Bank of New York. The record does not disclose that a license for this purpose was issued. It may, however, be assumed that it was not issued because the $78,000 purportedly owed to U.S.O.E. by Iremece is a part of U.S.O.E.'s present claim.

Ausnit was at one time a Rumanian citizen and apparently had been deprived of his Rumanian citizenship sometime before he acquired Cuban

citizenship on July 1, 1939. He has been a resident of the State of New York since 1939. The extent to which his property in Rumania was affected by his loss of Rumanian citizenship is obscure. There is some indication that following his departure from Rumania and acquisition of Cuban citizenship his property in Rumania may have been confiscated. The possibility of confiscation is made apparent in the cable dated November 6, 1941 from Istratti, Ausnit's agent in Bucharest, to Ausnit wherein Istratti stated:

"* * * New changed situation after Iremece pays balance 78,000 has to receive in exchange 175,000 TNC either there or duplicate here 167,867 from yours balance from Bessler to deliver stop cannot any more deliver here 25,000 because those and ours had to be ceded * * *".

If in fact Ausnit's or Cisatlantic's property in Rumania had been confiscated by the Rumanian Government, its power to seize property, even though a belligerent, and even though that power were exercised adversely to United States nationals, would be recognized by our courts. Istratti again on November 16, 1941 cabled Ausnit stating:

"* * * Irmc receiving duplicate will cable through Legation release of equipment * * *".

The reference to "Irmc receiving duplicate" may indicate that the original certificates were not available and that Istratti was arranging to have TITAN issue duplicate certificates and thus effect the transfer of the shares on the corporate records of TITAN. It is not apparent that Iremece received either original or duplicate certificates of the 175,000 shares. The November 6th cable from Istratti mentions that some of the shares were to be transferred from Ausnit's account in a British corporation known as Bessler-Waechter, Ltd. Since initially an effort was made to have the entire 175,000 shares transferred from this account and since the transfer application to the Board of Trade of London was denied, the absence of evidence of approval by the Board of Trade of the transfer of the Bessler-Waechter shares mentioned in the November 6th cable throws doubt upon whether or not the transfer took place.

Because the evidence of the making of the proposed contract for the transfer of the TITAN shares in exchange for Iremece's release of its interest in the forge plant is inconclusive and because the record is without substantial evidence as to whether or not such an agreement, if made, was performed, the Committee concludes that Cisatlantic did not actually acquire the claimed interest in the forge plant. Obviously Ausnit's claim as an individual fails for the same reasons.

ISSUE 2

The briefs of the parties present as a second issue the applicability to, and legal effect on, the transaction in question of the prohibitions contained in the Trading with the enemy Act, as amended, and executive orders issued thereunder. Having determined the first issue against the claimant; that is to say, having found that there was insufficient evidence to substantiate Cisatlantic's claim of ownership of the forge plant, the Committee finds that there is no reason for a present determination of the second issue.

ISSUE 3

It will be recalled that U.S.O.E. had contracted to manufacture and sell the forge plant to Iremece. U.S.O.E. contends that title to the forge plant did not pass from it to Iremece because the sale was to be on a cash basis and payment of the full purchase price was to be a condition precedent to delivery and to the transfer of title to Iremece.

Because the forge plant was not in existence at the time the contract was made, it was "future goods" (Uniform Sales Act, Section 76 (1)).[2] The passage of the "property in the goods" would thus take place when the goods were "unconditionally appropriated to the contract" (Uniform Sales Act, Section 19 (4) (1)) unless the terms of delivery postponed the passage of the property in the goods to a later date. That the forge plant had been unconditionally appropriated to the contract is evidenced by the fact that U.S.O.E. had on October 4, 1940 made application on behalf of Iremece to the State Department for an export license for the plant and by various items of correspondence with Iremece all conclusively indicating such an appropriation.

Although the phrase "F.O.B. Cleveland" appears in a proforma invoice which has been considered a part of U.S.O.E.'s contract to sell the plant to Iremece and although this would under ordinary circumstance require the application of the rule that "if the contract to sell requires the seller to deliver * * * at a particular place * * * the property does not pass until the goods have * * * reached the place agreed upon" (Uniform Sales Act, Section 19 (5)), the correspondence between U.S.O.E. and Iremece shows that the plant was to be constructed in Bethlehem, Pennsylvania, and stored in New York. The phrase "F.O.B. Cleveland" did not, therefore, control and New York became, by the agreement of the parties, the place of delivery. We note that in response to U.S.O.E.'s demands for the payment of the balance and of the cost of transportation of the plant to New York and of the storage there, Iremece stated in a cable, dated February 25, 1942:

"Balance plus transportation and storage will be made available to you from Roumanian Government funds blocked in USA stop understand you can readily obtain release of such remittances stop cable if you fear difficulties."

The forge plant was in fact ready for delivery on or about December 31, 1940. It was loaded at that time at the Bethlehem Steel plant in Pennsylvania on cars and pursuant to directions of U.S.O.E. was sent to a warehouse in New Jersey. It remained in storage until vested by the Custodian when it was turned over to the Navy Department for use in the war effort.

Additional evidence that U.S.O.E. and Iremece mutually understood that the property in the goods had passed to Iremece and that U.S.O.E. was interested only in the right to retain possession of the equipment as security for the unpaid purchase price is found in the correspondence between U.S.O.E. and Iremece. On September 12, 1940, anticipating the completion of the manufacture of the forge plant and the difficulties that would attend the exportation of the equipment to Rumania, U.S.O.E. wrote to Iremece stating that an application for an export license was

[2] The contract was to be performed in the United States, where both delivery and payment were to take place. Hence, its effect is governed by the laws of this country, viz., the Uniform Sales Act, which has been for many years the law of all the states in which any acts relating to the performance took place.

made covering "your forge plant equipment" and stated further that:

"* * * also, on the assumption that this equipment cannot be shipped to Rumania for possibly several years, it will gradually accumulate rust and become worthless. We believe, therefore, it would be to your best interest, as well as that of the Rumanian government to start discussions with MAM regarding the disposition of this equipment. We will send you a photostat copy of the official answer of the United States Government as soon as it is received. We are giving you this advance notice in order that a decision may be reached as promptly as possible after such official notice is sent to you * * *. We believe that in order to sell this equipment, it will be necessary for us to do a great deal of engineering work and to design and manufacture a very considerable quantity of additional hydraulic equipment, pump accumulators, and of course to make the equipment available to general forge work. We therefore cannot hold out any hope of selling this equipment for anything near its cost, on the other hand we do not believe that you will feel that you can afford to let it lie idle in the United States for years, paying large storage charges and insurance there monthly while it rusts. Please be assured that we want and intend to do everything possible to obtain the best solution for you of this situation, which was entirely beyond our control."

Then on December 14, 1940, U.S.O.E. cabled Iremece stating:

"Forge plant license refused cable immediately final payment and whether you wish to sell it otherwise we must receive funds covering transportation and storage immediately."

This cable was followed by another cablegram dated December 31, 1940, to Iremece, wherein U.S.O.E. stated:

"Forge plant ready delivery today stop neither final payment instructions for disposition nor funds for transportation and storage received stop unless payment and instructions received within thirty days we will sell it and apply any proceeds to expenses storage sale and maintenance and balance on account due us from you stop no purchase offers have been received stop will cable transportation and storage costs when determined."

Iremece replied in a cable dated January 19, 1941, as follows:

"* * * we therefore thought to store equipment and request you cable delayed answer our cable December 19 stop if equipment sold we are obliged to immediately order another one elsewhere stop furthermore exchange comptroller cannot conceive sale at loss at this time of high prices and asks for refund full amount dollars remitted stop we therefore request you use patience and wait for our news regarding further developments here to ease your and our position stop on other hand we have again asked for remittance to you of balance due plus funds for transportation and eventual storage."

And again, on February 25, 1941, Iremece, in a cable to U.S.O.E., stated;

"Balance plus transportation and storage will be made available to you from Rumanian Government funds blocked in USA stop understand you can readily obtain release of such remittances stop cable if you fear difficulties."

Moreover U.S.O.E. in an endeavor to sell the forge plant to a purchaser

(Netherlands East Indies Government) made, unsuccessfully, an extensive attempt to obtain the release of Iremece's interest.

It is noted that U.S.O.E. abandoned the proposal, referred to in the above correspondence, to sell the forge plant within 30 days and that it was not in fact resold by U.S.O.E. and that the original contract was not in fact rescinded.

The property in the goods having passed to Iremece, the only remedy available to U.S.O.E. was that set forth in Section 53 of the Uniform Sales Act, wherein it is provided:

"Subject to the provisions of this act, notwithstanding that the title in the goods may have passed to the buyer, the unpaid seller of goods, as such, has

"(a) A Lien on the goods or right to retain them for the price while he is in possession of them."

The right, therefore, that U.S.O.E. had was that of a lien-holder and the interest of Iremece was subject only to that right.

It appears, therefore, that by reason of its contract with U.S.O.E., the unconditional appropriation to that contract of the plant, and the delivery of the plant to New York, Iremece had acquired, prior to the date of vesting, the property in the goods subject to U.S.O.E.'s lien for security purposes.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that:

(1) Neither Edgar Ausnit nor Cisatlantic Corporation acquired an interest in the forge plant equipment,

(2) U.S.O.E. had a security interest in the forge plant equipment in the form of a lien for the unpaid balance on the purchase contract and for such additional charges as may hereafter be determined,

(3) Iremece was on the date of vesting a national of a designated enemy country, namely, Rumania, and

(4) The forge plant equipment and all right, title and interest of Iremece to such forge plant equipment was properly vested.

Accordingly, the claims of Edgar Ausnit and Cisatlantic Corporation and United States Ordnance Engineers, Inc., are hereby disallowed, without prejudice, however, to any security interest of United States Ordnance Engineers, Inc.

JUNE 10, 1944.

IN THE MATTER OF
LUDWIG BAER
Claim No. 943. Docket No. 69

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 943 (dated July 26, 1943) filed by Ludwig Baer, pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 201 and Vesting Order No. 4217, dated October 2, 1942, and October 14, 1944, respectively, vested, among other things, Patent No. 2, 196,198 and Patent No. 2,259,556 as property of Karl Drechsler, a national of a foreign country (Germany).

The Notice of Claim alleges in substance that the claimant, Ludwig Baer, acquired ownership of the two patents from Karl Drechsler under an assignment made orally in October 1934.

Pursuant to notice (9 Fed. Reg. 13996) a hearing on the claim was held in the New York Office of the Custodian before the Vested Property Claims Committee on December 6, 1944. Eugene R. Pickrell appeared on behalf of the claimant, and John Ernest Roe, General Counsel, by Edward M. Murphy and James M. Fallon, appeared on behalf of the Custodian. Proposed findings and supporting briefs were filed by claimant on January 29, 1945, and by General Counsel on March 3, 1945. Claimant replied on March 19, 1945, and General Counsel's reply was filed on April 17, 1945. A tentative determination disallowing the claim was issued on May 31, 1945. Oral argument was heard on August 1, 1945. A supporting brief was filed by the claimant on August 18, 1945, and a responsive memorandum was filed by General Counsel on September 4, 1945.

The transcript of the testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for the reasons hereinafter stated.

Determination

This proceeding concerns United States Patents Nos. 2,196,198 and 2,259,556 which were issued in 1940 and 1941 respectively to one Karl Drechsler, a citizen and resident of Germany, and were vested by Vesting Orders Nos. 201 and 4217, dated October 2, 1942, and October 14, 1944, respectively. The inventions are related to a device for automatically cleansing barrels.

The claimant, Ludwig Baer, who has been a resident of the United States since 1911 and a citizen since 1923, is without question an eligible claimant as to nationality. The only question in this proceeding, therefore, is whether he has sustained his burden of proving that he had at the time of vesting "any interest, right or title" in the patents in question within the meaning of section 9 (a) of the Trading with the enemy Act, as amended. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom, *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

The claimant contends in substance that the patents in question were orally assigned to him by the patentee Drechsler in October 1934. General Counsel contends that the claimant has failed to carry his burden of proof. The Committee has been constrained to disallow the claim for failure of proof upon the facts and for the reasons hereinafter stated.

It appears that the claimant was the sales representative in the United States of A. S. Baer & Sohn of Mannheim, Germany, from about 1907 until 1933. During that period Baer & Sohn, a family business organized by the claimant's grandfather in about 1826, was the exclusive distributor in the United States of barrel cleansing equipment manufactured by the firm of Oscar Bothner of Leipzig, Germany. It appears that Oscar Bothner was owned by Drechsler at all times material to the instant claim.

In 1933 the claimant—independently of Baer & Sohn—individually

entered into an agreement directly with Bothner and thereby acquired for a period of five years the exclusive sales agency in the United States for Bothner products. In respect of patents this agreement provides:

"In case of a sale or granting of a license on the American or Canadian patents, in respect to the manufacturing of Bothner's products in said countries, negotiations have to be started between the two parties."

On October 22, 1937, this agreement was extended by Bothner and the claimant without modification to January 1, 1943. It appears that Bothner did not have any ownership interest in the sales agency here and the claimant did not have any ownership interest in the Bothner firm. Pursuant to the 1933 agreement the claimant purchased from Bothner from 1933 until 1939 barrel cleansing machines manufactured by Bothner in Germany having a total sales price of approximately $350,000.

Several references were made at the hearing to contracts executed by and between Bothner and Baer & Sohn in 1907 and 1908. Both contracts related to an automatic barrel cleansing machine—invented by one Romberg who apparently was then a co-owner of Bothner—which was made the subject of a United States patent application in 1907 or 1908 but upon which a patent did not issue. By the 1907 agreement Baer & Sohn became the exclusive sales agent in the United States for the machines; that is, it purchased in Germany and exported to the United States the machines manufactured by Bothner in Germany. In this respect the 1907 contract between Baer & Sohn and Bothner is substantially similar to the 1933 agreement between the claimant and Bothner. Although the inventor Romberg had in fact assigned the invention to Baer & Sohn in December 1907, Bothner agreed in its 1908 contract with Baer & Sohn to apply for a United States patent thereon and if successful, to assign it to Baer & Sohn. Baer & Sohn agreed to pay all the expenses of the patent application and to pay a royalty of "Mk 400.—for each machine that has been manufactured, delivered and paid for, based on this American patent." The 1908 agreement further provided that if a patent did not issue on the application—and as stated above it did not issue—Baer & Sohn was to continue to be the "sole selling agent of this machine in the United States" in accordance with the terms of the exclusive sales agreement of 1907. Thus the claimant by the 1933 exclusive sales agreement succeeded Baer & Sohn with reference to the distribution in the United States of the barrel cleansing machines manufactured in Germany by Bothner. It is further noted that while the 1908 contract between Baer & Sohn and Bothner specifically called for an assignment of any related patent and prescribed the royalties to be paid therefor, the 1933 agreement between the claimant and Bothner provided merely that the parties negotiate in respect of any patent.

The repeal of the Eighteenth Amendment in 1933 revived interest in the barrel cleansing machine and Karl Drechsler came to the United States in 1933 and in 1934. While here he conferred with the claimant on several occasions relative to an improvement on the machine. Then on October 22, 1934, a conference took place in the office of Mr. Paul Goepel, a New York attorney retained by the claimant. Allowance or disallowance of the instant claim turns mainly upon what transpired at this conference. It was attended by Drechsler, Goepel, the claimant, and one Frankenberger. All except Drechsler testified as to what happened at the conference. Goepel has been engaged in the practice of

law in New York since 1902. Frankenberger is a naturalized citizen of the United States who—since he became a resident of the United States in 1914—has been employed by the claimant as an engineer exclusively engaged in the installing and servicing of the barrel cleansing machines.

The conference involved a lengthy discussion of the mechanical details of the invention and the drawings required for a patent application thereon; the assignment phase of the patent was mentioned briefly at the close of the conference. In view of the claimant's contention that Drechsler at this conference either orally assigned the invention to the claimant or then confirmed the making of such an assignment, it is well to recite in detail the exact testimony upon which the Committee bases its conclusion that the evidence falls short of sustaining the contention.

Mr. Goepel recalled:

"* * * We finally came to a point where I believed I understood the invention and having completed that mechanical work I said, 'Now, gentlemen, I have completed my mechanical work. How about the assignments?' Mr. Drechsler said, an assignment is to be made and it was either Mr. Drechsler or Mr. Baer who said, that Mr. Baer will pay the fees for the patent application to be filed and to be prosecuted. * * *"

On cross-examination Mr. Goepel further testified:

"* * * Then when I get through with my mechanics, I bring up the question, How about the assignments, so I did it on that day and as they were standing there the three of them mumbling to themselves for awhile, I shot this question out and the answer came as I said before, an assignment was to be made and Baer was to pay the bills and then they mumbled a little more and said probably a few complimentary things and broke away."

Mr. Frankenberger's recollection was:

"We discussed everything first and then afterward we were through with all the stuff then Mr. Baer was talking about assignments, then Mr. Drechsler said, 'Mr. Baer, we want to get this thing clear first, and after that we have the patents then I will assign it to you,' and then Mr. Baer said, 'All right, Mr. Drechsler, I pay the expenses for all that.'"

And on cross-examination Mr. Frankenberger's testimony included the following question and answer:

"Q. Isn't it possible that Mr. Drechsler might have said that we will assign these patents in the future?

"A. No, he didn't say that. He only said when it is ready, when everything is settled and he has the patents then he will assign it."

The claimant, Ludwig Baer, testified that at the conference the "understanding" was that:

"* * * Mr. Drechsler is to apply for this new improvement in the U. S. Patent Office and after the patents are granted they would be assigned to me just as it was done in 1907 and 1908, between our fathers for the original patents."

The claimant further testified on direct examination as follows:

"Q. Was the amount of that royalty discussed?

"A. No, the only thing said was, we go on as heretofore.

"Q. From that, do you infer that the royalty was to be fixed later?
"A. Yes.
* * * * * * *
"Q. Was anything said about payment of royalties by you to Oscar Bothner?
"A. It was always the understanding that we continue as heretofore.
* * * * * * *
"Q. Is the arrangement as before set forth in claimant's exhibit No. 3 and 7? [The 1907 and the 1908 contracts between Baer & Sohn and Bothner.]
"A. Yes."

Then on cross-examination the claimant responded to the following questions:

"Q. Mr. Baer, I believe you testified that part of the consideration for the alleged assignment of these two patents was to be the payment of royalties to Drechsler, is that not right?
"A. Yes.
"Q. And I believe you further testified that you never agreed with Mr. Drechsler as to the amount of the royalties, is that correct?
"A. Not to the amount of the royalties of these two patents referred to.
"Q. I mean you never agreed as to what royalties were be be paid to Drechsler for the alleged assignment of these two patents.
"A. No, if I may add, the only thing was that Drechsler repeatedly said, we go on the same way as before, and the amount of royalty was exactly given in the 1908 contract, but naturally conditions in the world have changed and both sides naturally thought some different amount would be stipulated when it comes to that.
"Q. But no different amount was ever stipulated.
"A. No."

Then when the claimant was asked "whether or not Mr. Drechsler at any time said to you, these are to be your patents?" he responded:

"I must say, no, he never said those are your patents. First of all, he couldn't say because the patents were not granted and were in the making and, as you know, it took some time, but there was no question that Drechsler repeatedly said in Goepel's office, as well as in my own office, regarding this thing, they will be assigned to you as soon as they are granted and we will go on the same way as heretofore."

As we interpret this testimony in the light most favorable to the claimant, it is apparent that all the claimant and Drechsler did at this conference was to agree that a patent was to be applied for at the claimant's expense, that Drechsler would assign the patent to the claimant when it was issued, and that the parties would negotiate subsequently as to the royalties. Such an agreement does not constitute a contract because the parties did not then agree as to the consideration for the transfer; that is, the payment of royalties. In view of the long and close association between the parties, it is understandable that they were satisfied with an agreement to agree in the future as to the royalties. Nevertheless, such an agreement to negotiate in the future concerning such an essential part of a contract—the consideration itself—does not give rise to any contractual rights.

The patent application was filed in Drechsler's name in the United States Patent Office in 1935. After some difficulty in establishing the

patent claim, there was a division and the two patents in question issued to Drechsler, one on April 9, 1940, and the other on October 21, 1941. It appears that in accordance with the statements made at the 1934 conference, the claimant paid attorney Goepel about $1,000 for the fees and costs of the patent proceeding. It is clear that this payment was not intended to be the consideration for the transfer of the invention. That was not the bargain. There is no evidence that they so agreed. Furthermore, the relationship of the parties sufficiently explains the claimant's willingness to expend about $1,000 in the expectation that eventually a patent might be issued and assigned to him. We conclude, therefore, that no contract to transfer the invention or the resultant patents to the claimant was made prior to vesting. It is likewise clear that—apart from the question of a contract to assign—Drechsler did not at the 1934 conference or otherwise manifest an intention to transfer presently the invention to the claimant.

A further item of evidence requires comment. The claimant testified that shortly after the issuance of the first patent he wrote to Drechsler requesting an assignment and, on March 26, 1941, he cabled Drechsler in reference to the second patent as follows:

"Referring to my letter of April 17, 1940, second patent, with three claims permitted application made June 13, 1935. Goepel recommends very strongly immedate transfer. Send documents. * * *"

Drechsler replied to this March 1941 cable as follows:

"The patent matter requires report from Berlin. I shall answer you after this has been made clear."

This correspondence does not imply that Drechsler had previously assigned the patents to the claimant. Nor is the extension in 1937 of the 1933 contract inconsistent with a finding that the invention had not been transferred because the 1933 contract, as extended without modification in 1937, provided that patent matters were to be the subject of negotiation by the parties.

Claimant's brief, submitted in support of his application for a modification of the tentative determination disallowing this claim, discloses that he actually bases his claim upon an alleged oral assignment. His contentions in this regard are not consistent with his own statements at the hearing or with those of his witnesses; that is, both he and his witnesses testified in effect that there was no actual present right conveyed to claimant at the time of the alleged oral assignment but that at the most there was an understanding that something in the nature of an assignment would be made in the future. Further, the assertion in claimant's brief that he was a joint inventor of the devices covered by the patents in question adds no strength to his position. Patents obtained by only one of two joint inventors, as he now asserts occurred as to the patents here in issue, would have been void. See Walker on Patents—Deller's Edition, Vol. I, p. 403, Sec. 117 and the several cases there cited.

The conclusion reached by the Committee is not based upon disbelief of the testimony of any of the witnesses. Accepting their testimony insofar as it depicted what happened, the Committee is constrained to conclude that the understanding as to which they testified did not effect either an assignment or a contract to assign the patents.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Ludwig Baer, did not have at the time of vesting a title or interest to the vested property sufficient to support a right of recovery.

Accordingly, Claim No. 943 is hereby disallowed.

SEPTEMBER 19, 1945.

IN THE MATTER OF

CHRISTIAN F. BENZ—AMERICAN VOITH CONTACT COMPANY, INC., J. M. VOITH COMPANY, INC., *and* VOITH-SCHNEIDER PROPELLER COMPANY, INC.

Docket Nos. 17, 18, 19. Claim Nos. 682, 683, and 684

STATEMENT OF THE CASE

This proceeding was initiated by Notices of Claims Nos. 682, 683 and 684, each dated May 10, 1943, filed by Christian F. Benz pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian, by Vesting Orders Nos. 114, 115, and 116, dated August 25, 1942 (7 Fed. Reg. 7155), vested:

1,990 shares (out of a total issue of 2,000 shares) of the capital stock of American Voith Contact Company, Inc., a New York corporation.

The entire outstanding capital stock (200 shares of no par value common stock) of J. M. Voith Company, Inc., a New York corporation, and

The entire outstanding capital stock (80 shares of no par value common stock) of Voith-Schneider Propeller Company, Inc., a New York corporation.

The Vesting Orders recited in substance that the shares were registered in the name of Christian F. Benz, claimant in this proceeding, and that he held the shares for the benefit of Walther Voith, Hanns Voith, and Hermann Voith, of Heidenheim, Germany, nationals of a designated enemy country (Germany).

The Notices of Claims allege in substance that the claimant was the owner of the claimed shares at the time of vesting, and that his ownership was acquired through assignments executed by the German owners in Germany on August 28, 1939.

The claims were consolidated for hearing. The Order for and Notice of hearing was published on March 31, 1944 (9 Fed. Reg. 3468), and copies thereof were served upon the persons designated in Section 2 of the Notices of Claims. Pursuant thereto a hearing was held on April 13 and 14, 1944, before the Committee in the Office of the Custodian in New York City.

Dow & Symmers, by William G. Symmers, and Cummings and Stanley, by William D. Donnelly, appeared on behalf of claimant. John Ernest Roe, General Counsel, by James Fallon and Elmer Cunningham, appeared on behalf of the Custodian.

Claimant's brief was filed with the Committee on June 20, 1944. General Counsel's brief and Proposed Findings and Conclusions were filed July 4, 1944. The claimant's reply brief was filed July 22, 1944. A tentative determination disallowing the several claims was issued on

August 14, 1944. The claimant submitted proposals to modify the tentative determination on August 28, 1944, and General Counsel submitted comments on the proposals to modify on September 14, 1944. Since the arguments contained in the claimant's proposals to modify the tentative determination had been thoroughly considered by the Committee in arriving at its tentative determination, and since a reconsideration of them has not altered the Committee's conclusions, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in the proceeding.

The transcript of the testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The Committee, following a consideration of the entire record, hereby disallows the several claims for the reasons hereinafter set forth.

Determination

The question in this proceeding is whether or not the claimant has sustained his burden [1] of proving his ownership of the claimed shares. He contends that he acquired ownership of them through assignments executed and delivered to him in Germany in August 1939, by Walther, Hermann and Hanns Voith. General Counsel maintains that the assignment constituted a "cloaking" transaction for the purpose of concealing the beneficial interest of the Voiths in the property transferred.

It is the claimant's contention that the property was transferred to him for the following reasons; he had been employed by and intimately associated with the German partnership (J. M. Voith of Germany composed of Walther, Hermann and Hanns Voith) since 1905, and the partnership was faced with the necessity of liquidating the three American corporations (whose shares were vested) because they had been for many years previous to 1939 in serious financial difficulties. Therefore, during claimant's visit to Germany in 1939, the Voiths transferred to the claimant all of their interests in the three American corporations and also their right to receive royalties under a contract with the S. Morgan Smith Company, of York, Pennsylvania, dated September 12, 1927.[2]

General Counsel contends that the pattern followed in the 1939 transfer was that of a similar "cloak" transaction in 1916–17; that the three American corporations considered together were not insolvent; that the theory of a gift of a going business is untenable under the circumstances; and that claimant's conduct after the transfer of 1939 was consistent with that of a "cloak" and not with that of a donee.

The claimant, Christian F. Benz, was born in Germany in about 1891, has been a resident of the United States since 1913, and a naturalized citizen since 1924. In 1905 he commenced work for J. M. Voith of Heidenheim, Germany, which was an old concern owned at the time by Frederick Voith and engaged principally in the manufacture and sale of pulp and paper machines and water turbines. Later the ownership passed to Frederick Voith's three sons, the present owners, Walther, Hermann and Hanns Voith, all residing in and nationals of Germany.

[1] *Sturchler* v. *Hicks*, 17 F. (2d) 321 (D. C. E.D.N.Y. 1926); *Stohr* v. *Wallace*, 269 Fed. 827, (S.D.N.Y. 1920) affirmed sub nom *Stoehr* v. *Wallace*, 255 U. S. 239 (1921); *Thorsch* v. *Miller*, 5 F. (2d) 118, 122–123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley*, —— Fed. (2d) —— (Civil No. 19–385, D. C. So. Dist. of N. Y. May 29, 1944). Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

[2] The claimant does not specifically define the transfer as a gift but his contentions in effect characterize it as such.

The claimant continued in the employ of the German partnership until 1913, except for one year when he was "loaned" to the Allgemeine Elektrizaets Gesellschaft—the General Electric Company of Berlin. In 1913 he came to the United States and became an officer and director of J. M. Voith Company, a New York Corporation (hereinafter referred to as "American Voith") which had been organized in 1912 by the German partnership for the purpose of merchandising its products and patents in this country. All of the capital stock (fifty shares) of American Voith was issued to the three Voith brothers.

As hereafter related, the claimant and the Voith brothers unsuccessfully attempted—in 1916 shortly prior to the last war—to "cloak" the then ownership of American Voith. One Herman F. Storrer, identified as a Swiss national, was then manager of American Voith and in September, 1916, the Voith brothers of Germany transferred their fifty shares of stock to him. It was not until March 31, 1917, that Storrer gave his note for $2500 in "payment" for the stock—about six months after the stock had been transferred to him. Christian F. Benz acted as attorney-in-fact at that time for the Voith brothers and held Storrer's note and the American Voith stock purportedly as collateral. The transfer of the fifty shares of American Voith stock in consideration of the $2500 promissory note, payable on March 31, 1920, was obviously an unsound business arrangement because at the time of the transfer, American Voith had contracts "outstanding for the sale and installation of machinery so manufactured for about $145,000". It appears that Storrer neither paid the note nor made claim to the ownership of the stock. The claimant in 1918 stated that the reason for the transfer of the fifty shares of stock to Storrer was "* * * for certain business reasons existing at that time, growing out of the settlement of patent litigation". It is further noted in connection with this stock transfer that diplomatic relations between the United States and Germany were severed on February 3, 1917, and that war was declared on April 6, 1917. Sometime thereafter the stock of American Voith was seized by the then Alien Property Custodian as property owned by enemies, and the finding of enemy ownership was not disputed. The property was sold by the Custodian in 1920.[3] Then in 1929 a claim was made by Benz on behalf of the Voith brothers for the proceeds of the sale of the stock and his affidavit in support of the claim stated that at the time of seizure "* * * he (Benz) was the American representative of the three Voith brothers who owned all of the outstanding stock of the company; * * *". These facts all indicate an unsuccessful attempt by the parties to avoid seizure. This experience of the claimant and the Voith brothers during World War I, as above related, is one that would naturally tend to move the parties to adopt a more expedient course of action to protect their interest in the event another war should occur.

In August, 1922, while Walther Voith was in the United States, the Voith brothers organized the American Voith Contact Company, a New York corporation (hereinafter referred to as "Voith Contact"), for the purpose of exploiting in the United States and Canada certain patents and inventions—principally relating to pulp and paper machinery and water turbines—assigned to it by the German partnership. The capital stock of Voith Contact consisted of 2,000 shares of $100 par value and 1,990 of

[3] From 1920 until sometime in 1921 the claimant was employed by other concerns as a bookkeeper. He then went to Germany and sometime during his stay in Germany and prior to his return to the United States in 1922, he resumed employment with the German partnership.

these shares were issued to the three Voith brothers. Two shares were issued to Christian F. Benz and two shares were issued to one John W. Van Gordon, a New York attorney. From 1922 until 1939 Walther Voith was president of Voith Contact and the claimant was a director, the treasurer, and the manager of the corporation. During the same period Van Gordon was a director, the secretary, and counsel of the corporation.

The 1,990 shares were issued to the Voith brothers in consideration of a contract, dated September 8, 1922, whereby the German partnership agreed to transfer to Voith Contact all of its interest in certain patents and patent applications—on the devices used in the manufacture of pulp and paper machinery and water turbines in the United States—and full technical disclosures together with any subsequently developed patents in this field of activity. The contract was to run for a ten-year period and from year to year thereafter until termination by six-months notice by either party. There is no evidence indicating that this contract was voluntarily terminated.

In 1931 a new J. M. Voith Company, Inc. (hereinafter referred to as "Voith Company"), a New York corporation, was organized by the German partnership as a sales agency for the various items of machinery. The entire capital stock of 200 shares was registered in the name of and owned by the German partnership—J. M. Voith of Heidenheim, Germany. It appears that the claimant was an officer and director of this corporation. Also in 1931 the German partnership organized another New York corporation, the Voith-Schneider Propeller Company, Inc. (hereinafter referred to as "Voith Propeller"). The purpose of this corporation was to commercialize certain ship propelling and maneuvering devices acquired from the German partnership. The entire capital stock of eighty shares was registered in the name of and owned by the German partnership.

Thus in 1931, there were three corporations, namely, Voith Contact, Voith Company, and Voith Propeller, each owned and controlled by J. M. Voith of Heidenheim, Germany. It appears that each of the three corporations, although maintained as separate entities, was managed by the claimant and occupied the same office. Admittedly the ownership and control of the three American corporations was retained by the German partnership at least until August 28, 1939, when, as hereafter described, bills of sale were executed in Germany whereby the Voiths purported to transfer all of their stockholdings to the claimant.

When Voith Contact was organized in 1922 the German partnership assigned to it, as previously described, certain patents, and Voith Contact placed them on its books at a value of $200,000. This formal book value was depreciated at the rate of $10,000 annually. In 1939 the total depreciation amounted to $170,000.

During the period from 1922 to August, 1939, it appears that Voith Contact, in addition to exploiting the patents assigned to it initially and subsequently, acted as a fiscal agent for the German partnership. It collected moneys due to the partnership from American customers and, before remitting the proceeds to the German partnership, it deducted from the collections various items of expenses of the three American corporations. One of the accounts of the German partnership in the United States so handled by Voith Contact was that of S. Morgan Smith Company of York, Pennsylvania. It appears that the Smith Company made periodic payments on account of royalties due the German partnership under a contract dated September 12, 1927. Approximately $67,000 accrued in

royalties under this contract between 1927 and 1938. For each year during that period the royalty payments under this contract were as follows:

1929	$3,810.12
1930	5,288.53
1931	4,799.06
1932	13,365.33
1933	3,510.72
1934	3,979.21
1935	6,190.52
1936	273.52
1937	24,199.09
1938	[4]1,901.02

In 1935 the claimant made a trip to Germany. The purpose of the trip, as stated by the claimant, was to complete arrangements for a loan of six or seven thousand dollars to "defray the operating deficit of the American company", and because "the finances of the corporation (in 1935) were in such a deplorable state that we could not keep going any longer without the financial assistance of J. M. Voith." While in Germany, the claimant and a representative of the German partnership conferred at Stuttgart with the German Foreign Exchange Control authorities (Devisenstelle) for the purpose of obtaining a license necessary under German law for the transfer of the funds. The license was refused and the claimant could ascribe no reason for the refusal. It appears, however, that after claimant's return in 1935, $3,000 was sent from Germany to the claimant pursuant to a license.

The claimant indicated in his testimony relative to the finances of the corporation; that in the spring of 1939 "things had come to such a pass that I was faced with a really serious question of what could be done"; that the German partnership early in 1939 had advised him that "they wanted to discontinue these (American) companies"; that he had kept the companies operating during 1935–39 by being able to "* * * squeeze out of moneys received for the account of J. M. Voith". He further stated in effect that the American corporations could not have continued to exist without financial aid. According to the claimant it was because of these stated financial difficulties that he again went to Germany in the Summer of 1939. On arrival in Germany in July, 1939, he conferred with Hermann and Hanns Voith in Heidenheim and later with Walther Voith at St. Polten, Austria. The principal subject of these conferences was the "business affairs" of the American corporations and the uncertainty of his "private situation". He was advised that, because of the "stringency of money", he could not "count any longer on continuing to get financial assistance from J. M. Voith and there would also be a possibility of even technical information being cut down". Claimant stated that he did not know the reason for this but surmised that it was because of controls of the German government. He testified that the German partnership, with the foregoing situation in mind, proposed that he either (1) reside permanently in Germany and work for the German partnership there in a suitable and secure position which would provide favorable retirement benefits, or (2) assume the German partnership stockholdings in the three American corporations together with an assignment of the S. Morgan Smith contract. The claimant testified that he chose the

[4] It should be noted that the above figures describe royalty *payments* between 1927 and 1938 but do not describe royalty *accruals* in *1938*. The evidence shows that in *1938* the royalty *accruals* were in excess of $20,000, most of which was paid later and, therefore, does not appear in the above tabulation.

latter because he felt that he would prefer to remain in the United States, continue to operate the corporations, and make a livelihood from the business and from the royalties under the S. Morgan Smith contract. He testified that he made this choice notwithstanding that "my financial future for myself and family would have been safer by accepting their proposal and return to Germany". On August 30, 1939, while still in Germany, he received from the Voiths transfers of their stockholdings in the three American corporations, resignations from them as directors and officers, an assignment of their rights under the S. Morgan Smith contract and an "assignment" of their claims, totaling $16,000, for money the Voiths had lent to Voith Contact.[5] It appears that the claimant did not participate in the drafting of the documents effecting the transfers nor was he even present when the documents were executed on August 28, 1939. Questioned as to whether the transfers required a license from the German Foreign Exchange authorities, the claimant said "I did not inquire too deeply and I did not in this particular instance concern myself with that. Nothing was said to me and I took what I could get". The documents of title were in claimant's possession at the time of his departure from Germany but were not displayed by him to the German Customs officials. If Devisenstelle licenses were not issued, the transfers may have been void under the German law, but since the Committee has concluded that the claims should be disallowed for other reasons, it is unnecessary to explore this question further.

The claimant returned to the United States in the latter part of September, 1939. The stock of the three corporations was then transferred on the corporate books to him, and new officers and directors were elected. The S. Morgan Smith contract was assigned by him to Voith Contact on January 6, 1941.

The claimant contends that because he had had a mutually satisfactory association with the German partnership since 1905 as a faithful and trusted employee, and because the American corporations were of little value, the Voith brothers were disposed to and did give the American business to him. In addition to the fact that his mutually satisfactory association included substantial compensation [6] there are divers incidents which compel the Committee to the conclusion that the purpose of the 1939 transfer was not to effect a bona fide gift to the claimant but to preserve the property for the ultimate benefit of the Voith brothers.

There is no reason whatever for distinguishing between the transfer of the stock and that of the contract. These transfers were part and parcel of the same transactions and must stand or fall together. The circumstances under which the claimant received the "assignment" of the Smith contract and his method of distributing its product indicate to the Committee that the beneficial interest in the contract remained in the Voith brothers. The claimant testified that he did not have in Germany in July, 1939, adequate information relative to royalty accruals under this contract and it further appears that the question of the amount of such royalty accruals was not discussed during the July-August, 1939 conferences in Germany. Notwithstanding the relationship of the parties, it seems to the Committee highly improbable that the Voith brothers were so disposed towards the claimant as to transfer to him as a gift property worth many thousands of dollars without a discussion and consideration

[5] This claim for $16,000, vested under a supplemental Vesting Order No. 3185, dated February 23, 1944, is not involved in this proceeding.

[6] His compensation ranged from $4,200 to $10,500 per year.

of its value. On February 2, 1940, claimant had transmitted to the Voith brothers $15,000 on account of royalties which had accrued prior to August 28, 1939, the date of the purported transfer. Then on March 5, 1940, claimant was paid under the Smith contract approximately $40,000 which substantially exceeded prior payments for similar periods. Of this $40,000 the claimant remitted $30,000 to the Voith brothers, $15,000—according to his testimony—as a further adjustment of royalty accruals prior to August 28, 1939, and $15,000 that the claimant felt "in good conscience * * *" should be paid to them. The Committee notes that the "assignment" of August 28, 1939, provided, among other things:

"* * * we hereby sell, assign and transfer to Christian F. Benz all our interest of whatever character in a certain agreement made between us. * * *."

In view of the absolute tenor of this "assignment", the Committee concludes that the purported basis of, and reasons for, the payments made by the claimant to the Voith brothers as "adjustments" of the royalty accruals prior to August 28, 1939, have not been satisfactorily established by the claimant's testimony that he "understood" that such adjustments were to be made. The payment, furthermore, of the additional $15,000 to the Voith brothers, after the date of the purported assignment of the contract to him, is reasonably explained in the opinion of the Committee only on the premise that the relationship between the parties had not in fact been changed as a result of the purported assignment. This finding is strongly corroborated by the fact that the claimant did not include as income to himself in his income tax return the amount so transmitted to the Voith brothers. The Committee feels that a finding favorable to the claimant is unwarranted in the light of his testimony [7] that his income tax return was on the basis that this $15,000 belonged to the Voith brothers. The purported assignment of the Smith contract being an integral part of the entire transaction, the conclusion is inescapable that the purported assignment of the stock was as illusory as the purported assignment of the contract.

Further indication that even after August 28, 1939, effective control resided in the Voith brothers is found in the so-called Link-Belt incident. By letter dated June 30, 1940, the Link-Belt Company of Philadelphia opened negotiations with Voith Contact for a license or an assignment of a certain patent—covering flexible couplings—which had been previously assigned by the German partnership to Voith Contact. Subsequently Voith Contact [8] cabled the German partnership as follows:

"Firm Linkbelt interested license for patent purchase * * * send

[7] "Member Dodds. On the $14,000 that went back to Germany or $15,000, let us say roughly, that was not required of you? You did that voluntarily?
The Witness. That is correct.
Member Dodds. Who paid the income tax on that $15,000?
The Witness. Upon the advice of my then attorney, Mr. John W. Van Gordon, who has since died, I returned all the monies received on Form, I think it is, 1042 as money belonging to J. M. Voith.
Member Dodds. You returned it as money belonging to them?
The Witness. That was the basis of the return.
Mr. Symmers. As their income?
Member Dodds. As income to them?
The Witness. That is right."

[8] Authorship of this cable was disputed. The claimant's testimony on the point was not only evasive but contradictory. Since there were only three employees in the office of the three American corporations and since the claimant admitted that "we" carried on the negotiations with Link-Belt and corresponded with the German partnership relative thereto, the Committee believes it to be highly improbable that the claimant did not at least approve this cable before its transmission.

urgently report present standing technical development particularly recent application inquire Maurer's experiences with Linkbelt stop if necessary cable what should be considered in approaching negotiations."

On August 8, 1940, Voith Contact by letter confirmed the cable and stated, among other things:

"It is particularly important for us to know something about the present technical development * * * it is important for us to find out what promises we can make today to a licensee in this field.

* * * * * * *

"Mr. Maurer (Germany) already had business relations with Link-Belt for several years so far as we know in connection with his P.I.V. gear but would be very valuable for our negotiations if we were able to ask Mr. Maurer which experiences he had up to now with Link-Belt and particularly if there has been a change in the relationship of this firm to him since the beginning of war."

We conclude that the claimant was not in a position to utilize this patent without the cooperation of the German partnership. Furthermore, the phrase "if necessary cable what should be considered in approaching negotiations", since it was in addition to a request for the technical information desired, is interpreted by the Committee as an obvious request for instructions and, therefore, an acknowledgment that the relationship between the parties had not in fact materially changed since August 28, 1939.

It is not contended by the claimant that the August 28, 1939, transfers were sales of property made in the usual course of business. It necessarily follows that the theory of the claim is one of gift. The claimant then argues that it was reasonable for the Voiths to give the shares in the three American corporations to him because they were of little value. The principal assets of the three American corporations are patents. The actual value of these patents is necessarily highly conjectural. The patents that were assigned in 1922 were given a book value of $200,000 and were depreciated, as stated earlier, at the obviously arbitrary rate of $10,000 annually, resulting in a total book depreciation by 1939 of $170,000. Meanwhile various new patents had been procured and assigned to the corporations, presumably to improve and strengthen its patent position, without, however, the books of the corporations reflecting the increased value of the patent structure. Since the August, 1939 market value of the shares of the three American corporations is unknown and since any book value of the shares is necessarily conjectural, depending largely on the accuracy of the rate of depreciation, it is obvious that no affirmative finding can be made as to the value of the shares. Therefore, to the extent that the claimant's asserted rights rest upon proof that the shares were nearly valueless, we are constrained to conclude that he has not sustained this burden. The evidence of the strained cash position of the three American corporations does not necessarily reflect in any degree whatsoever the value of their assets—the patents. In fact, to the extent that the German partnership retained the technical information necessary for the utilization of the patents—as evidenced in the Link-Belt incident—it retained a direct power of control over the value of the assets of the corporation.

The value of the S. Morgan Smith contract was clearly not conjectural. During the period from 1929 to 1938 it yielded some $67,000 in royalties.

In 1937 the royalty payments were about $24,000, a substantial increase over any prior similar period, and these increased earnings continued during the years 1938 and 1939.[9] It appears that these substantial increases in the royalty payments resulted in part from the expansion which began as early as 1935 of hydro-electric construction in the United States. The Committee cannot believe that men active and experienced in this field did not know that the earnings under the Smith contract were and would continue to be very substantial. Therefore, little weight can be given to the claimant's testimony that he was surprised by the fact that the royalty payments for the year 1939 were approximately $45,000. Likewise little weight can be given to the theory, as urged by the claimant, that it was reasonable under the circumstances to make a "gift" because of the slight value of the property.

The international situation existing at the time of the transfer cannot be ignored. According to claimant's testimony, the documents of transfer were executed on August 28, 1939, and delivered to him on the morning of August 30, 1939. Although he testified he had been assured that war was not imminent, he stated in an affidavit filed with the Foreign Funds Control Division of the Treasury Department that "the gathering war clouds made me very uneasy that I would not be able to leave Germany". Without declaring the documents at the border, he entered Switzerland on September 3, 1939, two days after the date on which Germany had invaded Poland and on the same day on which England and France declared war on Germany. These facts, coupled with the absence of any previous correspondence or discussion relative to a "gift", and coupled with the absence, as stated earlier, of any discussion as to the value of the property, have further convinced the Committee that the transfers were not bona fide but represented on the contrary a precipitate effort by the Voith brothers to salvage—on the eve of war—what they could of their American holdings.

In the light of the experience of the parties in 1917, the circumstances immediately surrounding the transfer, the method employed by the claimant in disposing of the proceeds of the Smith contract, the substantial value of that contract, the Link-Belt incident, the failure to establish that the shares were of little value, the Committee is constrained to conclude that the claimant has not satisfactorily established that the Voith brothers transferred the beneficial ownership of property to him.

In reaching this conclusion, the Committee has been guided by the "cloaking" decisions arising out of World War I.[10] It is true that the claimant testified that the transfers to him were bona fide but, except in *Metz* v. *Garvin,*[10] the courts seemingly attached more weight to the surrounding circumstances than to such direct affirmations of good faith, apparently on the ground that the parties to a factitious transaction can hardly be expected to disclose frankly their real motives. In short, surrounding circumstances indicate to the Committee that the transfers in question were made "* * * to avoid inconveniences which might

[9] Apparently the record of this proceeding does not show the amount yielded by the contract in 1940—prior to its assignment by the claimant to Voith Contact. The record does show, however, that the contract yielded about $34,000 in the eleven month period of January to November, 1941—after it had been assigned to Voith Contact.

[10] *Stoehr* v. *Wallace,* 269 Fed. 827 (S.D.N.Y. 1920), affirmed 255 U. S. 239 (1921); *Metz* v. *Garvin,* 3 Fed. (2d) 182 (S.D.N.Y. 1921); *Hodgskin* v. *U. S.,* 279 Fed. 85 (C.C.A. 2d, 1922); *Magg* v. *Miller,* 296 Fed. 973 (App. D. C. 1924); *Lust* v. *Miller,* 4 F. (2d) 293 (App. D. C. 1925); *Ebert* v. *Miller,* 4 F. (2d) 296 (App. D. C. 1925), appeal dismissed, 296 U. S. 666 (1926); *Thorsch* v. *Miller,* 5 Fed. (2d) 118 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Matheson* v. *Hicks,* 10 Fed. (2d) 872 (E.D.N.Y. 1926).

ensue from a state of war." *Stoehr* v. *Wallace,* 269 Fed. 827 (S.D.N.Y. 1920), affirmed 255 U. S. 239 (1921).

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Christian F. Benz, had at the date of vesting no title or interest in the claimed shares sufficient in law to support a right of recovery.

Accordingly, Claims Nos. 682, 683, and 684 are hereby disallowed.

SEPTEMBER 18, 1944.

IN THE MATTER OF

H. C. BIERING (E. A. M. BIERING). ESTATE OF RICHARD THEODORE RINGLING

Docket No. 15. Claim No. 1377

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 1377 (dated November 30, 1943 and amended March 18, 1944), filed by H. C. Biering pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1942 (8 Fed. Reg. 16709).

The Custodian, by Vesting Order No. 2392, dated October 11, 1943, (8 Fed. Reg. 14637) vested all the interest of one E. A. M. Biering in a judgment claim against one Aubrey Barlow Ringling, Executrix of the Estate of Richard T. Ringling. The vesting order recited, among other things, a finding that the property was in the process of administration by "Aubrey Barlow Ringling, Executrix, acting under the judicial supervision of the District Court of the Fourteenth Judicial District of Montana in and for the County of Meagher" and that the property was "payable or deliverable to, or claimed by" E. A. M. Biering, a national of a designated enemy country, Rumania. The vesting order further determined that "if such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country, Rumania, * * *"

The Notice of Claim as originally filed was by H. C. Biering as attorney-in-fact for E. A. M. Biering but was amended on March 18, 1944 to allege, in substance, that H. C. Biering had an ownership interest in the vested property.

The Order for and Notice of Hearing was published on March 10, 1944 (9 Fed. Reg. 2700) and a copy was served upon the person designated in Section 2 of the Notice of Claim.

A hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, National Press Building, Washington, D. C., on March 22, 1944.

Ralph J. Anderson, Esq., appeared on behalf of the claimant, and Karl D. Loos, pursuant to leave granted by the Committee, appeared as an intervenor on behalf of Aubrey Barlow Ringling, Executrix of the Estate of Richard Ringling, deceased. A. Matt. Werner, General Counsel, and subsequently John Ernest Roe, General Counsel, by Irwin L. Langbein and Thomas J. McBride, appeared on behalf of the Alien Property Custodian.

Briefs were filed with the Committee on April 13, 1944 by the intervenor, on April 18, 1944 by the claimant, and on April 24, 1944 by

General Counsel. Reply briefs were submitted by the claimant and by the intervenor on May 18, 1944. A tentative determination disallowing the claim was issued on June 21, 1944. Proposals to modify the tentative determination were subsequently submitted and an oral argument thereon was heard in Chicago, Illinois, on August 18, 1944. Memoranda related to the oral argument were submitted by the claimant on August 28, 1944 and September 25, 1944, and by General Counsel on September 18, 1944.

The transcript of the testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The Committee on the basis of the entire record disallows the claim for the reasons hereinafter set forth.

Determination

A judgment was entered in the District Court of the Fourteenth Judicial District of the State of Montana, County of Meagher, on September 10, 1934. E. A. M. Biering, a brother of the claimant, H. C. Biering, was the plaintiff in the action, and Aubrey Barlow Ringling, Executrix of the Estate of Richard T. Ringling, was the defendant. E. A. M. Biering's interest in this judgment was vested by said Vesting Order No. 2392 and is the subject of this proceeding. $67,561.75, representing the amount due in 1943 on the judgment, has been paid to the Custodian by the executrix pursuant to the vesting order.

Whatever interest E. A. M. Biering had in this judgment was properly vested. At the time of vesting, October 11, 1943, he was a citizen of Denmark and a resident either of Denmark or of Rumania. Denmark was occupied by Germany on or about April 8, 1940, and Rumania declared war on the United States on December 12, 1941. E. A. M. Biering had been in the diplomatic service of Denmark for many years and since about 1930 he was acting as minister of Denmark to Rumania, Yugoslavia and Bulgaria with headquarters at Bucharest, Rumania. His status after the invasion of Denmark, and for sometime prior thereto, is unknown. There is a material conflict in the evidence as to whether he was a resident of Rumania or of Denmark at the time of vesting but, in the opinion of the Committee, it is unnecessary for the purposes of this proceeding to determine his exact residence at that time because it is not contended that he was a resident of any country other than Rumania or Denmark and, in the opinion of the Committee, if he was a resident of either, the vesting of his interest in the judgment is not subject to attack.

Section 5E of Executive Order 8389 defines a foreign national as, among other things, "(i) any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order." Denmark became a foreign country "designated in this Order" on April 8, 1940, and Rumania on October 9, 1940. Title III of the First War Powers Act, 1941, amending Section 5 (b) of the Trading with the Enemy Act, ratified this definition of "foreign national" and authorized the President or his designated agent to vest the property of such a "foreign national". If E. A. M. Biering was a resident either of Denmark or of Rumania he was, therefore, a foreign national under Section 5 (b) of the Act, as amended. If he was a resident of Rumania, his property was vestible as that of a "national

of a designated enemy country" because he was a resident of "a designated enemy country", i.e., "any foreign country against which the United States has declared the existence of a state of war * * *". Section 10 (a), Executive Order 9095, as amended (8 Fed. Reg. 5205). If he was a resident of Denmark and not of Rumania, the Custodian was empowered by Section 10 (a) to vest his property upon a finding, as made by the Custodian in this case, that "the national interest of the United States requires that such person be treated as a national of a designated enemy country." Section 10 (a) further provides that a determination by the Custodian that property of a "foreign national"—the term employed in Section 5 (b)—is a national of a designated enemy country, as defined in Section 10 (a), shall be "final and conclusive" as to the power of the Custodian to exercise any of the power conferred upon the President by Section 5 (b) of the Act. Since Executive Order 9095, as amended, delegated the totality of the President's power under Section 5 (b) to the Secretary of the Treasury and to the Custodian, and since Section 3 of Executive Order 9095 authorized the Secretary of the Treasury to vest in the Custodian the property of a resident of Denmark merely on the basis of his status as a "foreign national", the "final and conclusive" phrase was apparently designed to avoid, among other things, any contention that a vesting was improper because the claimant, although a "foreign national", was not a "national of a designated enemy country". Assuming then that E. A. M. Biering was a resident of Denmark and that the Custodian was not warranted in finding that the national interest required the vesting of his property, it is, in the opinion of the Committee, one of the purposes of the "final and conclusive" phrase of Section 10 (a) to preclude a present return of property which might have been vested by the Treasury but was vested by the Custodian. We note, parenthetically, that a resident of enemy-occupied territory was an "enemy" under Section 2 of the Trading with the enemy Act. It would seem unreasonable to interpret Section 5 (b) of the Act, as amended, and Executive Order 9095, as amended, to the end that a claim on behalf of one who was an "enemy" under Section 2 of the Act would be allowed.

In an earlier determination—re. claims Nos. 553 and 554 and not related to the present proceeding—it was found that the Custodian's practice of not vesting property of a person who was at the time of vesting a resident of the United States and a citizen of a neutral and unoccupied foreign country, justified a divesting upon proof that the person was not a "cloak". As then stated, this administrative practice of the Custodian is based upon a construction of Section 5 (b), as amended, which reflects the earlier legislative policy of Section 2 of the Act. Such an administrative construction obviously is not relevant to the divesting of property of a person who was an enemy under Section 2.

The claimant argues, however, that since the vesting order found that E. A. M. Biering was a national of Rumania, the Custodian may not retain the property unless E. A. M. Biering was, in fact, a resident of Rumania. Otherwise, according to the claimant, "it might as well be argued that a conviction for murder be sustained because the defendant was proven guilty of another crime, such as burglary". This argument is predicated upon a misconception of the purpose of this proceeding which is, fundamentally, not a review of the findings of the vesting order, but is directed to the determination, de novo, of the status of the claimant

and his interest in the vested property. Under the pertinent statutes and Executive Orders a national of an enemy-occupied country residing in enemy-occupied territory at the time of vesting, cannot now, by himself or through an agent, successfully assert a claim for the divesting of his property regardless of inaccuracies in the findings in the vesting order.[1]

E. A. M. Biering having, therefore, the status of a "foreign national" and a "national of a designated enemy country" within the meaning of the Trading with the enemy Act, as amended, and Executive Order 9095, as amended, his interest in the property was properly vested and thus has become property of the United States and subject to such ultimate disposition as Congress may direct.

It remains to determine whether the claimant, H. C. Biering, a citizen and resident of the United States, has such an interest in the property as entitles him to it as against the Custodian. Such an interest must fall within established categories of proprietorship. *Lust* v. *Miller,* 4 F. (2d) 293 (App. D. C. 1925), *Ebert* v. *Miller,* 4 F. (2d) 296 (App. D. C. 1925). The burden of establishing such a legal or equitable right to the property rests upon the claimant. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920) affirmed sub nom *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122–123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* — Fed. (2d) — (Civil No. 19–385, D. C. So. Dist. of N. Y. May 29, 1944).

H. C. Biering is an American citizen—by naturalization in 1898—who has resided in Montana since his arrival in the United States in 1892 from his birthplace, Denmark. Shortly after his arrival in the United States he engaged in the livestock business in Montana in partnership with one M. S. Cunningham and, at about the turn of the century, the partnership purchased a ranch, giving a mortgage of $30,000. The claimant testified that while visiting his brother, E. A. M. Biering, in Baku, Russia, in 1904, he borrowed $30,000 from him to take up the mortgage. The claimant further testified that in 1912 he visited his brother at Copenhagen, Denmark, and borrowed an additional $20,000 to meet the needs of the expanding livestock business. This business was incorporated in 1912 under the name of the "Taylor's Fork Cattle Company", a Montana corporation, and was reorganized in 1919 when the "Southern Montana Livestock Company" was formed. One Richard T. Ringling contributed substantially to the capital of the Southern Montana Livestock Company and became a substantial but minority shareholder therein. Disagreement between the shareholders in this corporation eventually resulted in litigation and a judgment in the amount of $322,480 was entered in 1924 in favor of claimant and Cunningham against Ringling. This judgment was affirmed on appeal to the Montana Supreme Court, 74 Mont. 176, 240 Pac. 829 (1925). In 1919 the claimant had signed notes, apparently for accommodation, in the sum of $215,000. After the entry of the 1924 judgment against Ringling, Ringling acquired the ownership of the notes so signed by the claimant and in or about 1930 the judgment for $322,480—offset by the notes for $215,000—was settled by the execution and deliv-

[1] To illustrate this point, assume that a vesting order found that certain property was owned by A, and that A was a citizen and resident of Japan. Assume further that the evidence adduced at a hearing established that the vested property was—prior to vesting—owned by B, a citizen and resident of Germany, and that A was a citizen and resident of the United States. Because of B's status, a claim by him obviously would not be allowed although the vesting order contained erroneous findings both of ownership and of nationality.

ery to the claimant by Ringling of seven notes made by the Southern Montana Livestock Company, payable to the order of Ringling, and totaling $75,000. The notes were dated November 10, 1930, and fell due respectively annually from 1931 until 1937. H. C. Biering endorsed the notes in blank on November 10, 1930, the same day that he received them from Ringling.

Intervenor and General Counsel contend that the sums advanced by E. A. M. Biering were contributed to the capital of the business and not advanced as loans to H. C. Biering and Cunningham. Although there is unquestionably some evidence in the record to support this contention, the Committee believes that the weight of the evidence, particularly the direct testimony of the claimant, establishes a debtor-creditor relationship. The Committee finds, therefore, that in 1930 H. C. Biering was indebted to E. A. M. Biering for an undetermined amount in excess of $75,000 and likewise was at this point of time the owner of the seven notes above described.

In 1931 the claimant visited E. A. M. Biering in Denmark and delivered the notes to him. E. A. M. Biering thereupon redelivered the notes to the claimant together with the power of attorney hereinafter described. The claimant brought the notes back to the United States and made them the basis of the suit against the Ringling estate which resulted in the 1934 judgment. There is a conflict in the evidence as to the nature of this transaction in Denmark. The claimant contends that the notes were delivered to E. A. M. Biering as collateral security for the indebtedness, but the testimony of the claimant at the hearing—that he pledged the notes with E. A. M. Biering—appears to vary with the position taken by him in litigation with the Ringling estate. The Committee, however, believes it unnecessary to determine whether the notes were pledged with E. A. M. Biering or, on the contrary, transferred to him in discharge of the indebtedness because, in either event, the redelivered notes were held in trust for E. A. M. Biering. The power of attorney, executed in Denmark in 1931 and recorded in Montana in 1939, empowered the claimant merely to *collect* the notes on behalf of E. A. M. Biering. Any collection of the notes by the claimant would thus result in the claimant holding the proceeds in trust for E. A. M. Biering. If the notes were transferred to E. A. M. Biering in discharge of the debt, H. C. Biering's collection of them would necessarily be as the agent of the owner, E. A. M. Biering. If the notes were pledged to E. A. M. Biering, H. C. Biering's action in collecting them would be action in his capacity as an agent of the pledgee and would not be action in his capacity as a pledgor. In either case, H. C. Biering would hold the proceeds in trust for E. A. M. Biering. *White* v. *Platt,* 5 Denio 269 (N. Y. 1850); *Clark* v. *Iselin,* 88 U. S. 360, 368 (1874). E. A. M. Biering would not, of course, lose a pledgee's interest by delivering the notes to a pledgor for a temporary purpose, such as for collection. *Stockyards Nat. Bank* v. *First Nat. Bank,* 249 Fed. 421, 423 (C.C.A., 8th, 1918); *In re Smith-Flynn Commission Co.,* 292 Fed. 465, 471 (C.C.A., 8th, 1923); *Harrison* v. *Merchants Nat. Bank,* 124 F. (2d) 871, 874–875 (C.C.A., 8th, 1942).

Following Ringling's death in 1931 the action on the notes was instituted against the executrix of his estate and the judgment, E. A. M. Biering's interest in which was vested, was entered in September, 1934. If a vesting order had not issued and the judgment running in favor of E. A. M. Biering had been paid by the executrix to H. C. Biering, the

vesting of the proceeds in the hands of H. C. Biering—his interest being limited to that of an agent for collection—would have been impervious to attack,[2] and the proceeds being subject to vesting in his hands, it would be unnecessary to perform the "idle ceremony" of divesting the property and revesting it. *Sturchler* v. *Sutherland,* 19 F. (2d) 999 (E.D.N.Y., 1927) reversed on other grounds, 23 F. (2d) 414 (C.C.A., 2d, 1928). To the extent, therefore, that the present claim is based upon H. C. Biering's authority to collect the notes on behalf of E. A. M. Biering it must fail. The claimant, however, contends that under Section 7 (b) of the Trading with the enemy Act payment should be—and should have been—made to him. That section provides:

"Nothing in this Act shall be deemed to prevent payment of money * * * owing to an enemy * * * to a person within the United States not an enemy * * * for the benefit of such person * * * providing, That such payment shall not be made without the license of the President * * *".

Assuming this paragraph to be in effect and otherwise applicable, it does not support the claimant's contention for admittedly payment to the claimant has not been licensed.

Did, then, H. C. Biering have any interest over and beyond a right to collect as agent? Since he was a trustee of the notes, and any proceeds therefrom, his claim to a legal or equitable right of his own therein must be based upon proof that E. A. M. Biering agreed to permit him to convert himself from a trustee into a debtor. On this vital point the evidence—with due consideration to the permissible inferences therefrom—is, in the opinion of the Committee, insufficient to sustain a finding favorable to the claimant. E. A. M. Biering was not, of course, available as a witness. Nor does the record contain any instrument, however informal, evidencing his willingness to forego the advantage of the secured status that he held—according to the claimant's contention—since 1931. The record is devoid of any reason for E. A. M. Biering retreating from his position as a secured creditor in 1931 to that of a wholly unsecured creditor in 1943. Moreover, the claimant's testimony tending to establish his purpose in making a pledge in 1931 is inconsistent with his contention that in 1943 he had the power to destroy the security. Claimant testified that his purpose in endorsing the notes in blank in 1930, intending to deliver them to E. A. M. Biering in Europe, was "because I wanted to secure my brother. Things were in such a desperate shape it looked like I might never be able to pay him and these were assets that were good. I turned it over and I had had the experience of having $215,000 sprung on me out of a closed bank and I did not know what was coming next. I simply put it up as security for my brother." There is no evidence that these conditions had substantially changed by 1943. The one document executed by E. A. M. Biering relating to the issue—the power of attorney executed in 1931—is clearly limited to the right to act for E. A. M. Biering and does not either expressly or by implication authorize the claimant to deal with the proceeds as his own. The power of attorney

[2] It may be noted in relation to the problem so hypothesized that (1) the vesting order in this proceeding was issued under Section 2(f) of Executive Order 9095, as amended, (property in the process of administration by a person acting under judicial supervision), (2) any claim of E. A. M. Biering against H. C. Biering is vestible by the Custodian under Section 2(c) of Executive Order 9095, as amended, as "any other property * * *", and (3) the division of functions between the Secretary of the Treasury and the Alien Property Custodian, as detailed in Executive Order 9095, as amended, is not open to question by third parties. See Section 12 of Executive Order 9095, as amended.

reads "* * * to act as my agent, with full power to act for me and represent me in the handling of all matters pertaining to my interest in settlement made between R. T. Ringling and H. C. Biering and M. S. Cunningham." Since E. A. M. Biering had advanced sums of money to H. C. Biering and M. S. Cunningham as a loan and not as a capital contribution, E. A. M. Biering's only "interest in settlement made" would be his interest in the collection of the notes. In addition to the fact that the claimant's direct testimony is not convincing as to his exact right to retain and use the proceeds of the notes, his testimony on cross-examination clearly disclosed the lack of any understanding, even on the part of the claimant, that he had any right other than the right to collect the notes and remit the proceeds. The entire record shows that H. C. Biering had, at the most, an *expectation* that the judgment-creditor would not object to his retention and use of the proceeds. Such an expectation—involving major assumptions as to E. A. M. Biering's financial status and power under war conditions—is not a legal or equitable right in property.

Assuming that the notes were transferred to E. A. M. Biering in 1931 as collateral security for the claimant's indebtedness to him, the question remains as to whether the claimant's rights as a "pledgor" were impaired by the payment of the 1934 judgment to the Custodian. It is not disputed that if the judgment had been paid to E. A. M. Biering, the claimant's obligation would have been discharged pro tanto by operation of law, and his rights as a "pledgor" not thereby impaired. Payment to the Custodian—the successor in interest of E. A. M. Biering—had the same legal effect as payment to E. A. M. Biering because "* * * the Custodian succeeds to all the rights in the property to which the enemy is entitled as completely as if by conveyance, transfer or assignment * * *". *Commercial Trust Company* v. *Miller*, 262 U. S. 51, 56 (C.C.A., 3d, 1923). When the pledged notes were reduced to a judgment payable to the pledgee, and when the judgment had been paid to the successor in interest of the pledgee, discharging pro tanto the primary obligation which exceeded—according to the testimony of the claimant—the judgment in amount, the pledge no longer existed, and the claimant was no longer a "pledgor". Thus the claimant's rights as a "pledgor" were not impaired by the payment to the Custodian.

In summary, to the extent that Claim No. 1377 is on behalf of E. A. M. Biering, it must fail because of his status; to the extent that the claim is on behalf of H. C. Biering, it must fail because he has not sustained his burden of establishing that he had, at the time of vesting, a legal or equitable right to the judgment or its proceeds.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that:

1. E. A. M. Biering was, at the time of vesting, a foreign national and a national of a designated enemy country, Rumania; and

2. That the claimant, H. C. Biering, had at the time of vesting no title or interest in the judgment sufficient in law to support a right of recovery.

Accordingly, Claim No. 1377 is hereby disallowed.

OCTOBER 12, 1944.

IN THE MATTER OF

CLARA BIRNHOLZ

Claim No. 283. Docket No. 32

WILLIAM A. SCHUYLER

Claim No. 703. Docket No. 33

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 283 (dated January 12, 1943) filed by Clara Birnholz, and Notice of Claim No. 703 (dated May 19, 1943) filed by William A. Schuyler, pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 201, dated October 2, 1942 (8 Fed. Reg. 625) vested among other things all right, title and interest in United States Patent No. 2,257,253, registered in the United States Patent Office in the name of Wilhelm Wemhoner and Werner Plagemann, both of Berlin, Germany.

Notice of Claim No. 283 of Clara Birnholz alleges in substance that under an agreement which was executed in Berlin, Germany, on August 15, 1938, by the claimant and Werner Plagemann, she acquired from Plagemann a "proprietary interest" in Patent No. 2,257,253. Notice of Claim No. 703 of William A. Schuyler alleges in substance that under an agreement which was executed in Zurich, Switzerland, on or about April 3, 1939, by Schuyler, Plagemann, and Wemhoner, he acquired "complete rights" to the same patent. Since both claims related to the same patent, they were consolidated and pursuant to an Order for and Notice of Hearing published on July 15, 1944 (9 Fed. Reg. 7961), a hearing thereon was held at the New York Office of the Alien Property Custodian on July 27, 1944. Copies of the Notice of Hearing were served upon the persons designated in Section 2 of the Notices of Claims.

The claimants appeared at the hearing without counsel. John Ernest Roe, General Counsel, by Thomas J. McBride, appeared on behalf of the Alien Property Custodian. There was filed with the Committee on behalf of the claimants a brief by Hammond & Littell, Morris Landers of Counsel, on September 15, 1944. General Counsel's brief was filed on October 18, 1944, and a reply brief was filed by the claimant on November 15, 1944. A tentative determination disallowing the several claims was issued on November 29, 1944. No proposals to modify the tentative determination having been submitted by either party, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in this proceeding.

The transcript of the testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claims are hereby disallowed for reasons hereinafter set forth.

DETERMINATION

This proceeding concerns United States Patent No. 2,257,253 which was issued by the United States Patent Office on September 30, 1941 to the inventors thereof, Werner Plagemann and Wilhelm Wemhoner, both of Germany, and which was vested by Vesting Order No. 201. The records of the United States Patent Office do not disclose any assignment or license by the patentees. The claimant, Clara Birnholz, alleges a

"proprietary interest" in the patent and the claimant, William A. Schuyler, alleges "complete rights" thereto. The question in this proceeding is whether either claimant has sustained his respective burden of proving ownership of the patent. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

For reasons of convenience, attention is first directed to the claim of Clara Birnholz. This claim is based upon the contention that an equitable interest in the patent was acquired through an agreement which was executed in Berlin, Germany, in August 1938 by Werner Plagmann. General Counsel contends in substance that the record now before the Committee does not warrant a finding that Clara Birnholz has any interest in the patent.

Clara Birnholz is the wife of James Birnholz. She came to the United States from Germany in 1938. Prior to 1938 she and her husband resided continuously in Germany. Mr. Birnholz, for many years an official of the "General Electric Company" of Berlin, Germany, came to the United States in May 1939. Both the claimant and her husband have applied for citizenship. The religious and racial persecution then rampant in Germany caused the immigration of the Birnholzes to the United States and explains their willingness to enter into the inequitable transaction described in the following paragraph.

It appears that sometime prior to his departure from Germany, James Birnholz, acting for his wife, turned over to Werner Plagemann, co-inventor of the patent in question, 50,000 Reichmarks as a "loan". Sixty percent (60%) of the "loan" was by the terms of the contract forfeited and the remaining forty percent (40%) thereof was to be repaid outside of Germany if the "lender" succeeded in emigrating from Germany. The expectation was that Clara Birnholz was to be repaid from earnings to be derived by Plagemann from the exploitation outside of Germany of certain patents, including the patent in question. The contract does not, however, purport to be an assignment of the patent nor does it purport to create in Clara Birnholz any right other than that of an unsecured creditor of Plagemann.

When James Birnholz immigrated to the United States, Plagemann gave him a letter of introduction to William A. Schuyler—the other claimant in this proceeding—and advised him to endeavor to work out with Schuyler an arrangement so as to "manufacture together", "incorporate it", "or something like that". The letter of introduction is obviously not an assignment of the patent in question. It is clear from the testimony of the Birnholzes, the content of their contract with Plagemann, and the letter of introduction to Schuyler that Plagemann did not intend to transfer to Clara Birnholz a proprietary interest in the patent. It is likewise clear that the Birnholzes were induced to hope that in exchange for their 50,000 Reichmarks some income would be made available to them in the United States. Although the Birnholzes are apparently the victims of what appears to be a piratical contract and have been misled as to their hopes, their claim must be disallowed because they did not have at the time of vesting an interest in the patent within the estab-

lished categories of proprietorship. *Lust* v. *Miller,* 4 F. (2d) 293 (App. D. C. 1925); *Ebert* v. *Miller,* 4 F. (2d) 296 (App. D. C. 1925).

The Birnholzes testified that although they had been citizens of Germany they were "stateless" at the time of vesting. Since Clara Birnholz did not have a proprietary interest in the patent it is unnecessary to pass on the question of the status of her nationality.

William A. Schuyler's claim is based upon the contention that while Schuyler was in Leipzig, Germany, in March 1939, attending the Leipzig Engineering Fair, he conferred with Werner Plagemann relative to exploiting in the American market a machine for rolling threads, and that the inventors assigned to him in April 1939 their rights in the United States to the invention upon which the patent in question was subsequently issued. General Counsel contends in substance that Schuyler has failed to carry his burden of establishing such an assignment.

Schuyler was born in Switzerland, came to the United States in 1907, and has been since 1913 a citizen of this country. Prior to the outbreak of war he was engaged principally in the business of importing from various European countries and selling in the United States specialized production machinery. There is no dispute relative to his nationality.

The sole issue before the Committee in respect of Schuyler's claim is, therefore, whether Schuyler had in the Spring of 1939 consummated an arrangement with the inventors for an assignment of their interest to him. To establish the assignment Schuyler relies upon a letter which he testified was signed by Plagemann and Wemhoner and delivered to him by messenger in Zurich, Switzerland on April 3, 1939. For reasons hereinafter discussed neither this letter nor a copy thereof was offered in evidence. Schuyler's testimony of what transpired at the conference in Leipzig is in substance as follows. He reached a verbal understanding with Plagemann whereby he was to buy machines from Plagemann in Germany for resale here. Schuyler was to be invoiced for the machines so purchased and sales by him were to be made in his own name. He was to sell "as many of the machines as could be imported, and at the same time he was to get the American manufacturing rights". He was to import the machines from Germany "so long as it was convenient to him; when machines cannot be imported easily, other machines must be made here". The co-owners of the invention were to transfer to him the manufacturing rights in the United States "until the end of the patent" but "no other rights". "He was to sell the machines, to be exclusive agent for selling those, and have the manufacturing rights".

Then it appears that Schuyler on April 3, 1939 received the letter upon which he relies to establish the assignment, and Schuyler testified as to its contents. A consideration of this testimony reveals his uncertainty as to its exact contents. On one occasion he testified that the letter read:

"For receipt of a certain payment we give the exclusive selling and manufacturing rights. When the American patent is issued, we will advise the American Patent Office that the patent has been assigned to you".

If this is an accurate description of the contents of the letter, it would support a finding that the letter manifested an intention to assign the patent to Schuyler. On another occasion Schuyler testified that the letter read:

"I receive 20,000 Swiss francs and I appoint you sole selling agent, and I give you the American manufacturing rights."

If the letter so read it would not support a finding of an assignment because there is no grant of any right to use and the law is well settled that to constitute an assignment there must be present not only the grant of the right to make and sell but also to use. In any event this secondary evidence of the contents of the letter is not sufficiently certain or persuasive to warrant a finding that the letter did constitute an assignment.

There are further indications that Plagemann did not assign the patent to Schuyler. A consideration of Schuyler's testimony as related above as to the conversations which took place in Leipzig in March 1939 indicates an uncertainty as to whether it was proposed that the patent be assigned to Schuyler or that Schuyler become the American sales agent of the inventors. Furthermore, there is some indication that the understanding between the inventors and Schuyler never went beyond the stage of preliminary negotiation. In a letter from Plagemann to Schuyler dated April 26, 1939, Plagemann, according to the claimant's translation, said:

"The German patent is about to be issued. The American patent is still under discussion. I take this opportunity to ask you to do everything possible to sell as soon as possible one to two machines, to see that one to two machines are shipped to the United States so that already in the fall during my visit there I can see the machines in operation and possibly discuss improvements and suggestions at the place. I am possibly not unwilling to sell the machines against 30 days payment on the condition that you guarantee the payment."

The contents of this letter seem inconsistent with Schuyler's contention that there had been concluded about a month earlier—the date on which the alleged letter of assignment had been delivered to Schuyler in Zurich—an arrangement whereby Plagemann had assigned to the claimant his right, title and interest in the patent. The letter on the contrary seems to indicate that as late as April 26, 1939, the proposed transaction had not matured into a definite understanding.

Furthermore, James Birnholz testified that Plagemann told him in Germany that Schuyler was Plagemann's agent and that when Plagemann came to the United States in the Fall of 1939, "he ((Plagemann) would make arrangements between Mr. Schuyler and me". Birnholz further testified that when in 1939 he called on Schuyler for the first time, Schuyler did not state that Plagemann had assigned the patent to him. This would indicate either that Plagemann regarded Schuyler as an agent or that no definite agreement had been worked out between Schuyler and Plagemann.

Moreover, Schuyler testified that when he was in Zurich in April 1939 he borrowed 20,000 Swiss francs from one Julius Schoch, a Swiss businessman, who paid it to an agent of Plagemann as consideration for the alleged assignment of the patent to Schuyler and that Schuyler thereupon delivered to Schoch his promissory note for 20,000 Swiss francs along with Plagemann's letter. Schoch died sometime in early 1940. Serious doubt as to the existence of this "loan"—and for the same reason as to the existence of an assignment—arises from a statement apparently made by one Kurt Brunner, administrator of the estate of Julius Schoch and his attorney at the time of the alleged transaction. It appears that in response to an inquiry by the Alien Property Custodian through the State Department in the Summer of 1944, Brunner stated that he and Ebhart Schoch, brother and business associate of the deceased Julius

Schoch, were unable to discover any record to the effect that Schuyler owed Julius Schoch 20,000 Swiss francs.

This statement apparently means that Brunner and Ebhart Schoch have been unable to locate the alleged letter of assignment, Schuyler's promissory note for 20,000 Swiss francs, or any other record of the transaction. We also note that although Julius Schoch died in 1940, Schuyler's efforts, according to his testimony, to get possession of his alleged document of title were limited to two letters to Schoch's widow in 1940, both of which were unanswered, and to an inquiry in 1944.

Claimant, Clara Birnholz, filed her claim in January 1943. Schuyler filed his claim in May 1943. It appears that in March 1944, Schuyler and Clara Birnholz entered into an arrangement whereby Schuyler agreed to pay Clara Birnholz $50.00 for each machine manufactured under licenses issued by Schuyler on the patent in question until $12,000.00 was so paid, provided Schuyler obtained an exclusive license from the Alien Property Custodian and provided Clara Birnholz withdrew her claim and requested the Custodian to issue an exclusive license to Schuyler. Since the Clara Birnholz claim to an interest in the patent was obviously without merit, it is improbable, in the opinion of the Committee, that Schuyler would have made the arrangement if he had been the assignee of the patent.

A consideration of the conversations at Leipzig, of Schuyler's testimony as to the contents of the alleged letter of assignment, of the evidence indicating that a definite agreement between Schuyler and Plagemann had not been worked out, and of the Brunner statement, makes it apparent that the claimant, Schuyler, has failed to carry his burden of proving that he had at the time of vesting a proprietary interest in the patent.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that:

1. The claimant, Clara Birnholz, did not have at the time of vesting a title or interest in Patent No. 2,257,253 sufficient in law to support a right to recovery, and that

2. The claimant, William A. Schuyler, did not have at the time of vesting a title or interest in Patent No. 2,257,253 sufficient in law to support a right to recovery.

Accordingly, Claim No. 283 and Claim No. 703 are hereby disallowed.

MARCH 14, 1945.

IN THE MATTER OF
HERMAN A. BRASSERT; ASKANIA-WERKE, A. G.
Claim No. 589. Docket No. 14

STATEMENT OF THE CASE

This proceeding was commenced upon Notice of Claim dated March 10, 1943, alleging in substance that the claimant, Herman A. Brassert, was the owner at the time of vesting of the patents and patent applications described in the Notice of Claim. The Notice of Claim was filed pursuant to Regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Alien Property Custodian, by a series of Vesting Orders;

No. 13 dated May 29, 1942 (7 Fed. Reg. 4128),
No. 68 dated July 30, 1942 (7 Fed. Reg. 6181),
No. 112 dated Aug. 25, 1942 (7 Fed. Reg. 7785),
No. 151 dated Sept. 17, 1942 (7 Fed. Reg. 8317),
No. 201 dated Oct. 2, 1942 (8 Fed. Reg. 625),
No. 205 dated Oct. 2, 1942 (7 Fed. Reg. 8669),
No. 640 dated Jan. 6, 1943 (8 Fed. Reg. 1296),
No. 661 dated Jan. 12, 1943 (8 Fed. Reg. 2163),
No. 1184 dated April 2, 1943 (8 Fed. Reg. 7035),

vested certain patents and patent applications relating to hydraulically operated control and regulator devices, and all rights of Askania-Werke, Aktiengesellschaft, under a contract dated July 5, 1939 between it and Askania Regulator Company, as property in which nationals of a foreign country (Germany) had interests.

Pursuant to notice (9 Fed. Reg. 1917) a hearing was held before the Committee in New York on March 3, 4 and 6, 1944. Coudert Brothers, by Percy A. Shay, and Alva D. Adams, appeared on behalf of claimant. A. Matt. Werner, General Counsel, by Irwin L. Langbein, David Williford and Jennings Bailey, Jr., appeared on behalf of the Custodian.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claimant's brief was received on March 25, 1944. General Counsel's reply brief was submitted on April 8, 1944. Claimant's reply brief was received April 18, 1944. A tentative determination disallowing the claim was issued on May 23, 1944. By agreement of the parties oral argument in opposition to the tentative determination was heard on June 2, 1944, at which time Scandrett, Tuttle and Challaire, by Bernard Phillips, appeared and argued the matter on behalf of the claimant. The Committee, following a consideration of the entire record, hereby disallows the claim for the reasons hereinafter set forth.

Determination

The claimant, H. A. Brassert, was born in London in 1875 and educated as a metallurgical engineer in Germany. Entering the United States in 1897 he apparently acquired citizenship in 1908,[1] and since his arrival has been active and prominent in the steel industry here. In 1919 he organized, under the name of H. A. Brassert Company, an engineering firm—an Illinois corporation owned and controlled by him. Through this company, and others established abroad, he planned, designed and built plants for steel companies in various countries.[2] In 1929 the Illinois corporation acquired the exclusive agency in the United States for a hydraulically operated control device which had been patented by Askania-Werke, Aktiengesellschaft (hereinafter referred to as Askania-Werke), a German corporation located in Berlin. Under the agreement the device, which came to be widely used in American industry, was manufactured in Germany, shipped to the United States and assembled, sold, installed, and serviced by the Illinois corporation.

[1] See *Herman A. Brassert* v. *Francis Biddle*, Attorney General of the United States, District Court of the United States, District of Connecticut, Opinion of Judge C. C. Hincks, dated April 21, 1944.

[2] Including Corby Iron and Steel Works, England, completed in 1937 and Herman Goering Works, Germany, in construction in August 1939.

In 1933, because of some mechanical difficulties with the device as manufactured in Germany, Askania-Werke consented to the organization of another Illinois corporation, Askania Regulator Company (hereinafter referred to as Askania Regulator) for the purpose of manufacturing and distributing the device in the United States. Askania Regulator issued 500 shares of stock; 450 of these were issued to Askania-Werke in exchange for a patent licensing agreement and certain equipment; and the balance of 50 shares was issued to H. A. Brassert Company for $5,000. To satisfy a need for additional working capital, Askania Regulator in 1937 issued 250 shares to the claimant for $25,000.

By a license issued on February 16, 1943 the Treasury Department approved a transfer of the controlling 450 shares from Askania-Werke to the claimant. These shares were not vested by the Alien Property Custodian.

From 1933 to 1939 Askania Regulator operated under the 1933 patent license agreement. On July 5, 1939 Askania-Werke and Askania Regulator concluded a new patent license agreement—to terminate in 1948. This new license agreement was basically the same as the original in granting an exclusive right to Askania Regulator to the use of the control device in the field of industrial applications but provided for increased royalty payments and, in addition, an annual fee of $500 for the use of the trade-mark "Askania" and for the right to register the trademark "Askania-Chicago."

We find, therefore, that in 1939, Askania Regulator, an Illinois corporation, had certain rights in respect to the patented control devices owned by Askania-Werke, a German corporation, and that of the 750 shares issued by Askania Regulator 450 were owned by Askania-Werke and 300 by the claimant and H. A. Brassert Company.

For the purpose of constructing in Germany the Herman Goering Steel Works, the claimant in about 1937 organized a German limited partnership, the H. A. Brassert Kommandit Gesellschaft (hereinafter referred to as Brassert K. G.), and retained a 70 percent interest therein. The articles of partnership are not in evidence and the record does not establish the ownership of the minority 30 percent except to indicate that one Paul Pleiger [3] owned 5 percent. In 1939 Brassert K. G. owed the claimant an undetermined sum of money for his services on its behalf in respect to the Goering Works contract and, at that time, Brassert K. G. was the owner, among other things, of a building in Berlin which it had purchased for 350,000 marks and had converted into an office building at an additional cost of 50,000 marks. A few days before the invasion of Poland in September 1939 the claimant, in anticipation of the approaching invasion, went to Berlin from England and advised his American and English engineer associates there to leave Germany immediately. The departure from Germany of the claimant and a number of his associates—under such circumstances and without completing the Goering Steel Works—coupled with their refusal to return, was obviously resented by the German interests.

Claimant contends that a contract was made between claimant and Askania-Werke whereby claimant acquired the right to the ownership of the patents and patent applications in question. Claimant bases this contention principally [4] upon an exchange of cables on October 22, 1940.

[3] An agent of the German government who acted on its behalf apparently as a supervisor of the construction of the Herman Goering Steel Works.

[4] Claimant also relies upon communications subsequent to October 22, 1940.

General Counsel contends that (1) neither the cable exchange of October 22, 1940 nor any subsequent communications between Askania-Werke and Askania Regulator constituted a contract, and (2) that if it should be held that a contract came into being, it did not come into being until after June 14, 1941 and, therefore, ineffective because of the prohibition of Executive Order 8389 as amended.

Apparently the first step taken by the claimant to acquire the interest of Askania-Werke in Askania Regulator was a cable, dated August 7, 1940 addressed to one Furstenau who was a resident of Germany, the office manager of Brassert K. G. and an attorney-in-fact for the claimant, the cable read:

"FURSTENAU CAN YOU ARRANGE PURCHASE GERMAN INTEREST IN AMERICAN ASKANIA FOR FIVE HUNDRED THOUSAND MARKS FROM MY PERSONAL AND COMPANY ACCOUNT".

Clearly this cable is not an offer but a request by the claimant to his agent to explore the possibility that the claimant personally acquire, from Askania-Werke, the "German interest in American Askania" for 500,000 marks (approximately $200,000.) to be paid out of the claimant's "personal and company account".

Apparently the claimant did not receive a response to this cable directly from Furstenau but did receive a cable dated October 22, 1940 from one Roux who was the general manager of Askania-Werke. The cable read:

"YOUR BERLIN OFFICE DECLARES THAT NO EQUIVALENT FOR ARECO SHARES AVAILABLE STOP SUGGEST TO VALUE ARECO SHARES INCLUDING LICENSE AGREEMENT AND PATENTS AT DOLLARS ONE HUNDRED FIFTY THOUSAND STOP READY TO TAKE IN EXCHANGE HOUSE GRUNEWALD KRONENBERGERSTRASSE STOP IMMEDIATE TRANSACTION OF EXCHANGE IN OUR MUTUAL INTEREST THEREFORE WIRE YOUR DECISION".

According to the claimant's contention, allowance or disallowance of the claim in this proceeding must rest largely upon the correct interpretation of this cable. It either is or is not an offer. It is not an offer unless, (1) in the light of the surrounding circumstances, including the conduct of the parties, it manifests an intention to place in the alleged offeree the power to bring an obligation into existence merely by manifesting absolute and unqualified assent to the terms of the alleged offer, and (2) the subject matter of the proposed exchange is defined with reasonable certainty.

The cable contains language which is clearly susceptible of being interpreted as language of preliminary negotiation:

"* * * suggest to value * * *" and "* * * ready to take in exchange * * *".

The last sentence of the cable "* * * immediate transaction of exchange in our mutual interest therefore wire your decision", if interpreted independently of the preceding portions, might well indicate an intention to manifest an offer but, in the opinion of the Committee, when read in conjunction with the preceding portions of the cable it does not do so. We note that it does not read: "Wire your acceptance." The "decision" requested may well have been a "decision" to negotiate on the basis of the valuation of the real estate at $150,000. Assuming that the cable did manifest a formal intention to offer, we do not believe that the subject matter of the "offer" was defined with requisite certainty in that it failed to designate, as to the patents, the number, identity, and the nature of the interest to

be transferred. The subsequent conduct of the parties—the disputes between them as to what, if any, patents were intended, and the nature of the interest therein to be granted; that is, whether full or limited rights—clearly discloses that the minds of the parties failed to meet.

On October 22, 1940, the same day the claimant received the cable described above, the claimant in response thereto cabled Askania-Werke as follows:

"ROUX YOUR PROPOSITION IN CABLE OCTOBER TWENTY SECOND ACCEPTED YOU VOMBERG AND FUERSTENAU PLEASE CONFIRM."

This laconic cable does not clarify the intention of the parties as to the subject matter of the proposed exchange but injects an added note of uncertainty—the request that "you vom Berg and Fuerstenau please confirm." This request that Fuerstenau "confirm" might well have been the expression by the claimant of an unwillingness to negotiate on the basis of the Askania-Werke proposal unless Brassert K. G. assented in advance to the proposed conveyance of its real estate to Askania-Werke in acquittance of the financial obligations of Brassert K. G. to the claimant; that is to say, it is unreasonable to assume or to infer that the claimant intended—if the real estate should not be released by Brassert K. G. in exchange for claimant's money claims against Brassert K. G.—to bind himself to go through with the transaction and remit $150,000 to Germany. The fact that vom Berg and Furstenau were included in the request to "confirm" indicates that the claimant was asking for something more than merely a formal acknowledgment of the receipt of his "acceptance." Corroboration of this interpretation of "confirm" is found in a cable sent claimant from Spain by Furstenau on October 22, 1940 because the cable stated: "* * * if you agree we must negotiate with Paul and jointly with him obtain approval."[5] Paul Pleiger it will be recalled had a five percent interest in Brassert K. G. and was a representative of the German government.

One month later the claimant sent the following cable, dated November 23, 1940, to Brassert K. G.:

"VOMBERG FURSTENAU UNLESS ROUX OFFER OCTOBER TWENTY SECOND WHICH WE ACCEPTED SAME DAY IS CONFIRMED ASKANIA SHARES HERE

[5] The cable in its entirety reads as follows:

"BRASSERT AGREE WITH PROPOSAL MAX THAT YOUR PURCHASE PRICE SHALL BE PAID BY OUR CEDING A CORRESPONDING SUM OUT OF YOUR OPEN ACCOUNT FOR REMUNERATION. IF YOU AGREE WE MUST NEGOTIATE WITH PAUL AND JOINTLY WITH HIM OBTAIN APPROVAL. ADVISE TOTAL AMOUNT REMUNERATION WE SHALL DEMAND. DETAILED EXPLANATION ABOUT PUBLICATION ARTICLE ON YOUR PERSON IN IRON AND STEEL IS URGENTLY REQUIRED. LETTER FOLLOWS. PLEASE REPLY BY TELEGRAM AND LETTER TO DR. KNIPPING BILBAO HOTEL CARLTON."

The Committee cannot determine what proposal is referred to in the first sentence. There is some evidence to the effect that it was *not* the proposal made by Roux to the claimant on October 22. The "Iron and Steel" article referred to is the following statement published in Iron Age by the claimant on August 29, 1940:

"These plants, (Germany and Austria) however, were not completed on account of the outbreak of the war, at which time Mr. Brassert disassociated himself from this undertaking."

It appears that the statement was resented by German authorities. Claimant responded to the above quoted cable from Furstenau, on the day it was received, as follows:

"CARL I CLAIM COMPANY OWES ME MORE THAN VALUE OF PROPERTY IN QUESTION STOP AGREE TO RELINQUISH SUFFICIENT TO SATISFY PURCHASE PRICE PROPERTY FOR EXCHANGE SHARES STOP PUBLISHED ARTICLE REFERRED TO NECESSARY UNDER CONDITIONS OBTAINING THIS COUNTRY WITH WHICH YOU SHOULD BE FAMILIAR."

This cable seems to corroborate further the Committee's interpretation of "confirm" because in it the claimant apparently attempts to persuade Furstenau that an acquittance of Brassert K. G.'s money obligations to the claimant was a fair exchange for its real estate. Also this cable further supports the finding that the subject matter of the alleged offer was not specified with requisite certainty because it indicates an uncertainty in the claimant's mind—the day after his "acceptance" on October 22—as to what was to be given to him in exchange for the Brassert K. G. real estate in Germany. Here he speaks only of the exchange of "shares"—no mention at all being made of the patents.

WILL BE CONFISCATED STOP SHALL I SEND TO PAUL FOLLOWING CABLE HOPE YOU WILL UNDERSTAND MY VERY DIFFICULT POSITION AND WILL AGREE IN BEST INTEREST OF ALL TO TRANSFER GRUNEWALD PROPERTY FOR THE ASKANIA REGULATOR COMPANYS SHARES NOW HELD BY ASKANIA-WERKE IN SETTLEMENT OF ALL MONIES OWED ME FOR SERVICES PLANS SPECIFICATIONS PATENTS."

This cable is direct corroboration by the claimant himself of the Committee's interpretation of claimant's cable of October 22 as requiring a confirmation from Brassert K. G. as a condition precedent to a contract. Confiscation of "Askania shares here" is incompatible with the contention that a contract to transfer the shares came into existence in October. In other words, this message clearly discloses claimant's then understanding that no binding contract then existed. He correctly considered the assent of Brassert K. G. necessary to create in him such a right as would operate to prevent "confiscation". We note also that the cable refers twice to the exchange of "shares" and fails to refer at all to the Askania-Werke patents involved in this proceeding—the only reference to patents being to some unrelated ones owned by claimant.

On November 30, 1940 claimant's cable of November 23, 1940, to Brassert K. G. was answered by the following cable from not only vom Berg and Furstenau but also by Roux, the general manager of Askania-Werke:

"BRASSERT OWING UNFAVOURABLE INTERPRETATION OF ANNOUNCEMENT AMICABLE ARRANGEMENT WITH BUYER IMPOSSIBLE AT PRESENT STOP YOUR WAIVING YOUR REMUNERATION CLAIM WOULD ONLY BE REGARDED AS SUBSTANTIATING REPROACHES AND SUSPICIONS EXISTING AGAINST YOU STOP CLARIFYING CONFIDENTIAL LETTER IN WHICH YOU JUSTIFY YOURSELF FROM HUMAN VIEWPOINT TO BE ADDRESSED TO US FOR YOU NAME SAKE ABSOLUTELY NECESSARY STOP SINCE TAX SETTLEMENT PROBABLY A LITTLE MORE FAVOURABLE THAN EXPECTED ASKANIA AND OURSELVES IMMEDIATELY MAKE PETITION FOR TRANSFER GRUNEWALD PROPERTY DUE YOUR URGENT REQUEST STOP WE POINT OUT THAT WHEN SOLD ASKANIA IS NOT ALLOWED TO PERMIT ARECO FURTHER USE OF TRADEMARK ASKANIA."

The obvious intent of this cable is to suspend all negotiations pending claimant's attempt to appease the indignation aroused in Germany by the publication in the Iron Age referred to above. The cable cannot be reconciled with claimant's contention that the respective rights and obligations of the parties had long since become fixed. This cable, rather than supplying the requested confirmation from Brassert K. G. asserts the impossibility of presently obtaining any confirmation under the circumstances.

In the opinion of the Committee, therefore, the negotiations had not, at the end of 1940, reached that degree of mutual agreement and certainty required of a contract. In other words, in the opinion of the Committee, if nothing at all had transpired subsequently between the parties, neither party at this time would have had a cause of action for non-performance of a contractual undertaking.

Apparently there was no other correspondence between the parties until another exchange of cablegrams took place in April 1941.[6] We

[6] On April 11, 1941 Askania-Werke cabled the claimant as follows:

"WE HEREBY SELL AND TRANSFER TO YOU ALL OUR HOLDINGS OF THE ASKANIA REGULATOR COMPANY THAT IS FOUR HUNDRED AND FIFTY SHARES OF SAID COMPANY INCLUDING RIGHTS OF LICENSE AGREEMENT WITH ARECO DATED JULY 1939 BUT EXCLUDING TRADEMARK ASKANIA STOP KINDLY CABLE AC-

pass the question whether a contract was entered into by the exchange of these cablegrams because if a contract then originated, it clearly concerned only the shares of stock and the license agreement but not the patents as such.[7] It is obvious from subsequent communications that no assignment of the patents was then mutually intended.[8] Askania-Werke flatly refused to transfer the patents unless, as a condition precedent to so doing, it should be agreed by the claimant that he would turn them back to Askania-Werke in 1948[8] (the time when the license agreement would terminate). This conditional element clearly negatives any possible inference that it had been mutually intended that title to the patents was to pass to the claimant. The right of ownership of the patents asserted by claimant in this proceeding must stand or fall upon proof of a contract to convey the title to the patents to the claimant but not only was the intention to pass title expressly negatived by the condition above mentioned, but in the same message[8] Askania-Werke insists upon another limitation—a reservation of the right to "free use and transfer of patent rights outside province of Areco (Askania Regulator)".[9] This cable of Askania-Werke adds further support to the finding of uncertainty as to what the parties had in mind—that is as to what particular patents they were considering and what interests in those patents were to be transferred to the claimant.

The dispute between the parties continued through July and August 1941, the claimant insisting that he had acquired the right to the patents by virtue of the April exchange of cables and Askania-Werke insisting that the April exchange of cables did not include the patents.[10] The formal

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CEPTANCE IN SUCH FORM THAT THIS SALES AGREEMENT IS DEFINITELY CLOSED STOP WE RECEIVE HERE PAYMENT IN FULL BY YOUR AGENTS BRASSERT AND COMPANY WHO TURN OVER TO US BUILDING KRONENBERGERSTRASSE STOP FOR THIS DEAL WE SECURED ALL NECESSARY PERMITS BY GERMAN GOVERNMENT."

The claimant in response cabled Askania-Werke on April 15 as follows:

"HEREBY ACCEPT EXCHANGE ASKANIA SHARES FOR PROPERTY ON TERMS AND CONDITIONS STATED YOUR CABLEGRAM APRIL ELEVENTH."

[7] As stated earlier, the shares of stock were in fact transferred to the claimant pursuant to a Treasury license and are not involved in this proceeding.

[8] By a letter dated June 17, 1941 (three days after Executive Order 8389 was amended to include Germany) the claimant wrote to Askania-Werke setting forth the cables that were exchanged in April 1941 and a further cable from Askania-Werke advising claimant that the Askania Regulator shares had been transferred to him personally. The letter continued as follows:

"In further confirmation of this transaction I enclose herewith sales agreement in duplicate dated April 18, 1941 * * *."

The sales agreement so submitted to Askania-Werke recited that Askania-Werke had sold to the claimant as of April 18, 1941 not only the shares of stock but also the patents involved in this proceeding. On August 6, 1941 Askania-Werke answered by cable as follows:

"ACKNOWLEDGE RECEIPT AGREEMENT DATED APRIL EIGHTEEN COMPREHENDING NOT ONLY LICENSE AGREEMENT BUT ADDING PATENT ASSIGNMENTS TO WHICH WE AGREE AT FOLLOWING CONDITIONS FIRSTLY PATENT RIGHTS REVERT TO US AT THE TERMINATION OF LICENSE AGREEMENT SECONDLY WE RETAIN FREE USE AND TRANSFER OF PATENT RIGHTS OUTSIDE PROVINCE OF ARECO PROGRAM THIRDLY YOU CARE ALL PENDING PATENTS INCLUDING FEES PATENT LAWYER STOP TRANSFER PATENTS STOECKER RHEINLAENDER BACH STEINEN IMPOSSIBLE STOP IF YOU AGREE BY CABLE WE WILL SIGN AND FORWARD AGREEMENT CONTAINING ABOVE CONDITIONS TO BE RETURNED WITH YOUR SIGNATURE."

[9] As a matter of fact, Askania-Werke had licensed to others in the United States, in a noncompetitive field, some at least of the patents licensed to Askania Regulator.

[10] The claimant cabled Askania-Werke on August 12, 1941 as follows:

"REFERENCE YOUR CABLE AUGUST SIXTH MY ACCEPTANCE DATED APRIL FOURTEENTH OF YOUR OFFER CONSTITUTED A VALID AGREEMENT DATED APRIL EIGHTEENTH WHICH PROVIDED FOR DELIVERY TO ME OF ALL YOUR HOLDINGS IN ARECO CONSISTING OF 450 SHARES OF STOCK INCLUDING RIGHTS OF LICENSE AGREEMENT WITH ARECO DATED JULY 1939 AND THE ASSIGNMENT OF ALL PATENTS BELONGING TO THE FIELD OF ACTIVITIES OF ARECO STOP IN ACCORDANCE WITH OUR AGREEMENT WE HAVE CANCELLED ARECO TRADEMARK STOP REGARDING PATENT EXPENSES FOR ALL PATENTS ASSIGNED OR THAT WILL BE ASSIGNED TO ARECO THESE WILL BE BORNE BY ME BUT IT MUST BE UNDERSTOOD THAT EXPENSES OF ASKANIA-WERKE PATENTS WHICH WILL NOT BE MY PROPERTY MUST BE BORNE BY YOU OTHERWISE SUCH ACTION CONTRARY TO UNITED STATES LAWS STOP IT IS THEREFORE IMPERATIVE THAT AGREEMENTS SUBMITTED AND ACKNOWLEDGED BY YOU BE EXECUTED AND RETURNED TO ME AS CONFIRMATION OF CABLED CONTRACT."

On August 20 Askania-Werke responded by cable as follows:

"OUR OFFER OF APRIL ELEVENTH NEITHER INCLUDED PROPERTY OF PATENT RIGHTS NOR DID YOUR ANSWER DEMAND IT STOP WE WISH NOT TO INTERFERE WITH ACTIVITIES OF ARECO SAFEGUARDED BY LICENSE AGREEMENT STOP TRANSFER OF PATENT RIGHTS FOREVER FOR US IMPOSSIBLE UNLESS YOU

sales agreement, which had been transmitted by the claimant to Askania-Werke on June 17, 1941, to be executed as of April 18, 1941 was never executed. Sometime in September 1941, however, and very probably shortly before the transmittal of the cable dated September 30, 1941 from Askania-Werke to the claimant,[10] Askania-Werke sent to the claimant an instrument signed on its behalf which varied from the formal sales agreement tendered to it in June 1941—the June instrument designated some fifty-seven patents as coming within the field of activity of Askania Regulator but the September instrument designated only some forty patents as coming within such field of activity. By reason of this material variance the September instrument was a counter-offer to whatever proposals preceded it, and there is no evidence that this counter-offer was accepted by the claimant.

In any event, if a contract was made after June 14, 1941, it was a contract for the transfer of patents in which a foreign national (Askania-Werke) had an interest, and such a transaction, not being licensed by the Treasury Department, falls within the prohibition of Executive Order 8389 as amended and cannot be given consideration by the Custodian.

THEREFORE, for the purpose of this proceeding, it is the determination of the Committee that:

(1) H. A. Brassert did not have, at the time of vesting, the right to the ownership of the patents and patent applications claimed in this proceeding, and

(2) That the patents and patent applications claimed in this proceeding were properly vested.

Accordingly, Claim No. 589 is hereby disallowed.

JUNE 10, 1944.

AGREE TO REASSIGN TO US AT ANY TIME AND TO SEND AGREEMENT BINDING YOU AND YOUR SUCCESSORS STOP APPARENTLY DISSENSION CAUSED BY DIFFICULTY OF COMMUNICATION KINDLY CABLE."

Again on September 5 the claimant cabled to Askania-Werke stating:

"REFERENCE YOUR CABLE AUGUST TWENTIETH PATENT REASSIGNMENT PROVISION WOULD MAKE CONTINUED OPERATION IN PRESENT STATUS HERE OF ARECO BUSINESS IMPOSSIBLE UNDER GOVERNMENTAL CONTROLS STOP PENDING APPLICATIONS OF PATENTS MUST BE PROTECTED BY OUR PAYING NECESSARY LEGAL EXPENSES OTHERWISE THESE WOULD BE DROPPED FOR LACK OF PROSECUTION THEREFORE SITUATION AS STATED OUR CABLE AUGUST TWELFTH EXPLAINS THAT BINDING AGREEMENT DATED APRIL EIGHTEENTH EXISTS AND PROVIDES FOR UNCONDITIONAL ASSIGNMENT PATENTS IN ACCORDANCE WITH CONFIRMATORY AGREEMENT SUBMITTED AND WHICH YOU ARE KINDLY REQUESTED TO EXECUTE AND RETURN TO ME STOP IN MY OPINION CONTROVERSY UNWARRANTED ON BASIS STATUS OF PATENTS IN YEAR NINETEEN FORTY EIGHT STOP FAILURE ASSIGNMENT OF PATENTS WOULD MEAN NO MATERIAL ADVANTAGE TO YOU."

The September 5 cable was supported by a cable from Askania Regulator to Askania-Werke dated September 8, 1941, which follows:

"RETEL BRASSERT REGARDING PATENT ASSIGNMENT PLEASE CONSIDER THAT IN 1948 MOST BASIC PATENTS HAVE EXPIRED AND PENDING PATENTS CAN NO LONGER BE PROSECUTED DUE TO LACK OF FUNDS AND MAY NEVER ISSUE STOP WE STRONGLY RECOMMEND ACCEPTANCE OF TERMS AS UNDERSTOOD BY BRASSERT AND OURSELVES STOP WE FEEL CERTAIN THAT CONDITIONAL ASSIGNMENT IS IMPOSSIBLE AND IMPRACTICAL BECAUSE IT IS NOT BONA FIDE SALE WHICH IS ONLY CONDITION ASSURING US PROTECTION AND UNDER WHICH WE ARE PERMITTED TO PROSECUTE AND PAY APPLICATIONS STOP AGREEMENT TO REASSIGN WOULD CONSTITUTE DANGER TO CONTINUED OPERATION OF BUSINESS."

Then on September 18, 1941 Askania-Werke cabled the claimant as follows:

"REFERENCE YOUR CABLE SEPTEMBER SIXTH WE SIGNED AGREEMENT OF APRIL EIGHTEENTH AND TRANSFERRED TO YOU ALL PATENTS AND APPLICATIONS PENDING BELONGING TO THE PRESENT FIELD OF ACTIVITIES OF ARECO STOP BUT WE ARE NOT ABLE TO TRANSFER PATENTS NOT BELONGING TO ARECO ACTIVITIES BECAUSE THIS WOULD DAMAGE OUR FUTURE AMERICAN BUSINESS IN OUR OTHER LINES STOP CABLE AGREEMENT."

The claimant on September 19, 1941, cabled Askania-Werke stating:

"HEREBY AGREE ACCEPT TRANSFER PATENTS BELONGING FIELD ARECO ACTIVITIES ACCORDANCE YOUR CABLE SEPTEMBER EIGHTEENTH STOP PLEASE FORWARD TO ME IMMEDIATELY SIGNED AGREEMENT DATED APRIL EIGHTEENTH AND CABLE DATE MAILED."

Finally, on September 30, 1941, Askania-Werke cabled the claimant as follows:

"REFERENCE YOUR CABLE SEPTEMBER TWENTY FIRST AGREEMENT OF APRIL EIGHTEENTH AND ASSIGNMENTS OF SAME DATE FOR PATENTS AND APPLICATIONS HAVE BEEN SIGNED BY US AND CERTIFICATE INDICATING CHANGE OF OUR CORPORATE NAME ARE DISPATCHED TODAY STOP COPIES OF DOCUMENTS IN QUESTION WILL BE FORWARDED ONE WEEK LATER."

In the Matter of
HERMAN A. BRASSERT: ASKANIA-WERKE, A. G.
Amended Claim No. 589. Docket No. 14

Statement of the Case

This proceeding was initiated by the filing of an amendment, dated June 10, 1944, to notice of Claim No. 589. Claim No. 589, filed by Herman A. Brassert, had been directed to certain patents and patent applications which had been vested by a series of Vesting Orders as the property of Askania-Werke Aktiengesellschaft, a German corporation, hereinafter referred to as Askania-Werke. The Custodian had likewise vested Askania-Werke's rights in a certain license agreement, dated July 5, 1939, by and between Askania-Werke and Askania Regulator Company of Chicago, an Illinois corporation. Claim No. 589 was heard and on June 10, 1944 a final determination was issued disallowing the claim, but the Committee then expressly refrained from passing upon the claimant's rights, if any, in the license agreement—the proceeding to that date not having been directed, in the opinion of the Committee, to the issue presented by the vesting of the license agreement. The claimant, Herman A. Brassert, thereupon filed an amendment to Claim No. 589 in order to include specifically therein a claim to Askania-Werke's rights under the license agreement, and, in accordance with the agreement of the parties, the Committee has considered the claim to the rights under the license agreement on the basis of the record made in the proceeding on Claim No. 589 together with additional evidence that was received at a supplemental hearing on September 6, 1944.

A statement of the related Vesting Orders and of the appearances is set forth in the final determination of June 10, 1944, on Claim No. 589.

A tentative determination allowing the claim with respect to the license agreement was issued on February 26, 1945. On April 24, 1945 General Counsel submitted a brief in support of a proposal to reverse the tentative determination, and the claimant submitted an answering memorandum on May 12, 1945.

On the basis of the entire record and the memoranda submitted, the claim is disallowed for the reasons hereinafter set forth.

Determination

Since this determination is based upon the record of the proceeding on Claim No. 589 the facts and conclusions as found in the final determination on that claim issued on June 10, 1944 are hereby incorporated by reference into and are adopted as a part of this determination, and are not repeated herein except to the extent necessary to dispose of the issue presented by the amendment.

Prior to the fall of 1940, Askania-Werke of Germany owned 450 shares of Askania Regulator Company of Chicago and also certain United States patents and patent applications which were subject to a license agreement between Askania-Werke and Askania Regulator, dated July 5, 1939. The license agreement granted, in substance, an exclusive license to Askania Regulator within a limited field to patents owned by Askania-Werke relating to hydraulically operated control and regulator devices.

The claimant is an American citizen who has resided at all material times in the United States, and is an eligible claimant insofar as nationality is concerned. In the fall of 1940, he negotiated with Askania-Werke

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in an attempt to acquire the shares of Askania Regulator, the patents, and the license agreement, but, as found in the final determination of June 10, 1944, "* * * the negotiations had not, at the end of 1940, reached that degree of mutual agreement and certainty required of a contract."

Thus matters stood until April 11, 1941 when Askania-Werke cabled the claimant as follows:

"WE HEREBY SELL AND TRANSFER TO YOU ALL OUR HOLDINGS OF THE ASKANIA REGULATOR COMPANY THAT IS FOUR HUNDRED AND FIFTY SHARES OF SAID COMPANY INCLUDING RIGHTS OF LICENSE AGREEMENT WITH ARECO DATED JULY 1939 BUT EXCLUDING TRADEMARK ASKANIA STOP KINDLY CABLE ACCEPTANCE IN SUCH FORM THAT THIS SALES AGREEMENT IS DEFINITELY CLOSED STOP WE RECEIVE HERE PAYMENT IN FULL BY YOUR AGENTS BRASSERT AND COMPANY WHO TURN OVER TO US BUILDING KRONENBERGERSTRASSE STOP FOR THIS DEAL WE SECURED ALL NECESSARY PERMITS BY GERMAN GOVERNMENT."

And on April 15, 1941 the claimant responded:

"HEREBY ACCEPT EXCHANGE ASKANIA SHARES FOR PROPERTY ON TERMS AND CONDITIONS STATED YOUR CABLEGRAM APRIL ELEVENTH."

In the June 10, 1944 determination the Committee commented on this cable exchange as follows:

"We pass the question whether a contract was entered into by the exchange of these cablegrams because if a contract then originated, it clearly concerned only the shares of stock and the license agreement but not the patents as such."

Following this exchange of cablegrams, the claimant and Askania-Werke continued to correspond through the summer of 1941, the claimant insisting that the agreement reached by the April exchange of cables included not only the shares and the license agreement but also the patents, while Askania-Werke insisted that the April agreement encompassed merely the shares and the license agreement. The transfer of the shares to the claimant was licensed by a Treasury license issued on February 16, 1943; and, as stated above, the final determination of June 10, 1944 disallowed the claim to the patents for the reasons therein fully stated.

The issue presented by the amendment to the claim is whether Askania-Werke—prior to June 14, 1941, the date on which Executive Order No. 8389, as amended, was made applicable to Germany—had contracted to transfer its rights under the license agreement to the claimant. The Committee has concluded that it had not.

The cable of April 11th was obviously intended to be an offer—as distinguished from preliminary negotiation—but it was an offer to sell only the 450 shares of stock and the license agreement. Although the claimant had been negotiating in the fall of 1940 to acquire not only the shares of stock and the license agreement but also the patents, and although it is clear that Askania-Werke knew that the claimant was seeking all three items, we are unable to interpret the April 11th cable as offering anything more than the license agreement and the 450 shares. The cable bears the earmarks of careful draftsmanship. It defines with explicit precision the items thereby offered to the claimant. Whoever drafted the cable was not content with the vague phrase "all our holdings of the Askania Regulator Company" but continued on in order to specify in detail what items were included and what item was excluded, "* * * *that is* 450 shares of said

company *including* rights of license agreement with Areco dated July 1939 but *excluding* trademark Askania * * *." (Italics supplied.) In view of the definitive character of the cable, it should have been obvious to the claimant, in the opinion of the Committee, that if Askania-Werke had intended to include patents it would have so stated specifically. It did not do so.

But this offer did not mature into a contract because it was not accepted by the claimant. He did not, in other words, accept the offer of the 450 shares and the license agreement. His response to the offer was

"hereby accept *Askania shares* for property on terms and conditions stated your cablegram April 11th" (Italics supplied.)

and by "Askania shares" he meant all three items; that is, not only the 450 shares of Askania Regulator and the license agreement, but also the patents. That the claimant meant by the term "Askania shares" all three items clearly appears from the correspondence—set out in detail in the final determination of June 10, 1944—between Askania-Werke and the claimant in the fall of 1940. In this correspondence Askania-Werke and the claimant used several diverse phrases more or less interchangeably to describe the subject matter of the negotiations. On one occasion all three items were described as the "German interest in Askania Regulator." On another occasion the description was "Areco shares including license agreement and patents." And, very significantly, in a cable dated October 23, 1940 from the claimant to the manager of Brassert K. G., all three items are referred to merely as "shares." In other words, it is clear that the phrase "Askania shares" as used in the claimant's cable of April 15th was merely an abbreviated designation of all three items.

Since Askania-Werke had offered to sell, in its cable of April 11th, merely the license agreement and the 450 shares of stock, and since the claimant in his response of April 15th described as the subject matter of his response all three items, it follows that the parties did not in April 1941 mutually agree as to the subject matter of the proposed exchange.

This conclusion is corroborated by other evidence. Askania-Werke in its correspondence with the claimant subsequent to April 1941 insisted that the April 11th cable did not include the patents, and the claimant on his part insisted that it did; that is, the conduct of the parties after April 1941 is confirmatory of the finding that they had not agreed in April 1941 as to the subject matter of the exchange. Furthermore, the claimant and witnesses on his behalf testified that at all times he was bargaining for a "three-item package" and not merely for the license agreement and the 450 shares—testimony which is consistent with the meaning of the phrase "Askania shares" as used in the claimant's cable of April 15th when the phrase is read in the light of the earlier negotiations.

The question as to whether the correspondence between Askania-Werke and the claimant subsequent to April 1941 resulted in a contract was passed upon by the Committee in the final determination of June 10, 1944. As found therein, the subsequent correspondence did not constitute a contract and, in any event, if a contract was made after June 14, 1941, it was a contract for property in which a foreign national (Askania-Werke) had an interest, and such a transaction, not being licensed by the Treasury Department, falls within the prohibition of Executive Order No. 8389, as amended, and cannot be given consideration by the Custodian.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that Herman A. Brassert did not have, at the time of vesting, a title to or an interest in the vested property sufficient to support a right of recovery.

Accordingly, Claim No. 589, as amended, is hereby disallowed.

AUGUST 8, 1945.

IN THE MATTER OF "COLOS" INTERNATIONAL COMPANY *for* COMMERCE & INDUSTRY, INC.

Claim No. 1112. Docket No. 49

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 1112, dated September 14, 1943, filed on Form APC-1 by "Colos" International Company for Commerce & Industry, Inc., pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Alien Property Custodian by Vesting Order No. 1025, dated March 4, 1943 (8 Fed. Reg. 4203), vested all right, title and interest in United States Patent Nos. 1,890,645 and 2,010,805, as the property of M. Ow-Eschingen, a national of a foreign country (Germany).

Notice of Claim No. 1112 alleges in substance that the patents in question were assigned on or about May 8, 1939 by Ow-Eschingen to the claimant and alleges that by virtue of the assignment it has "complete ownership of both of these patents." The claim also alleges that "the inventor may claim $2750 which we have agreed to pay but which we dispute as we have a counterclaim for damages against him for breach of contract."

The Order for and Notice of Hearing was published on November 4, 1944 (9 Fed. Reg. 13171) and a copy was served upon the person designated in Section 2 of the Notice of Claim. Pursuant thereto a hearing was held before the Committee, at the New York Office of the Alien Property Custodian, on November 20, 1944.

The claimant appeared at the hearing without counsel. John Ernest Roe, General Counsel, by George B. Searls, Edward M. Murphy, and David M. Williford, appeared on behalf of the Alien Property Custodian. Claimant did not file a brief. General Counsel's brief was filed on January 12, 1945. A Tentative Determination disallowing the claim was issued on February 3, 1945 and the claimant filed a memorandum directed to the Tentative Determination on February 15, 1945.

The transcript of the testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for reasons hereinafter set forth.

DETERMINATION

The claimant, "Colos" International Company for Commerce & Industry, Inc., a New York corporation (hereinafter called Colos), contends in this proceeding that by virtue of an agreement made in 1939 with one Max Ow-Eschingen, a resident of Vienna, it had acquired the "complete ownership" of U. S. Patents Nos. 1,890,645 and 2,010,805

prior to the issuance of Vesting Order No. 1025 which vested the patents as the property of Ow-Eschingen. General Counsel contends that the claimant has failed to sustain its burden of proving that it had acquired the beneficial interest in the patents prior to vesting.

The claimant was organized by one Max Gutmann after his arrival in the United States from Germany in 1937. Gutmann, who testified that he became a naturalized citizen of the United States in March 1944, has been at all material times the owner of all of the stock of Colos, and its President. It appears that while Gutmann was travelling abroad in 1938 he was told by one Leopold Bandler of Prague, Czechoslovakia, of a new metallizing process. He then conferred in Vienna with the patentee of the process, one Max Ow-Eschingen, for the purpose of purchasing the two patents which are the subject of this proceeding. Gutmann was not then convinced that the patents were of commercial value. It seems, however, that Gutmann found, sometime after his return to the United States, that the Metaplast Corporation of New York was willing to purchase the patents for $4,000. Gutmann then corresponded with Ow-Eschingen with a view to purchasing the patents and received from Ow-Eschingen a cable, dated April 15, 1939, which stated "Agree 2750 England await letter." It appears from Gutmann's testimony that Ow-Eschingen was indicating by this cable that he was willing to sell the patents to Colos for $2,750. The claimant replied on April 20, 1939, "Accept 2750 please send assignment certificate or documents."

The April 20th cable was followed by a letter from the claimant to Ow-Eschingen, dated April 25, 1939, stating:

"Referring to the agreement we are sending you separately, we take pleasure in confirming to you that we will pay you the sum of $2,750.00 after this agreement has been properly signed by you and furthermore after assignment, in a proper legal form, of your rights on the American Patents No. 1,890,645 and No. 2,010,805. We leave it to you to send these documents in trusteeship to Mr. Gutmann or to the Manufacturers Trust Co., branch office 513 Fifth Avenue, New York City, with the understanding that payment of this amount may be made only after proper examination of the documents in question. To simplify matters, we would, however, suggest submitting, in trust, all documents to Mr. Gutmann."

The "agreement" of assignment referred to in the April 25th letter is executed by Ow-Eschingen and returned to the claimant with a letter of transmittal which advised the claimant that assignment certificates were being sent "thru two patent lawyers in Washington." Although this was contrary to the claimant's instructions as contained in the letter of April 25th, it resulted in the recording of the assignments in the United States Patent Office by the patent lawyers acting on behalf of Ow-Eschingen. It may be noted that the instrument referred to in the April 25th letter as an "agreement" of assignment does not purport to be a complete memorial of the transaction and the determination of the claimant's rights in the premises requires a consideration of all the related correspondence.

Colos had requested, in the April 25th letter, that the assignments be sent "in trusteeship" either to the named bank or to Gutmann so that Colos could be assured that the assignments were in order and that it

had received adequate instructions as to the use or know-how prior to the payment of the purchase price.

It appears that the assignments were not executed to the satisfaction of the claimant—one was undated and neither had been acknowledged before a proper authority—and that the claimant, therefore, returned the assignment certificates to Ow-Eschingen. The claimant then endeavored through correspondence with Ow-Eschingen to obtain assignments executed to his satisfaction and to obtain the promised know-how. Its attempts were unsuccessful, however, and the last letter it received from Ow-Eschingen, dated December 12, 1939, stated:

"The patents have not become your property because you have not paid for them."

The question presented is whether on these facts the claimant had acquired prior to vesting the legal or beneficial interest in the patents and the Committee has concluded that title to the patents was in Ow-Eschingen and not in the claimant at the time of vesting.

It seems clear that the agreement called for a simultaneous exchange of performances and that neither party in fact performed or tendered performance. The purchase price was not paid; the know-how, without which the patents could not be commercially exploited, was not disclosed. We cannot conclude that Ow-Eschingen by executing and recording the assignment intended title to pass independently of the terms of the agreement. If he did so intend, it does not follow that title was transferred because the claimant did not in fact accept the assignments but rejected them. The execution and recording of an assignment is not an effective transfer of title in the absence of acceptance of the transfer or at any rate in the presence of an affirmative disclaimer.

It being necessary to disallow the claim on the ground that the claimant had not carried its burden of proving that it had, at the time of vesting, any "interest, right or title" in the vested patents within the meaning of Section 9 (a) of the Trading with the enemy Act, it is unnecessary to consider whether Colos is an eligible claimant as to nationality.

For the purpose of this proceeding, therefore, it is the determination of the Committee that the claimant, "Colos" International Company for Commerce and Industry, Inc., did not have at the time of vesting a title or interest in Patent Nos. 1,890,645 and 2,010,805 sufficient in law to support a right to recovery.

Accordingly, Claim No. 1112 is hereby disallowed.

May 18, 1945.

IN THE MATTER OF

CHARLES ENGELHARD

Claim No. 107, as amended. Docket No. 28
Claim No. 108, as amended. Docket No. 29

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 107 (dated November 17, 1942, and amended on December 30, 1943, and on June 29, 1944), and Notice of Claim No. 108 (dated November 17, 1942, and amended on December 30, 1943) filed by Charles Engelhard pursuant to regulations issued by the Alien Property Custodian on March 25, 1942

(7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

By Vesting Order No. 56 of July 23, 1942 (7 Fed. Reg. 5741), Vesting Order No. 74 of July 30, 1942 (7 Fed. Reg. 7047), Vesting Order No. 288 of November 2, 1942 (7 Fed. Reg. 9098), and Supplemental Vesting Order No. 3186 of February 23, 1944 (9 Fed. Reg. 2807) the Alien Property Custodian vested the following property:

15,388 shares of $1.00 par value common capital stock of Arushee Company, a New Jersey corporation;

1,523 shares of $100 par value common capital stock of The American Platinum Works, a New Jersey corporation;

All cash dividends declared but not yet paid, and 60 shares of $100 par value common capital stock declared as a stock dividend, by The American Platinum Works on June 6, 1942, on the said 1,523 shares of the capital stock of The American Platinum Works, and

Claims against Arushee Company aggregating $7,347.81.

These shares, dividends, and claims were found by the vesting orders to be the property of certain named nationals of a designated enemy country (Germany), including among the said nationals the business organization of W. C. Heraeus, G.m.b.H., of Hanau, Germany, but not including the claimant, Charles Engelhard.

The Notices of Claims allege that the claimant, Charles Engelhard, is the owner of an interest of 23.59 percent of 450 shares of the capital stock of Arushee Company, so vested, or in the proceeds thereof, and 23.59 percent in the 1,583 shares of capital stock of The American Platinum Works, so vested, or the proceeds thereof, and 23.59 percent of $10,280.25 unpaid cash dividends so vested, all on the basis of, among other things, his alleged ownership of an interest of 23.59 percent of W. C. Heraeus, G.m.b.H.

The Order for and Notice of Hearing was published on June 20, 1944 (9 Fed. Reg. 6837) and a copy was served upon the person designated in Section 2 of the Notices of Claims.

A hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, 120 Broadway, New York, New York, on June 29, 1944.

At the hearing Claim No. 107 was amended so as to include a claim against the property—claims against Arushee Company aggregating $7,347.81—vested by the supplemental Vesting Order No. 3186 of February 23, 1944.

Choate, Mitchell & Ely by Clarence B. Mitchell, and Karl Huber, appeared on behalf of the claimant, and John Ernest Roe, General Counsel by Robert A. Fulwiler, appeared on behalf of the Alien Property Custodian.

Proposed findings and supporting briefs were filed by the claimant on August 3, 1944, and by General Counsel on September 1, 1944. The claimant submitted a reply brief on September 22, 1944. A Tentative Determination disallowing the claims was issued on November 2, 1944, and the claimant filed proposals to modify the Tentative Determination on November 15, 1944.

The transcript of the testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

On the basis of the entire record the Committee hereby disallows the several claims for the reasons hereinafter set forth.

DETERMINATION

By Vesting Orders Nos. 56, 74, 288 and 3186, the Alien Property Custodian vested about 15,000 shares of stock of Arushee, a New Jersey corporation, about 1,500 shares of stock of The American Platinum Works, also a New Jersey corporation, and certain cash and share dividends payable on the shares so vested. All of the 1,500 shares of American Platinum stock so vested and 450 shares of the Arushee stock so vested were carried on the books of the issuing corporations in the name of W. C. Heraeus, G.m.b.H., of Hanau, Germany. In this proceeding, the claimant, Charles Engelhard, asserts ownership of a part of the shares which stood at the time of vesting in the name of W. C. Heraeus, G.m.b.H., principally on the basis that he was at the time of vesting a member or participant of Heraeus and as such personally owned a part of its assets. Disposition of his several claims thus requires consideration of the nature of the relationship between him and the three companies, W. C. Heraeus, G.m.b.H., Arushee, and The American Platinum Works.

The claimant is the President and Treasurer of the Arushee Company and also of The American Platinum Works. He was born in Hanau, Germany, and has been a resident of the United States since 1891 and a naturalized citizen of the United States since 1906. He now has a substantial interest—not vested and not involved in this proceeding—in The American Platinum Works. It is not contended, and the several Vesting Orders did not find, that he is a national of a designated enemy country.

W. C. Heraeus, G.m.b.H.—in whose name the 450 shares of Arushee and the 1523 shares of The American Platinum stood at the time of vesting—is a German business organization with headquarters in Hanau, Germany, that evolved from a drug store founded in Hanau by the Heraeus family more than two centuries ago. In 1909 the business became what is known to the German law as a "G.m.b.H." with four members, or participants, including the claimant. The literal translation of "Gesellschaft mit beschrankter Haftung"—of which "G.m.b.H." is the abbreviation—is "association with limited liability" and the principal issue in this proceeding is whether Heraeus G.m.b.H. is a legal entity under the German law. At the time of vesting Heraeus apparently had 21 participants consisting, with unimportant exceptions, of members of the Heraeus family and including the claimant who is a brother-in-law of Dr. W. C. Heraeus, one of the original participants. The claimant alleges that at the time of vesting he owned 23.59 percent of the Heraeus participations.

The Arushee Company is a New Jersey corporation which was organized in 1923 to serve, because of the collapse of the internal economy in Germany, as a holding company for certain Heraeus properties which were outside of that country. To this end Heraeus transferred to Arushee certain license agreements that it had with Hanovia Chemical and Manufacturing Company of England and with The American Platinum Works, and Arushee issued to Heraeus in exchange 20,000 shares of its stock. It appears that by agreement of the Heraeus participants at the time of organizing Arushee, sale or purchase of a participation in Heraeus carried with it a corresponding interest in Arushee. It also

appears that Heraeus retained 450 of the shares which at the time of vesting were in its name on the books of Arushee and distributed the remainder of the 20,000 shares to its several participants. The shares so distributed to its participants were recorded in the names of the distributees on the books of Arushee. The Custodian vested about 15,000 of these shares including the 450 shares which stood in the name of Heraeus. The claimant contends in this proceeding that because of his 23.59 percent interest in Heraeus, he has a 23.59 percent interest in these 450 shares of Arushee.

In 1927 The American Platinum Works which is also a New Jersey corporation issued 1523 of its shares to Heraeus for cash. At the time of vesting these shares were in the name of Heraeus on the books of The American Platinum Works. As in the case of the 450 Arushee shares, the claimant alleges a 23.59 percent interest in these 1523 shares of The American Platinum Works on the basis of his 23.59 percent interest in Heraeus.

The claimant testified that he had had a 23.59 percent participation in Heraeus but that he was uncertain as to whether he still owned the interest because of its possible seizure by the German government. Participations in Heraeus are not evidenced by certificates but, according to the claimant, merely by entries on the books of Heraeus, and the only evidence before the Committee as to ownership thereof is his testimony above summarized. Since, however, the Committee has felt constrained to disallow the several claims on other grounds as hereinafter set forth, it assumes for the purpose of this proceeding—but does not find—that the claimant had at the time of vesting a 23.59 percent interest in Heraeus.

Assuming, then, that the claimant at the time of vesting did have a 23.59 percent interest in Heraeus, does it follow, as he contended, that he is entitled as against the Custodian to the same proportion of the Arushee and American Platinum shares which at the time of vesting were recorded on the books of the issuing corporations as owned by Heraeus? In other words, does the claimant personally own a part of the property of Heraeus because he is a member of Heraeus?

Since the claimant is an American citizen and the Committee has reached a conclusion adverse to his contentions, it seems appropriate to outline the legal framework within which the Committee acts. Property vested by the Custodian becomes property of the United States. *Cummings* v. *Deutsche Bank & Disconte Gesellschaft,* 300 U. S. 115, 120–121 (1937); *Sorenson* v. *Sutherland, 27* F. Supp. 44 (S.D.N.Y. 1939), reversed on other grounds, 109 F. (2d) 714 (C.C.A., 2d, 1940), affirmed sub nom *Jackson* v. *Irving Trust Co.,* 311 U. S. 494 (1941). Title to property of the United States cannot be divested unless authorized by Congress. *United States* v. *16,572 Acres of Land,* 45 F. Supp. 23 (S. D. Tex., 1942). Proceedings to recover it are against the United States, and statutory permission to maintain such a suit is to be strictly construed. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591 (1924); *Pflueger* v. *United States,* 121 F. (2d) 732 (App. D. C. 1941), certiorari denied, 314 U. S. 617 (1942) and see *Wallace* v. *United States,* 142 F. (2d) 240, 243–244, (C.C.A., 2d, 1944). The claimant must prove that he had, at the time of vesting, an interest in the property within the established categories of proprietorship. *Lust* v. *Miller,* 4 F. (2d) 293 (App. D. C. 1925), *Ebert* v. *Miller,* 4 F. (2d) 296 (App. D. C. 1925). And the burden of establishing such a legal or equitable right to the

property rests upon the claimant. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

Within this framework, we proceed to consider the claimant's contentions. If W. C. Heraeus, G.m.b.H., is a legal entity in the sense that it may own property, and have rights and duties in respect thereto distinct and separate from the rights and duties of its members, it is clear that the claimant's contention that his participation in Heraeus gave him, as against the Custodian, an ownership of a proportionate part of the assets of Heraeus, must fail. Whether members of Heraeus have such an interest in its assets must admittedly be determined by German law. Dr. Richard E. Newkirk, an employee of the Office of Alien Property Custodian, and a former judge of the Court of Appeals of Kassel, Germany, whose qualifications as an expert on German law were not disputed, testified as to this phase of the German law. The Committee finds on the strength of his testimony that under the German law a "G.m.b.H." is a legal entity, a juristic person separate and distinct from its members, and that a G.m.b.H. —and not its participants—owns its assets. Among the several authorities quoted by Dr. Newkirk were Becker and Schmidt who in the 1936 edition of their handbook stated "the members of a G.m.b.H. do not own any property rights in the property of the company".

The evidence offered by the claimant to support his contention that members of a G.m.b.H. own its assets, consists of an exchange of letters concerning a tax assessment by German tax authorities. The letters (hereafter referred to as the "tax letters") are letters, or copies thereof, which were exchanged by several German lawyers, Heraeus, the claimant, and Baker & Company which is an American corporation controlled by the claimant. From the tax letters it appears that in 1938 the German Internal Revenue Bureau requested Heraeus to submit an income tax return on the dividends received by the claimant from Arushee in 1934 and 1935. The assessment was contested and finally in February 1940 the claimant was notified by Heraeus that the German Internal Revenue Bureau "has dropped its view and has exempted you from the income tax." As we read the tax letters they establish merely: (1) that in 1938 the Bureau asserted that all of the assets of Arushee were assets of Heraeus and that any income received by the claimant from Arushee was therefore income received from Heraeus, and (2) that in 1940 the Bureau held that Arushee and Heraeus were separate and distinct legal entities. The letters do not state that it was contended before the Bureau that Heraeus was not a legal entity; nor do the letters indicate a finding by the Bureau to that effect. If the tax letters had stated specifically that Heraeus was not a legal entity, they would nevertheless not be controlling evidence on the German law, not only because of Dr. Newkirk's testimony to the contrary but also because such evidence is not adequate proof of the law of a foreign country. Such a law does not come within the scope of judicial notice, *Smith* v. *Hays,* 10 F. (2d), 145, 146 (C.C.A. 8th, 1925), and must be proved by the testimony of a qualified expert. *Guaranty Trust Co.* v. *Hannay,* 210 Fed. 810, 812 (C.C.A. 2nd, 1913). The Committee's finding on this issue is based on the uncontradicted expert testi-

mony of Dr. Newkirk, who was thoroughly cross-examined. *Badische Anilin and Soda Fabrik* v. *Klipstein & Co.,* 125 Fed. 543 (Cir. Ct. N. Y. 1903).

Therefore, we conclude that to the extent the several claims are based upon the theory that a member of Heraeus has such an interest in the assets of Heraeus as entitles him to the assets as against the Custodian, the claims must be disallowed.

Disposition of the claim to the 1523 American Platinum shares requires further discussion because the claimant apparently rests his claim to an interest therein not only on the contention that Heraeus is not a legal entity but also on the ground, seemingly in the alternative, that if Heraeus is a legal entity the method of distribution of American Platinum dividends, as hereinafter described, and the action of the German tax authorities described above, proved that he nevertheless owns personally 23.59 percent of the vested American Platinum shares. Since these shares were originally issued by The American Platinum Works to Heraeus for cash paid by Heraeus, and since Heraeus is a legal entity, we understand this contention to be that the dividend procedure and the action of the German tax authorities prove that Heraeus, in legal effect, informally transferred the ownership of these shares to its participants. The evidence, however, does not, in the opinion of the Committee, sustain the claimant's burden of proof on this contention.

The American Platinum shares were issued to Heraeus in 1927 and since that date, although the shares remained on the books of American Platinum in the name of Heraeus, the dividends thereon were paid by American Platinum to Arushee—with the knowledge and consent of Heraeus but not by written agreement. These dividends were one of the sources of income that Arushee used as the basis of its dividends. Since a sale or purchase of a participation in Heraeus carried with it a corresponding interest in Arushee shares, it seems that the Heraeus participants received in the form of Arushee dividends what they would otherwise have received in the form of Heraeus dividends if American Platinum Works had paid the dividends to Heraeus, the shareholder of record. We face, therefore, the anomalous situation of members of Heraeus, a legal entity, receiving dividends on shares carried in the name of, and paid for in cash by, Heraeus, and receiving the dividends not from Heraeus, not from American Platinum Works which issued them, but from Arushee. This unique method of dividend distribution might have been merely a convenient method of getting Heraeus dividends to Heraeus participants, but if any inference of share ownership is drawn from it—whether it be that the shares were informally transferred to Arushee, or to the Heraeus participants—the inference is not of sufficient strength, in the opinion of the Committee, to rebut the inference of ownership by Heraeus which arises from the fact that the shares were originally issued to Heraeus for cash and remained in its name on the books of American Platinum Works until vesting. It will be noted that this question does not arise in the case of the 450 Arushee shares, for the Arushee dividends on these shares were paid to Heraeus. In 1923 when Heraeus transferred to its participants its Arushee shares—aside from the 450 shares retained in its name and involved in this proceeding—the books of Arushee reflected the transfer in customary fashion. The record does not indicate why Heraeus, if it intended a similar transfer to its participants of its holdings in American Platinum Works, did not accomplish the transfer in like manner. Nor,

in the opinion of the Committee, does the action of the German tax authorities sustain the contention of an informal transfer. The tax letters do not indicate that the action of the German Internal Revenue Bureau was based upon a finding that Heraeus had transferred its American Platinum shares to its participants; nor apparently was such a transfer urged before the Bureau. It is clear that the futile tax assessment did not pertain to the 450 Arushee shares owned by Heraeus, or to the dividends paid thereon by Arushee to Heraeus, and it also may be fairly inferred from the tax letters that the Bureau did not in fact have under consideration the *ownership status* of the 1,523 shares of American Platinum. We note in this respect that one of the tax letters—dated March 8, 1939 and addressed to the claimant by Baker and Company—contained the following caution:

"It seems to the writer that your position is absolutely correct, except possibly in regard to the A.P.W. [American Platinum Works] dividends paid on shares actually *owned* by W.C.H. [W. C. Heraeus]. In regard to these dividends it is conceivable that the German tax authorities will be able to uphold their point, since the shares were not assigned to Arushee. While this may be so there does not seem to be any reason to call their attention to this fact at this time."

The claimant insists that this letter "* * * deals only with ownership as between W. C. Heraeus, G.m.b.H. and Arushee Company and not with ownership as between W. C. Heraeus G.m.b.H. and the participants * * *". The letter, however, speaks for itself. It refers to the shares of American Platinum Works as "actually owned by Heraeus" and "not assigned to Arushee." The letter was addressed to the claimant and cautioned him against calling the attention of the German tax authorities "to this fact at this time."

The claimant further insists that a clause in an instrument entitled "Copy of Extract from the Examination of The Books for 1936" which was admitted into evidence along with a copy of a covering letter of transmittal, dated February 6, 1936, from a German attorney to the claimant, shows that the German tax authorities did have under consideration the "dividends on the American Platinum Works shares." This document is, in the opinion of the Committee, unsatisfactory and unconvincing evidence that the German tax authorities passed on the ownership status of the American Platinum Works shares, particularly in view of the conflicting implication of the March 1939 letter quoted above.

We are urged to consider this evidence of a futile tax assessment as adequate proof of an informal transfer by Heraeus of part of its assets to its participants. But what the tax action meant in terms of the ownership of the American Platinum shares is in fact wholly speculative. We do not know the precise issue, or the evidence presented, or the reasons assigned by the Bureau for its action. Nor do we have before us the German tax law under which the Bureau purported to act, and, of course, the collection or non-collection of a tax does not necessarily reflect the ownership status of the property concerned.

In summary, the record does not contain, in the opinion of the Committee, satisfactory or convincing evidence that the claimant as a participant in W. C. Heraeus, G.m.b.H. has an ownership interest in its assets, or that the 450 shares of Arushee and the 1,523 shares of American Platinum Works were owned at the time of vesting by any person other than W. C. Heraeus, G.m.b.H.

The notices of claims involved in this proceeding assert an ownership interest not only in the Arushee and the American Platinum shares but also in certain cash and share dividends of American Platinum Works, and in certain dividend payable accounts of Arushee. The claims to this property rest upon the same contentions and evidence as the claim to the Arushee and the American Platinum shares, and for the same reasons are disallowed.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Charles Engelhard, did not have at the time of vesting a title or interest in the claimed property sufficient in law to support a right of recovery.

Accordingly, Claim No. 107, as amended, and Claim No. 108, as amended, are hereby disallowed.

DECEMBER 14, 1944.

IN THE MATTER OF

KARL FELLER: SCHLOEMANN ENGINEERING CORP.

Docket No. 24. Claim No. 1931

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 1931 (dated March 25, 1944) filed by Karl Feller pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 2953 (dated January 15, 1944, 9 Fed. Reg. 915) vested all of the issued and outstanding capital stock, consisting of 5,000 no-par value shares, of Schloemann Engineering Corporation, a Delaware corporation. The Vesting Order recited, among other things, a finding that the shares were owned by Schloemann Aktiengesellschaft, a national of a designated enemy country (Germany).

The Notice of Claim alleges that the claimant, Karl Feller, was the legal and beneficial owner of the shares.

The Order for and Notice of Hearing was published on April 12, 1944 (9 Fed. Reg. 3924) and a copy was served upon the persons designated in Section 2 of the Notice of Claim.

A hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, National Press Building, Washington, D. C., on April 24, 25 and 26, 1944. Donovan, Leisure, Newton & Lombard by J. H. Doran and H. H. Bond appeared on behalf of the claimant, and John Ernest Roe, General Counsel, by Irwin L. Langbein and Thomas J. McBride, appeared on behalf of the Alien Property Custodian. Proposed findings and supporting briefs were filed by the claimant on June 5, 1944, and by General Counsel on July 1, 1944. The claimant submitted a reply brief on July 15, 1944. A Tentative Determination disallowing the claim was issued on August 4, 1944. Proposals to modify the Tentative Determination were submitted by the claimant on October 25, 1944.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The Committee after a consideration of the entire record hereby disallows the claim for the reasons hereinafter set forth.

DETERMINATION

The Schloemann Engineering Corporation was organized under Delaware law in December, 1938, and 5,000 shares were issued in the spring of 1939 in the name of the claimant, Karl Feller. These shares, being all of the issued and outstanding shares of the corporation, were vested by the Alien Property Custodian in January, 1944, pursuant to a finding that they were owned by Schloemann Aktiengesellschaft (hereinafter referred to as Schloemann A. G.), a German corporation with headquarters in Duesseldorf, Germany. The claimant, who has been a resident of the United States since 1927 and a naturalized citizen since 1932, contends that the record title of the shares reflected the true ownership. General Counsel, on the other hand, insists that the shares were owned by Schloemann A. G. for whom the claimant acted as a nominee or cloak.

If the claimed shares were owned at the date of vesting by Schloemann A. G., they were, of course, properly vested, because a corporation organized under the laws of Germany is a national of a designated enemy country under Executive Order 9095, as amended. If, on the contrary, the shares were owned by the claimant and he was not acting as an agent, nominee or cloak for Schloemann A. G., they were vested under a material mistake of fact and are properly subject to divesting in his favor. On this issue of ownership the claimant has the burden of proof. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee. And the Committee has concluded that the burden has not been sustained. The evidence in the record tending to show that the claimed shares were owned at the date of vesting by Schloemann A. G. is of such persuasive weight that a finding favorable to the claimant would not be warranted.

The claimant, born and educated in Germany, was an employee of Schloemann A. G. from 1923 until at least the summer of 1939. Schloemann A. G. was engaged in the business of devising certain rolling mill units and extrusion presses—which are devices for ejecting hot metal under high pressure, through dies, into a desired form—and supervising their construction and installation. The claimant was initially employed by Schloemann A. G. as an officer in charge, in Germany, of accounting and commercial matters; and then, following his experience in developing the extrusion press market in England, he was sent to the United States in 1926 to explore the prospect of developing a market here. He returned to Germany for a short period and then, reentering the United States in February 1927, he opened an unincorporated branch of Schloemann A. G. at Pittsburgh and became its general manager. He remained the general manager of the Pittsburgh branch from 1927 until Schloemann Engineering Corporation commenced business in August, 1939. The Pittsburgh branch operated under the name "Schloemann Engineering Company" and carried on in the United States the same general business as its principal in Germany. Until 1936 the extrusion presses installed in the United States by Schloemann A. G. were manufactured in Germany by subcontractors, and since 1936 these presses have been manufactured in the United States by subcontractors here. The rolling mill units apparently were at all times manufactured in the United States by subcontractors.

The vested shares were issued in the name of the claimant on or about May 24, 1939, and paid for with $50,000 which was transmitted to the claimant by Kleinworth & Sons, a London banking firm, in August, 1939. The claimant's asserted rights necessarily rest on the question of the source of this fund and the intention with which it was transmitted to him. It is not contended that it was a gift. The claimant insists that if it was transmitted by Schloemann A. G. it was either a loan to the claimant or compensation to him for his services in a transaction hereafter referred to as the "Mesta deal". General Counsel contends that the fund was forwarded by Schloemann A. G. as a contribution by it to the capital of the Schloemann Engineering Corporation and that consequently the shares issued therefor in the name of the claimant were to be held by him for and on behalf of Schloemann A. G.

The Committee has been heavily influenced in its conclusion—that the claimant has failed to establish his ownership of the claimed shares—by certain testimony of the claimant, hereinafter set forth, which the Committee interprets to be an admission by the claimant that as of April, 1939, it was planned by Schloemann A. G., and then acceptable to the claimant, to have an American corporation financed by Kleinworth & Sons of London for the sole benefit of Schloemann A. G. That this was the mutual intention of Schloemann A. G. and the claimant, as of April, 1939, seems to the Committee to be a very logical development of what had transpired in the preceding years. For that reason, we shall first describe various items of correspondence and other evidence tending to show that from 1931 to April, 1939, at least, both the claimant and Schloemann A. G. understood that if the Pittsburgh branch were incorporated, it would be owned by Schloemann A. G. but, for various reasons, the true ownership would not be revealed.

In 1931 the claimant recommended to Schloemann A. G. that it organize an American corporation and he continued so to recommend at all material times. He testified that he desired the organization of an American corporation for several reasons which changed in relative importance from time to time. His reasons were as follows: (1) simplification of the method [1] of evaluating imports for customs purposes, and correction of irregular practices in respect thereto, (2) to minimize the increasing reluctance of American business to deal with German interests, (3) to remove an impediment to the development of the business in the United States caused by the hesitancy of American sub-contractors to construct and install machinery in the United States on the sole financial responsibility of a foreign corporation, (4) to facilitate the development in the United States of a staff adequate to handle the United States business independently of the staff in Germany, and (5) to enable the claimant to acquire eventually the ownership of the American business.

To achieve some or all of these purposes the claimant in 1931 conferred with one Bernard G. Heyn, and Heyn thereupon outlined a letter [2] to the

[1] As apparently predicted by the claimant, the method of evaluation used by Schloemann A. G. resulted in 1939 in a deficiency assessment by the Collector of Customs of over $600,000. This was compromised eventually on the basis of the value of Schloemann A. G. assets in the United States by the payment of some $23,000 in 1941. As stated above, the machinery imported into the United States by Schloemann A. G. was not manufactured by it but by sub-contractors. Schloemann A. G.'s practice apparently was to evaluate the imports at the price at which they were invoiced to the Pittsburgh branch, these being the cost prices rather than either the German market price or the American sales price. The claimant correctly anticipated that customs officials would eventually disagree with this method of evaluation.

[2] The letter was dated October 5, 1931 and reads as follows:

"In accordance with the various interviews which we have had concerning the organization of an American company under the laws of the State of Delaware to be known as the Schloemann

claimant a detailed proposal for the organization of an American corporation by Schloemann A. G. Heyn was not a witness at the hearing. Claimant testified that Heyn was paid for his legal advice by Schloemann A. G. and that he was "The only man I would discuss legal matters with." The letter proposed in effect that the ownership by Schloemann A. G. of the American corporation be concealed by the device of placing Schloemann A. G. in the apparent status of a creditor and by having the capital of the American corporation "appear to be contributed by the American organizers". By a letter dated October 7, 1931 the claimant thanked

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Engineering Corporation or some other name which may be decided upon, I am giving you a rough outline of the essentials as I see them, based upon the information that you have heretofore given to me.

"I propose to organize a corporation with a perpetual existence having a capitalization of one thousand shares of common stock without par value with a charter conferring the broadest possible powers, with five directors, three of whom shall be located in the United States. The three directors in the United States shall constitute a Committee, which, broadly speaking, shall have the power to decide upon matters having reference to the local management. The other two directors shall constitute a Committee with powers to decide matters relating to European management.

"Generally speaking, the American company from its inception should be so organized that on the face of things it will appear as an independent American company and not as a mere subsidiary of the German corporation. If possible, the working capital going into the corporation shall appear to be contributed by the American organizers. The money which you tell me is in your name and in your possession can be contributed for that purpose. Covering the amount so contributed by you you can give your demand note to the company or somebody in Germany designated by the company, upon the understanding, that if payment of the note is demanded and you fail to pay the same you shall be entitled and the German company can demand the delivery of all the stock of the American corporation held in your name; this stock to carry out the transaction in question shall be placed by you in escrow in a bank or Trust company in the United States subject to an escrow agreement which shall cover the above conditions. In the event of your death or of your severance of your relations to the company, the stock held by you shall automatically revert to the German company or its designees.

"As a further safeguard it shall be understood that all the American directors shall file their resignations to be accepted by the German company whenever it sees fit to do so. The American company shall be given the exclusive right to purchase machinery or merchandise from the German company and in turn the American company shall agree that it shall not purchase machinery or merchandise from any other company except upon the written consent of the Germany company. The German company shall be entitled to charge to the American company a fair amount annually covering a just share of the expenditures of the German company for development and experimentation, to be paid by the American corporation. This will constitute a method whereby the profits of the American company can be reduced and those of the German company increased whenever this may be deemed advisable.

"The Delaware law gives a wide discretion to the Board of Directors to withhold the declaration of dividends payable out of profits, in other words, the declaration of dividends is not compulsory under any circumstances. Furthermore, a certain share of the profits can be set aside by creating reserves, for instance, a reserve fund could be created for the purpose of purchasing a plant for the manufacture in America and other items in connection therewith. The German company could further safeguard its control by a clause in the contract, whereby it reserves the right to terminate the contract at the end of any year.

"The advantages of creating an apparently independent corporation are manifest. The American company can purchase its machinery from the German company at prices which may be agreed upon from time to time. It can thereby bring about a saving in the duty to be paid on such merchandise. The German company, if it considers it desirable can minimize the profits which it is making out of the American business, and can thus bring about a saving in German taxation. In case the German company desires to obtain money from the American corporation, this can be accomplished by the clause which allows the German company to charge the American corporation with its share of expenses incurred by the German company in development and experimentation. If this should not be possible, other methods can be found to have the American corporation advance the German company sums of money for loans and other purposes.

"The contract between the American and the German company should be very flexible, so that the profits can be thrown into either company as the occasion may require. The Delaware law does not require the directors to be stock holders and the company by proper provision in its certificate of incorporation may be allowed to purchase its own stock.

"Once the American corporation is functioning there should be little difficulty in providing for contingencies as they may arise. It is important, as I have mentioned, that the outline of the purposes underlying the organization of the company and the contracts to be made between the companies shall not form a part of the archives of the company.

"I need hardly add that the present methods which you have been compelled to adopt should be discontinued as soon as possible by the organization of the American corporation. If, for any reason, any of the proposals should be unsatisfactory to the German company, I have no doubt that the plans can be changed to meet their requirements. Even after the contracts between the companies have been signed they can be from time to time modified by mutual agreement.

"I have not gone into the details as to the bylaws, the voting of the stock, etc. I might say, however, that if desirable a voting trust can be created whereby the voting rights of the stock are conferred upon a designated number of voting trustees, appointed for a specified number of years. As soon as I hear from you I shall take immediate steps to organize the corporation, get up the bylaws, etc. Of course, in writing to Germany you will put these suggestions in your own language and you can enlarge upon them if you deem fit to do so."

Heyn for his letter of October 5th, "particularly for having gone into the matter so thoroughly" and further stated:

"I have forwarded our recommendations to Duesseldorf this week and have requested that they comment immediately on any point which may not appear entirely clear to them. I am fully aware of the fact that it would be folly, of (sic) not dangerous, to carry on as we are at present, and I have no doubt but that this will also be understood at Home."

When interrogated as to the meaning of the letter the claimant admitted that it called for the concealment of Schloemann A. G.'s ownership of the proposed American corporation. This 1931 proposal was not effectuated because, according to the claimant's testimony, a change occurred in the ownership of Schloemann A. G. and because of the fear of the German management that the organization of an American subsidiary would result eventually in a loss of its American business.

While this incident occurred about eight years before the shares of Schloemann Engineering Corporation were issued in the name of the claimant it is, in the opinion of the Committee, significant because it evidences willingness to obscure the identity of the real owner, familiarity if not expertness in the mechanics of so doing, and because it was the first step in a course of conduct that continued uniformly and consistently until at least April, 1939.

Following Schloemann A. G.'s refusal to assent to the 1931 proposal, the claimant continued to urge the "American formation." He testified that in 1933 and 1934 he continued his efforts to cause Schloemann A. G. to form an American corporation and, on re-direct examination, he further testified that when discussing the matter with Schloemann A. G. during 1935 and 1936 there was no question but that the American corporation was to be owned and controlled by Schloemann A. G. although its shares were to appear in the claimant's name.

Then on July 2, 1937, the claimant wrote to one Doctor Luethje, a Director of Schloemann A. G. The letter reads in part as follows:

"I have as yet got no further in the matter of establishing a firm in America. The hitch here lies in the contradiction that the enterprise must appear one hundred percent American without Duesseldorf running in danger of losing hold some day. To get around this obstacle is by no means so easy; at any rate, not when the entire matter is to be made foolproof, and neither you in Duesseldorf nor we have any interest in making it otherwise. I am today inclined to the opinion—I must emphasize, however, that as yet I have not arrived at a conclusion in my deliberation—that the most correct way would be the one in which Schloemann A. G. empower me with the representation of your interests in America, and that with this agreement behind me I establish an American company or join an American company bearing the name of 'Schloemann Engineering, Incorporated.' I hope to have a little quiet in the next few days for reasoning, and I shall then write you in detail on this point."

This letter clearly shows that, regardless of why the claimant desired the organization of an American corporation, he was, as of July 1937, of the opinion that it "* * * must appear one hundred percent American without Duesseldorf [Schloemann A. G.] running in danger of losing hold some day."

On August 2, 1937, one month after the claimant wrote the letter quoted

immediately above, he wrote [3] to the directors of Schloemann A. G. making detailed recommendations for the organization of an American corporation. The claimant in his reply brief characterized this letter as follows: "Finally after a lapse of some years, the negotiations commenced out of which the deal between claimant and Schloemann A. G. did in fact come. So far as the documentary evidence is concerned, the first step in these negotiations was claimant's proposal of August 2, 1937 * * *". The

[3] The letter reads as follows:

"Re: Formation in the U. S. A.

"The notes of May 11th of this year, which served at Mr. P. Reusch's as basis for the discussion of the formation matter, as well as the file memorandum on the discussion itself, contain the points of view by which we let ourselves be guided in writing out the following suggestions.

"If we herewith set about contributing our part towards finding a form of execution of the not easy task of obtaining a legally correct connection between Duesseldorf and Pittsburgh under agreements that in the eyes of the law may be defended at any time, it is very clear to us that neither for you nor for us is there sense in pursuing the thoughts set down here, if a perhaps unusual amount of confidence cannot be brought forth on both sides. We have ourselves not only spent much time in thinking about your security, but, beyond this, have called in a legal adviser in order to have all our thoughts and intentions thoroughly weighed by him, to be sure that these proposals of ours could be maintained under American law also.

"Now when you read these proposals, we urgently request you bear in mind earnest, honest endeavor in seeking to obtain like yourself, straightforward collaboration between Dusseldorf and Pittsburgh.

"Now to our suggestions.

"(1) K. Feller undertakes the formation of a Pennsylvania Company, named the Schloemann Engineering Corporation, with 10,000 shares (no par value), of which 5,000 shares will be handed over as consideration for the capital of $50,000.00 that is either fully paid in by him or in part still to be paid in. The duration of the establishment is unlimited. The company must have three directors; Mr. F. proposes for himself; director (president, treasurer or secretary) and for Mr. Drexler; director (vice-president, treasurer or secretary); as a third, an American with a high-sounding name, about whom an agreement is yet to be reached.

"(2) The American company undertakes the liquidation of the branch of the Schloemann A. G. The American company shall wind up all unsettled contracts and agreements and after deduction of all expenditures, including a proportional amount for business expenses, taxes, etc., pay to the Schloemann A. G. fifty percent (50%) of the total remaining net profit.

"(3) The American company will have to obligate itself to keep books in an orderly manner about this winding up and from time to time to give an account to the Schloemann A. G.

"(4) The Schloemann A. G. pledges itself to transfer its American patents to the American company and to grant to it the use of improvements that may still possibly appear. For these patents the American company pays an amount to be decided upon, which shall be protected by notes or other arrangements clearly recognizing this debt.

"(5) As security for the fulfillment of all incurred and future obligations, Feller may pay in, in escrow, either entirely or in part, his 5,000 shares on the basis of an agreement (voting trust agreement). This voting trust agreement shall not initially exceed a duration of ten years; it shall consist of two, possibly three, administrators entitled to vote, of which one of them would have to be Mr. Feller, and the other, or two others, may be determined by the Schloemann A. G. The agreements about the voting trust and 'escrow' may be limited in such a way, perhaps, that in the event of non-fulfillment within 60 days of a demanded repayment of indebtedness, the Schloemann A. G. will be in a position to cancel both agreements. It shall also be provided for that in the event of the death, an accident, or the withdrawal of Mr. Feller from the American company, the Schloemann Aktiengesellschaft (Stock Corporation) may cancel the voting trust.

"The stock certificates, as well as the voting trust certificates must be marked, suitably, to the effect that they are subject to special agreements. In the event of the termination of the aforementioned agreements from the causes stated, the Schloemann A. G. shall also be in a position to take over the shares at their book value as payment or part payment of its claim against the American company. But by way of precaution it must here be further provided for that neither against Mr. Feller (nor) against the executor of his will or heirs, can claims be advanced that exceed the value of the shares deposited by him as security.

"(6) The American company will set up from time to time regular reserve funds for the payment of its existing debts concerning the Schloemann, A. G. and other liabilities incurred. Both companies to deliver the experiences, inventions and developments resulting from their joint sphere of work, and to pay an appropriate share of the incurred expenditures.

"(7) The Schloemann A. G. will pledge itself not to do business with the U. S. A. and Canada either directly or indirectly, or to assist any person or company in any way whatever in the field of hydraulics and rolling mills in the U. S. A. and Canada, without the previous consent in writing of the American company. Logically, this would have to apply also to the exploitation of patents and inventions.

"(8) It should be provided for that with the written consent of both sides all agreements may from time to time be changed.

"We now request that in the event that the meaning of one or another of the points should not be entirely clear, you make inquiries of us without letting too much time elapse before doing so. Of course, you may speak with Mr. Drexler also about this, who is familiar with the ideas [and] also attended a discussion with the aforementioned legal adviser.

"It will be well to call attention to the desirability of having the work of the formation concluded prior to the shipment of the press 'Erie'.

"The undersigned will write separately on the handling of the formation capital as soon as a number of other urgent and more productive matters have been concluded."

claimant when interrogated on the meaning of this "documentary evidence" of the "first step" in the negotiations out of which "the deal between claimant and Schloemann A. G. did in fact come" testified as follows:

"Q. The incorporation you referred to in your letter of August 2, 1937, was that to be a corporation of yours?

"A. I beg your pardon?

"Q. That you are referring to in the letter of August 2?

"A. Yes.

"Q. Was that to be your corporation or the German corporation, that is, Schloemann, A. G., when I say German?

"A. That was to be a corporation over which the Schloemann A. G. had control.

"Q. And by having a control, what do you mean?

"A. By control I mean ownership.

"Q. So that the proposal and your letter of August 2, 1937, as you have just said, was a proposal for a corporation in the United States, over which Schloemann, A. G., had control and ownership?

"A. That is right.

"Q. That is correct?

"A. That is right.

"Q. Now, let us see your suggestion number 1, Mr. Feller.

"A. Yes.

"Q. (Reading.) '1. Karl Feller undertakes the organization of a Pennsylvania corporation called Schloemann Engineering Corporation, with 10,000 shares, no par value, 5,000 of which will be surrendered as compensation of a capital of $50,000, which will be paid either in full or in part by him. The term of the organization is unlimited. The corporation is to have 3 Directors. Mr. Feller suggests for himself: Director (President, Treasurer and Secretary) and for Mr. Drexler: Director (Vice President and Secretary or Treasurer); and as a third person: An American with a well-sounding name whose selection will have to be agreed upon. Mr. Feller, if it was to be a corporation owned and controlled by Schloemann A. G., in Germany, why was the stock to be issued in your name?

"A. To meet with the situation in regard to Custom House and such like.

"Q. For what purpose?

"A. For what purpose? I do not quite get it—for what purpose. I did mention the situation that existed, that I mentioned previously.

"Q. To have the stock in your name, Mr. Feller, showing you to be the owner and controller, and in control of the corporation, would on the record conceal the true ownership, would it not?

"A. On the records, yes.

"Q. And wasn't that, Mr. Feller, the purpose of putting the stock in your name? Mr. Feller, isn't it very apparent?

"A. That is a suggestion that I have written, yes.

"Q. And that is the suggestion, Mr. Feller, that you were perfectly willing to go through with at that time?

"A. That is right."

The claimant argues that this testimony indicates only what the claimant as a "practical" business man "understood by ownership and control, namely, all of the voting rights of the stock and the right to take it if the

liability due Schloemann A. G. were not paid when called." The Committee was impressed, however, by the claimant's intelligence and also by his frank answer to the question "Mr. Feller, if it was to be a corporation owned and controlled by Schloemann A. G., Germany, why was the stock to be issued in your name?" He answered "to meet the situation in regard to Custom House and such like." It seems clear to the Committee that the August 2, 1937 proposal was merely a continuation of the efforts initiated in 1931 to further the interests of Schloemann A. G. by organizing an American subsidiary and concealing its ownership thereof by investing the claimant with the appearance of ownership.

As the discussions continued Schloemann A. G. apparently proposed that the capital of the American corporation be advanced by an English firm, as in fact it was in August 1939, because on June 10, 1938, the claimant wrote to Schloemann A. G. and said, among other things:

"The interposition of the English firm—for one, as money source to me, but thereafter as protector of your security—appears to me to be entirely practicable, so far as I can foresee this at the moment, provided that there is not considered a firm or a person that obviously appears merely for G.H.H., M.A.N., or Schloemann."

A desire to conceal effectively the fact that Schloemann A. G. was to be the source of the capital funds for the projected corporation is explicit in this language. If the parties were contemplating at this stage—as contended by the claimant—a bona fide loan to the claimant to be secured by a bona fide voting trust why would it not be "practical" to borrow from an English firm even though it did obviously represent Schloemann A. G.? A few days later, on June 29, 1938, the claimant wrote to Dr. Hentschel, the General Manager of Schloemann A. G., suggesting, among other things, a plan of trying "a way without a voting trust" which "* * * comes close to the voting trust; but in case of necessity, it would surely not be easy to find precedents to such a setting up of a firm." This letter [4]

[4] The authorship of this letter is disputed and the photostatic copy received in evidence is admittedly incomplete. The letter, however, begins:

"Since I wrote to you on June 10 * * *" and the claimant was admittedly the author of the June 10th letter. Both letters are addressed to Dr. Hentschel, and the contents of both are so intimately related that the same authorship is persuasively indicated. Moreover, the claimant's letter of June 10, 1938, bears serial number 3912 and this letter of June 29, 1938, bears serial number 3918. The letter reads as follows:

"Since I wrote to you on June 10th—before receipt, therefore, of Mr. Luethjes two letters of May 30th—on the matter referred to above, I have attempted to analyze your proposal: taking up money in England, but for want of particulars have not been able to arrive at a conclusion.

"As I pointed out in the course of our telephone conversation, and also previously, it would be entirely unsuitable to effect a loan with a place closely connected with the concern. The motive of this place, whoever it may be, for the willingness of assisting an American firm would have to be logical and over there and here bear being sworn to. This place interposed between Pittsburgh and Duesseldorf would possibly have a very important role. The 'possibly' in this connection is not at all far-fetched—it can come about very easily without any political occurrences whatever by tax and customs inquiries.

"If one now attempts, in place of the voting trust, which in reality—as you will see—must bear the stamp of genuineness for effecting a formation in America, and indeed in such a way that the establishment proceedings may with success be 'explained' trustworthy and perhaps be sworn to before the authorities here, is not so complicated as it appears to be upon brief consideration. Voting trusts are an entirely usual arrangement in the U. S. A.; they are above all recognized by the courts as a method of limiting the rights of a stockholder.

"As I see no possibility for the time being of attaining a simplification that is desirable in itself, by interposing a third party, but in spite of this would like to try a way without a voting trust, I leave it to you to examine the sketch of the following proposal and possibly to discuss it with the lawyers over there as to practicability over there:

"1. To transfer Df's [Duesseldorf, i.e., Schloemann A. G.] property in the U. S. A. to the new company at a value to be established (!).

"2. The new company pledges itself to repay the amount to be established.

"3. K. F. [Karl Feller] forms the new company, takes care of the financing and guarantees the redemption of the company's promissory notes or other debts acknowledging liabilities.

"4. As security, K. F. deposits his stock in safe custody under Df's control.

"5. Beyond this, the stipulations of the now proposed agreement between Df and K. F. can be

clearly indicates that in the summer of 1938 claimant and Schloemann A. G. continued to have under consideration the project of organizing an American subsidiary without disclosing its true relationship to Schloemann A. G.

In the fall of 1938 the claimant went to Germany and discussed the organization plans with officials of Schloemann A. G. On returning to the United States either late in October or early in December of 1938, he brought with him several instruments that had been typed in Germany as a result of the discussions, the previous correspondence, and drafts that had been prepared by Heyn and sent earlier to Germany. These instruments were characterized by the claimant as Schloemann A. G.'s proposal of 1938. They consist of the following instruments: (1) articles of incorporation for the "Schloemann Engineering Corporation", (2) a voting trust agreement to cover all of the shares to be issued by the corporation. The voting trustees were to be the claimant and an undesignated bank. The agreement was to terminate in 1948, contains no security references, and recites that its purpose was to unite voting power, (3) by-laws for the proposed corporation, (4) an agreement between Schloemann A. G. and the proposed corporation whereby the proposed corporation would be the exclusive agent in the United States for Schloemann A. G., would liquidate the Pittsburgh branch, paying Schloemann A. G. therefor 50% of the net proceeds of the liquidation in addition to the net value of the property taken over and would issue to the claimant its entire capital stock of 5,000 shares in return for $50,000 "which Mr. Karl Feller pays for his own account". All of the shares were to be subject to a ten year voting trust with two trustees, "one of whom shall be Mr. Feller and the other to be designated by the German corporation (that is, Schloemann A. G.)." Schloemann A. G. was to transfer to the proposed corporation, in addition to the assets of the Pittsburgh branch, certain of its American patents. The agreement further provided that there should be no liability on the part of the claimant "other than that arising from the ownership of the stock deposited as collateral security" and that the agreement was to remain in force until terminated by Schloemann A. G. or by the proposed corporation by giving one year's notice, and (5) a draft of a contract between the claimant and an undesignated bank providing for a loan of $50,000 to the claimant and a thirty year option to the bank to purchase the shares at the issuing price of $10 a share. The shares or the voting trust certificates were to be deposited, endorsed in blank, with the bank or "its American correspondent". The loan could be matured by either party upon three months' notice and there was no provision for payment of the principal sum in installments. If the bank called the loan "* * * Mr. Feller shall be authorized to transfer to the bank in settlement of his debt the shares or voting trust certificates * * *". The bank was to designate one of the trustees of the voting trust.

The net effect of the "proposal" contained in these instruments—

used. Salaries can be determined by you and the duration of the agreement be limited to K. F.'s activity in the new company.

"6. In consideration of the services rendered by Df, the new company pays 50 percent of its profits to Df.

"In its effect, this proposal comes close to the voting trust; but in case of necessity, it would surely not be easy to find precedents to such a setting up of a firm.

"On the occasion of our telephone conversations, I drew attention to our earlier conversation about the advisability of an office in New York. The appearance of a Loewy office in New York is, with regard to the easiness with the 80 percent of the * * *" (conclusion missing).

coupling a call "loan" with an option and a voting trust, and providing against any personal liability on the part of the "borrower"—was to place complete effective control in the undesignated bank or in its principal in the transaction. There is also no question in the Committee's mind but that the undesignated bank was to act for and on behalf of Schloemann A. G. The claimant while in Europe in the fall of 1938 went to the London office of Kleinworth & Sons in the company of Mr. Luethje, an official of Schloemann A. G. The purpose of this visit was, in the opinion of the Committee, to implement the proposals contained in the instruments described above by causing Kleinworth & Sons, on the credit or guarantee of Schloemann A. G., to advance to the claimant the $50,000 of capital needed for the American corporation.

In December, 1938, following his return from Europe the claimant organized under Delaware law the "Schloemann Engineering Corporation" whose shares are the subject of this proceeding. He re-visited Germany early in 1939 and testified that at sometime prior to this date he advised Schloemann A. G. that the "proposal" of October, 1938, was not acceptable to him because, as stated in claimant's reply brief "although the other terms followed the lines of his original proposal, the suggested long term option to Schloemann A. G.s' nominee was wholly inconsistent with it and would have defeated its main purpose, from the claimant's point of view." The "main purpose, from the claimant's point of view", according to his testimony, was to acquire personal ownership of the business in the United States. The Committee cannot reconcile this testimony with the fact that on April 27, 1939 the claimant wrote a letter to Schloemann A. G. discussing changes that had been made in the drafts submitted to him in October 1938 and indicating that the changes were "insignificant" except that:

"It is different with paragraph 7; here is involved an extension of my personal liability, which is not only new, as Heyn says, but so far as I am able to ascertain, stands contrary to the heretofore intended limitation of my personal liability of the stockholdings themselves. Dr. Wirtz and Heyn may consider that in accepting the wording by Wirtz, I personally and/or my heirs would be liable for the obligations incurred under paragraph 1–4, for instance, also for the obligation under paragraph 2; the payment of $50,000. This can hardly have been intended!"

This letter indicates that in April 1939, the October 1938 proposals—with "insignificant" changes and with the exception of the question of the claimant's personal liability—were acceptable to the claimant. When questioned on re-direct examination as to the meaning of this letter, the claimant testified that as of its date Schloemann A. G. was putting up the necessary capital and he was not going to make himself personally liable while Schloemann A. G. "had such ideas as an option". The option was, however, an integral part of the October 1938 proposals and the April 27, 1939 letter does not advise Schloemann A. G. that the option was not acceptable to the claimant.

Although the claimant strongly insists that by April 1939 he was bargaining to acquire capital for a corporation to be owned and controlled by himself, we find that he testified under cross-examination that as of April 1939 the American corporation was to be capitalized, owned, and controlled by Schloemann A. G. In the opinion of the Committee no other interpretation of the following testimony is possible, particularly

when the testimony is read in the light of what had transpired, as related above, in the preceding eight years.

"Q. So that it was to be Schloemann, A. G.'s money and Schloemann, A. G.'s stock?

"A. At that point, it would have been their stock either by way of voting trust or something else at that point.

"Q. Yes. In other words, the ownership and the management and control of the American corporation that was to be formed as a result of your trip to Germany in 1938, that was to be financed through Kleinworth & Sons and was for the sole benefit of Schloemann, A. G.?

"A. That was the state of affairs in October 1939.

"Q. Of 1938?

"A. 1938.

"Q. And that state of affairs was perfectly agreeable and perfectly acceptable to you at that time?

"A. No.

"Q. I may have misunderstood you, Mr. Feller, but I thought a few minutes ago you said that if the money had been advanced, the $50,000, under those conditions by Kleinworth & Sons, it would have been accepted by you.

"A. Yes, but you asked whether it was agreeable to me; it was not agreeable.

"Q. Well, the only phase of it, Mr. Feller, if any, that was not agreeable to you at that time, Mr. Feller, was the voting trust agreement and the manner in which it was being handled?

"A. More than the voting trust agreement was any option stuff that was mentioned. I didn't object much to the voting trust.

"Q. Well, the phase of it, Mr. Feller, wherein the stock would be held by you for the benefit of Schloemann, A. G., the ownership and control of the company to be in Schloemann, A. G. was acceptable to you?

"A. At that time.

"Q. Yes, sir!

"A. But not agreeable.

* * * * * * *

"Q. And in April, on April 27, 1939, you had no intention of assuming any obligation personally of $50,000?

"A. That is right; at that time.

"Q. At that time, you mean April 27, 1939?

"A. Yes, April 27, 1939.

"Q. In other words, as late as April 27, 1939, this American corporation was to be capitalized by Schloemann, A. G. of Germany?

"A. Yes.

"Q. They were to own it, they were to control it?

"A. The viewpoints expressed in this letter lead to the refusal of going on with the proposition thereafter.

"Mr. McBride: Would you read my question, Miss.

"(Question read from the record by the reporter.)

"A. At that point.

"Q. Will you answer that yes or no, please, Mr. Feller?

"A. Yes, at that point.

"Q. As of April 27, 1939?

"A. As of April 27, 1939.

"Q. And the only thing that you were to do as far as that corporation and being part of it, was to have the stock issued in your name for their benefit as of April 27, 1939?

"A. More than that.

"Q. Well, I mean, in addition to acting as an officer and a director?

"A. And there was to be a voting trust agreement.

"Q. Yes, but placing that stock in a voting trust agreement or in some other manner whatever, it might be for the protection of Schloemann, A. G.

"A. Yes. At this point, there was still to be a voting trust agreement."

The Committee, therefore, finds that as of April 1939, plans had been formulated for the ownership by Schloemann A. G. of an American subsidiary, Schloemann Engineering Corporation had been incorporated, arrangements had been made to finance the subsidiary through Kleinworth & Sons, and the shares of the subsidiary were to be issued in the name of the claimant but through a voting trust and an option were to be controlled by Schloemann A. G. through its nominee, Kleinworth & Sons.

On March 30, 1939, Schloemann A. G. executed a power of attorney authorizing the claimant to use the name "Schloemann Engineering Corporation" in connection with any corporation which Mr. Feller might organize, and on May 3, 1939 a power of attorney to liquidate the Pittsburgh branch. On or about May 24, 1939, three steps were taken. The 5,000 shares—claimed in this proceeding—were issued by Schloemann Engineering Corporation in the name of the claimant. While the claimant contends that the shares were issued at a much earlier date, the claimant's own testimony on the point, and all of the incidental circumstances, leave no trace of doubt as to the fact that the shares were not issued until on or about May 24, 1939. The claimant then executed an agreement placing the shares in escrow with Heyn. And the claimant, having received from Kleinworth & Sons a letter of introduction to Goldman & Sachs, deposited the certificates for the shares endorsed in blank at Goldman & Sachs pursuant—according to his testimony—to the discussions in Duesseldorf and London. The claimant further testified that if it had been Heyn and not the claimant who had physically delivered the shares to Goldman & Sachs "the reason can only have been in anticipation of a transfer that was to come." It is apparent, therefore, that on May 24, 1939, the claimant was acting on the assumption that the $50,000 was to be advanced to him by Schloemann A. G. through Kleinworth & Sons and Goldman & Sachs against the deposit of the shares issued in his name.

Then "sometime in August" the claimant received a contract, dated August 9, 1939, and executed by Schloemann A. G. and by Schloemann Engineering Corporation by "Karl Feller, President" which had been forwarded by the claimant to Schloemann A. G. earlier in the year. This contract contains, word for word, those clauses of the instrument delivered to the claimant in October, 1938, which made the American corporation the exclusive agent of Schloemann A. G., provided for the transfer of certain patents, for the liquidation of the Pittsburgh branch, and for the termination of the contract by one year's notice. The August 9, 1939, contract does not contain, and makes no reference to, the provisions of the 1938 proposal which related to the claimant's obligation to form a corporation, to the methods of capitalizing the proposed corporation, to the voting trust, and to the option. The claimant contends that this contract "superseded all the negotiations, proposals and counter-proposals which had been exchanged" and that any proposals not incorporated into the

contract "had been abandoned". This cannot be so because the August 9, 1939 contract contains no reference whatsoever to the $50,000 which was advanced, as hereinafter described, a few days later and which was paid to Schloemann Engineering Corporation for the subject shares. Furthermore, the claimant testified that he had, early in August, advised Schloemann A. G. *by telephone* that unless it transmitted the "contracts" and the money "* * * I am going to be through with you and the whole thing" and had been advised by Schloemann A. G. *likewise by telephone* that the German government had approved the formation of the corporation and that the "contracts" and the money had been sent. In the light of this evidence, it is futile to argue that the August 9, 1939 contract encompassed the entire understanding of the parties as to the American corporation.

Then on August 11, 1939, Goldman & Sachs notified the claimant that by order of Kleinworth & Sons $50,000 had been paid to the Chase National Bank of New York for payment to the claimant through the First National Bank of Pittsburgh. The claimant then caused this $50,000 to be paid to the Schloemann Engineering Corporation for the shares which had been issued in his name on or about May 24, 1939 and thereupon the Schloemann Engineering Corporation commenced business. On September 11, 1939 the claimant went to Goldman & Sachs and received the certificates which had been deposited there to his account on May 24, 1939. When he was asked: "Why did you go there to get the stock back? How did you know you could get it back * * *?" He answered: "Well, what do I know now what I thought when I went there? I really don't know. The thing to do was to go there and see what is going to happen: Will they turn it back, are there strings attached to it or are they not attached to it?"

We now face the apparent anomaly of this proceeding; that is, why were the certificates and the $50,000 released to the claimant without the execution of the voting trust and the option agreement as previously carefully planned? Or, in other words, what was the understanding of the parties when the claimant was advised by telephone early in August that the German government had approved the formation of the corporation and that the "contracts" and "the money" had been sent?

To explain this apparent anomaly the claimant argues that when it became known in January, 1939, that the deficiency assessments by the Collector of Customs would consume the entire value of the assets of the Pittsburgh branch, the voting trust and the option became unnecessary because there no longer existed any value to be secured. Assuming, arguendo, this to be true, we still face the question of the intention of Schloemann A. G. in transmitting the $50,000 to the claimant for the $50,000 was a value apart and distinct from the assets of the Pittsburgh branch. If the $50,000 had been transmitted—as contended in the alternative by the claimant—as a bona fide loan and not for the purpose of maintaining Schloemann A. G.'s interest here, the shares in question would be owned by him and the only enemy interest would be Schloemann A. G.'s claim as a creditor. The evidence does not, however, warrant a finding that the $50,000 was advanced as a loan. When the claimant was asked on re-direct "What did you think this $50,000 was for, in your opinion?", he answered: "What I think today, and what I thought then, and if the $50,000 are Schloemann money, that they are compensa-

tion for services rendered." Assuming, however, that the claimant had unqualifiedly testified that the $50,000 was advanced to him as a loan, such testimony could not prevail over the fact that none of the ordinary trappings of a loan were present. For there is no evidence of execution of a promissory note or other engagement to repay, no evidence of a maturity date, no evidence of an interest rate, and there is evidence that the claimant did not at any time intend to incur any personal liability. Finding, as we do, that the $50,000 was not advanced as a loan, it is unnecessary to consider the question of whether a "loan" made under such circumstances was in furtherance of enemy interests to an extent that would warrant vesting.

The claimant contends, in the alternative, that if the advance of $50,000 was not a loan, it was compensation for his services in the "Mesta deal". In 1938 and in the early part of 1939 the claimant assisted Schloemann A. G. in becoming a participant with the Mesta Machine Company, an American corporation, and with the Sack Company, a German firm, in a transaction relating to the Hermann Goering Steel Works in Germany. But assuming that the claimant's services in this respect were of high value to Schloemann A. G. and assuming that Schloemann A. G. intended to compensate him for such services, there is, in the opinion of the Committee, no substantial or persuasive evidence in the record establishing that the $50,000 transmitted to him on August 11, 1939, was intended by Schloemann A. G. to be compensation for such services. The only relevant evidence in the record is the testimony of the claimant and this testimony, interpreted in the light most favorable to him, indicates to the Committee merely an expectancy on his part that Schloemann A. G. would at some time make some payment to him for such services. There is no evidence that Schloemann A. G. at any time advised the claimant that the $50,000 was a commission for his services in the "Mesta deal" and, although he was in communication by mail and by telephone with Schloemann A. G. for about two years after August 11, 1939, he testified that at no time did he ask Schloemann A. G. the purpose for which the $50,000 had been transmitted.[5] Nor did the claimant report the $50,000 in his income tax return. He explained this by stating that "sometime in 1939 and thereafter, I approached Heyn on this subject of reporting this $50,000 in my income. His contention was that, and I don't know what it is now, 'but Mr. Feller, you don't know whose money it is' and he advised not to report it as income." The Committee, therefore, finds that the $50,000 was not transmitted to the claimant as compensation for services rendered to Schloemann A. G.

At one point in the proceeding the claimant testified that the $50,000 might have been transmitted on behalf of some unknown person who had an account in London and who was being persecuted, or anticipated persecution, by Germany. This speculation requires only the comment that it does not tend to show ownership by the claimant of the $50,000 or of the shares issued in exchange for the $50,000.

[5] When asked on redirect why he did not inquire of Schloemann A. G. as to what the $50,000 represented—communications with Germany being open for two years following August 1939—he answered "I was satisfied with having the $50,000; that wasn't my worry." Assuming the truthfulness of this answer, it appears to the Committee that the claimant's failure to ask why the $50,000 had been transmitted to him can be explained only on the ground that there was some impropriety in its transmittal under the circumstances. There was no impropriety in Schloemann A. G.'s advancing the $50,000 to him as a bona fide loan and no impropriety in Schloemann A. G.'s compensating him for services rendered. Why then did he not, while in telephone or other communication with Duesseldorf, ask the purpose of this transmittal? As related above, he had been advised shortly before the $50,000 was transmitted to him that the German government had approved the formation of the corporation.

There being no evidence whatever that the $50,000 was intended as a gift to the claimant and no such contention being voiced, there remains, in the opinion of the Committee, but one alternative; that Schloemann A. G. intended the $50,000 to be invested in the Schloemann Engineering Corporation as Schloemann A. G.'s contribution to the capital of Schloemann Engineering Corporation. The shares issued by Schloemann Engineering Corporation in the name of the claimant would then be the product of the capital contribution made by Schloemann A. G. and Schloemann A. G. would be the owner of the shares, a result consistent with the plan as of April 1939, and in accord with the course of conduct initiated as early as 1931. Such a conclusion does not necessarily depend on a finding that the claimant had agreed to and intended to hold the shares for and on behalf of Schloemann A. G. Finding, as we do, that Schloemann A. G. transmitted the $50,000 to the claimant with the intention that it be paid to Schloemann Engineering Corporation as the quid pro quo for the issuance of the shares claimed in this proceeding, and not as a loan, or a gift, or as compensation to him, it follows that he was at least a *constructive* trustee for Schloemann A. G. of the fund and its product, but as such in no better position to establish his asserted personal ownership than if he were admittedly acting as a trustee.

The Committee, therefore, finds that the evidence in the record tends to show so strongly that the claimed shares were owned at the date of vesting by Schloemann A. G. that the claimant has not sustained his burden of proving ownership by him.

The contention of the claimant that additional evidence not presently available would establish his claim unequivocably cannot be regarded as an adequate cause for a stay of the proceeding. There is a likelihood that additional evidence may become available particularly when the war ends but the possible effect thereof on the issue is so speculative in view of the present record that, in the opinion of the Committee, a stay of the proceeding is not warranted.

THEREFORE, for the purpose of this proceeding, it is the final determination of the Committee that the claimant, Karl Feller, had at the date of vesting no title or interest in the claimed shares sufficient in law to support a right of recovery.

Accordingly, Claim No. 1931 is hereby disallowed.

DECEMBER 4, 1944.

IN THE MATTER OF
PAUL GUTSCHOW AND PHELAN BEALE
Claims Nos. 957 and 959. Dockets Nos. 79 and 80

STATEMENT OF THE CASE

This proceeding was initiated by Notices of Claims Nos. 957 and 959, each dated August 5, 1943, and filed respectively by Paul Gutschow and Phelan Beale, each of whom is a citizen of the United States and a resident of New York City. The claims were filed pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290), which were amended on December 11, 1943 (8 Fed. Reg. 16709).

Claim No. 957, filed by said Paul Gutschow, as above stated, concerns two hundred and forty shares of the common stock of Jungmann & Co., Inc., a Delaware corporation, which shares were vested by the Custodian by Vesting Order No. 166, dated September 24, 1942 (7 Fed. Reg. 8568);

and Claim No. 959 concerns an alleged pledge of the same shares by said Gutschow to the claimant Beale prior to the vesting thereof. The two claims were consolidated and heard by the Vested Property Claims Committee in New York City, on June 20, 21, 22, and 23, 1945. Bouvier & Beale, by Phelan Beale with John S. V. Kilmartin, of counsel, appeared on behalf of the claimants. John Ernest Roe, (and subsequently his successor Raoul Berger), General Counsel, by George B. Searls and Edward M. Murphy, appeared on behalf of the Alien Property Custodian. A brief was filed by the claimants on August 13, 1945, and by General Counsel on October 18, 1945. A reply brief was filed by the claimants on December 3, 1945. A tentative determination disallowing these claims was issued on February 12, 1946. Proposals to modify the tentative determination were filed by the respective claimants on March 11, 1946.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated into and constitute the basis of this determination.

The Committee hereby disallows the claims for the reasons hereinafter set forth.

DETERMINATION

This proceeding concerns, as to Claim No. 957, an alleged right on the part of the claimant Gutschow to a return to him of the two hundred and forty shares of the common stock of Jungmann & Co., Inc., a Delaware corporation hereinafter mentioned—which stock Gutschow alleges that he owned at the time of vesting by reason of a bona fide prior purchase thereof from a German citizen, one Helmuth Voss, of Hamberg, Germany. As to Claim No. 959, the claimant Phelan Beale alleges that, after Gutschow had purchased the above mentioned shares from Helmuth Voss, Gutschow pledged them to him, Beale, as security for a loan of fifteen thousand dollars bearing interest at 4%, which loan Beale claims that he made to Gutschow on May 25, 1940, and on which obligation Beale asserts that there remains due and unpaid some eight thousand dollars of principal and interest.

General Counsel contends the alleged sale, and subsequent pledging of the stock to the claimant Beale, constituted a cloaking transaction and that the beneficial ownership of the shares remained in Helmuth Voss.

The claimant Gutschow was born in Germany, came to the United States in 1912, and became a naturalized citizen in 1934. The claimant Beale is a citizen of this country by birth and is an attorney-at-law in general practice in New York City.

Jungmann & Co., Inc., was incorporated in 1921 in Delaware. Three hundred shares of no par value stock were issued. In return for two hundred of the original shares issued directly to him, Helmuth Voss contributed the entire original cash capital of twenty thousand dollars and later made further contributions until he had a total cash investment of about sixty thousand dollars. The remaining one hundred shares were equally divided between the claimant Gutschow and one Dr. Jungmann. Both Gutschow and Jungmann, in consideration for the shares issued to them, contributed certain previously acquired business interests that were considered to be of value to the new corporation. Dr. Jungmann became the President of the new company, and Gutschow was made its Secretary and Treasurer. The claimant Beale organized the corporation and was subsequently employed as its attorney. Since its organization the corporation

has been engaged in a general chemical brokerage business involving both domestic and foreign transactions. In the beginning it dealt almost exclusively in merchandise procured from the firm of Lehman and Voss, chemical manufacturers of Hamburg, Germany, which firm was owned by the above mentioned Helmuth Voss. In 1925 Dr. Jungmann resigned as President of Jungmann & Co., Inc., selling his fifty shares of stock to Voss, who subsequently transferred ten shares of it to Gutschow, leaving Voss two hundred and forty shares and Gutschow sixty shares at the time of the alleged transfer of Voss' stock to Gutschow in 1940.

The issue in this proceeding, upon which both claims necessarily rest, is not a complex one, there being no question at all but that the transfer of the two hundred and forty shares of stock was formally made by Voss to Gutschow or that the pledge thereof to Beale was formally made—the real issue being confined to the bona fides of the pertinent transactions; that is, the question as to whether the several parties intended the transfer of the stock to Gutschow to be a genuine transaction designed to convey full and final ownership to the latter or whether the several formal transactions involved comprised a scheme to conceal a continued beneficial ownership in Voss and thus effectively to protect the latter's interest in the event that the then existing war in Europe should ultimately involve the United States.

The Committee is constrained to state at this point that it considers both claimants to have acted in unison in connection with the several transactions here under consideration. The Committee must therefore assume that the intentions and purposes of the claimants were mutual, particularly in view of the fact that admittedly the necessity for some such plan of action, as well as the details thereof, were suggested—as hereinafter related—to Gutschow by Beale in the first instance. The Committee will therefore confine itself to the facts and circumstances that appear to be pertinent from the standpoint of a determination of the matter of the bona fides of the sale of the two hundred and forty shares of stock by Voss to Gutschow.

Shortly subsequent to the beginning of the war in Europe in the latter part of the year 1939, according to the testimony both of Gutschow and Beale, the claimant Beale called Gutschow into the former's office in New York City and suggested to Gutschow that, recalling their joint experiences in connection with the seizure of certain property by the Alien Property Custodian during World War I, it would be prudent to take some present action to safeguard their respective interests in the firm of Jungmann & Co., Inc. in the event that the United States should become involved in World War II; that is, some action that would protect the shares owned by Voss from seizure by the Alien Property Custodian and also insure the payment to Beale of such fees as he alleged were due to him from Jungmann & Co., Inc. for legal services theretofore rendered. Beale at first suggested to Gutschow that the latter should ask Voss to transfer to Gutschow all of the former's stock for a wholly nominal consideration. Gutschow evidently did not consider it expedient to make such a drastic request of Voss under the circumstances and told Beale that he was unwilling to do so. Beale thereupon suggested that Gutschow offer to purchase Voss' shares for $15,000 and that he, Beale, would obtain the funds for such purchase by rendering a bill to Jungmann & Co., Inc. for that sum for past legal services, and that as soon as the bill should be paid from the funds of Jungmann & Co., Inc., Beale would at once loan

the entire sum to Gutschow—securing this loan by taking all of the 240 shares of stock as a pledge. This suggestion, when effectuated, would enable Gutschow to procure the money for the purchase of Voss' stock indirectly from the funds of the corporation itself. At this time the net worth of the corporation appears to have been about seventy-three thousand dollars [1] and the equity of Voss therein, based upon his ownership of his 240 shares, was approximately $58,000—this estimate of the value of Voss' equity possibly being an understatement thereof as Voss also had, according to the claimant Gutschow's testimony, some kind of an agreement with Gutschow in the nature of an option to purchase the 60 shares owned by Gutschow for the sum of $6,000. This agreement, if carried out, would have increased the actual value of Voss' interest by the difference between the agreed price of $6,000 and the actual book value of the 60 shares—about $9,000 increase in the value of Voss' shares. In sum, Voss apparently had at the time of the alleged sale of his stock to Gutschow an equity in the liquid assets of the corporation, had it been dissolved, of a value of between 60 and 70 thousand dollars. This, of course, puts no value upon the good will of the business as a going concern with a considerable national and international trade built up through years of effort on Gutschow's part as a salaried employee, but with the use of cash capital furnished entirely by Voss and with Voss' cooperation as to the supply of chemical products. In fact the amount received by Voss—$15,000—in alleged full payment for his shares was only about one-fourth of his total cash investment in the business, and this at a time when the assets had increased and the business of the company had been expanded by years of foreign and domestic trade. The Committee considers that the alleged purchase price, under these circumstances and particularly in view of the apparently rather devious method adopted to obtain the moneys involved from the cash assets of the corporation itself, compels the conclusion that the alleged purchase price was, even under the conditions that then maintained, so obviously inadequate as to challenge the bona fides of the entire transaction. With this in mind we will briefly examine the several communications between the parties involved for such probative value as they may have in the premises.

On April 10, 1940 the claimant Gutschow, assisted by Beale, wrote a lengthy letter to Voss suggesting that Jungmann & Co., Inc. should presently pay to the claimant Beale the sum of $15,446.52, from the corporation's funds, as compensation for Beale's legal services to the corporation for the seventeen years then last past, and that Gutschow could then borrow the money so paid to Beale and secure Beale therefor with a pledge of the Voss stock which he, Gutschow, would simultaneously purchase from Voss with the funds thus obtained. There is a suggestion in this letter to Voss that it would not be necessary for the latter to find and transmit to Gutschow the actual stock certificates if by any chance they had been "lost or misplaced," but that other appropriate and effective means of evidencing the transaction could be adopted. The certificates apparently never were transmitted to Gutschow although photostats thereof were duly transmitted at a later date.

Voss replied to the above mentioned letter as follows:

"DUPICATE APRIL TENTH JUST ARRIVED HAVE ABSOLUTE CONFIDENCE

[1] Exhibit "AAA", the accuracy of which has not been questioned by the claimants, sets forth the sum of $73.110.64 as the net worth of the corporation in 1939—which figure evidently was taken from Exhibit "BBB", the balance sheet of the corporation as of December 31, 1939.

IN YOU PERSONALLY THEREFORE NO HESITATION HOWEVER CONSIDER OBTAINING PERMIT FOR PROPOSAL IN PRESENT FORM TEDIOUS AND LITTLE PROSPECT OF SUCCESS STOP OF EIGHT THOUSAND DOLLARS FIVE THOUSAND MUST BE ELIMINATED FOR TAXES STOP CABLE WHAT GUARANTEES IN CASE OF YOUR DEATH." (Emphasis supplied)

To this message from Voss, Gutschow replied on the same day:

"IN CASE OF MY DEATH THIS CABLE SERVES AS OPTION FOR YOU TO REPURCHASE FOR ONE HUNDRED DOLLARS STOP SITUATION MAKES QUICK SETTLEMENT URGENTLY DESIRABLE STOP SUGGEST REICHSSTELLE FUER AUSSENHANDEL TO WHICH LETTER IN TRANSIT TO REQUEST REPORT OF LOCAL CONSULATE GENERAL STOP YOUR CABLE REPLY WOULD PERMIT IMMEDIATE CONSUMMATION REQUIRING DOCUMENTS SIGNED BY YOU AS CONFIRMATION LATER." (Emphasis supplied)

The claimant Beale knew the contents of both of these messages at the time that they were respectively received and sent, and was, in our opinion, bound by his knowldge of the option limitation therein agreed upon; that is, he had notice thereof in fact. We will not discuss the legal question that here arises—the possible effect of such an option upon Beale's alleged rights as a pledgee—as we do not consider it to be of any ultimate importance in the premises because, as stated above, we find it impossible to consider the transfer, the pledge, and the option to be other than one transaction.

On May 23, 1940 after an exchange of two more messages between Voss and Gutschow, Voss sent the following radio message to Gutschow:

"AGREE TO PROPOSAL AGAINST PAYMENT OF FURTHER TWELVE THOUSAND DOLLARS ON CONDITION THAT WHEN DANGER PASSED OLD STATE IS REESTABLISHED AND IN CASE OF YOUR DEATH OPTION TO REPURCHASE FOR ONE HUNDRED DOLLARS STOP PERMIT FOR THIS OBTAINED STOP IMMEDIATE PAYMENT TO CHASE NATIONAL FAVOR SCHWEIZERISCHE KREDITANSTALT ZURICH WITHOUT DETAIL STOP CABLE SEPARATELY THAT PAYMENT FAVOR REICHSBANK DIREKTORIUM CABLE AGREEMENT." [2] (Emphasis supplied)

Gutschow replied:

"DEATH OPTION ENTIRELY LEGAL BUT FURTHER CONDITION WOULD IMPUGN GOOD FAITH OF SALE AND MAKE IT APPEAR A PRETENSE STOP UNLESS HEAR CONTRARY SHALL ASSUME THAT YOU WAIVE THIS CONDITION AND PROCEED ACCORDINGLY INCLUDING REMITTANCE PURCHASE PRICE BALANCE."

On the same day, May 24, 1940, Voss sent to Gutschow the following radio message:

"AGREE WAIVING FURTHER CONDITION WITH FULL CONFIDENCE IN YOU." (Emphasis supplied)

The Committee considers it unnecessary to elaborate as to the intention of the parties as evidenced by these several messages. On their face they appear to disclose a purpose on the part of the claimant Gutschow to obtain and hold the Voss shares against seizure by the Alien Property Custodian in the event of war between Germany and the United States, and to con-

[2] This $12,000 is a part of—not in addition to—the $15,000 heretofore mentioned as the purchase price of the stock.

trive to pay Voss therefor from the funds of the corporation itself—money to which Voss was obviously entitled in any event to the extent of his ownership of four-fifths of the capital stock of the corporation. Also it is evident that the corporation could have paid the claimant Beale whatever it may have owed to him from time to time during the past several years from funds used for the several payments that the evidence disclosed were paid out as "dividends." These dividend payments totalled more than $40,000 during the years 1936 to 1940 inclusive.[3]

To summarize: The conditions that prevailed internationally at the time of the alleged transfer in 1940; the inadequacy of the payment of $15,000 for the 240 shares; the fact that this inadequate consideration actually emanated from the treasury of the corporation; the option to repurchase for a nominal sum in favor of the German interest; all of these things make it impossible for the Committee to conclude that Gutschow and Voss intended the transactions evidenced by the several communications between them to convey the beneficial and final ownership of the stock to Gutschow. And these facts and circumstances collectively have convinced the Committee that when the obviousness of the cloaking plan inherent in Voss' message of May 23, 1940 ("when danger passed, old state is reestablished") was pointed out to Voss by Gutschow's reply, Voss by his radio answer merely substituted for the objectionable statement, quoted immediately above, the words "with full confidence in you" and did not by that substitution change the actual intent and meaning of his prior message. In short, the actions of the parties were not such as, in the opinion of the Committee, normally attend a bona fide transaction between seller and purchaser.[4] The Committee, bearing in mind that it is here being requested to turn over to the claimants valuable property now belonging, by virtue of the vestings involved, to the United States government—the claimants being charged with the burden of proof in respect to their respective claims [5]—is constrained to hold that the testimony and documentary evidence offered in support of these claims does not meet any reasonable standard of satisfactory and convincing proof in support of the claims or of either of them.

The Committee has considered Public Law 322—adding Section 32 to the Trading with the enemy Act, as amended, and approved on March 8, 1946,—in relation to these claims and concludes that it does not affect the conclusion set forth in this determination.

THEREFORE, for the purposes of this proceeding it is the determination of the Committee that neither of the claimants, Paul Gutschow or Phelan Beale, had, at the time of vesting, a title or interest in the vested property sufficient in law to support a right to recovery.

Accordingly, Claims Nos. 957 and 959 are hereby disallowed.

MAY 13, 1946.

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[3] Exhibit "AAA" discloses dividend payments of $41,701.35 during the years 1936, 1937 and 1938, and Exhibit "1" discloses that $8,000 more was sent to Voss in April 1940 and prior to the conclusion of the arrangement for the transfer of Voss' stock to Gutschow—which latter sum Gutschow asked Voss to consider as part payment for Voss' stock if Voss should agree to the transfer thereof to Gutschow.

[4] *Stoehr* v. *Wallace*, 269 Fed. 827 (S.D.N.Y. 1920), affirmed 255 U. S. 239 (1921); *Metz* v. *Garvin*, 3 Fed. (2d) 182 (S.D.N.Y. 1921); *Hodgskin* v. *U. S.*, 279 Fed. 85, C.C.A. 2d, 1922); *Magg* v. *Miller*, 296 Fed. 973 (App. D. C. 1924); *Lust* v. *Miller*, 4 F. (2d) 293 (App. D. C. 1925); *Ebert* v. *Miller*, 4 F. (2d) 296 (App. D. C. 1925), appeal dismissed, 296 U. S. 666 (1926); *Thorsch* v. *Miller*, 5 Fed. (2d) 118 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Matheson* v. *Hicks*, 10 Fed. (2d) 872 (E.D.N.Y. 1926).

[5] *Sturchler* v. *Hicks*, 17 F. (2d) 321, 324 (E.D.N.Y. 1926); *Draeger Shipping Co.* v. *Crowley*, 55 F. Supp. 906, 912 (S.D.N.Y. 1944); Paragraph IV of Rules of Practice and Procedure of the Vested Property Claims Committee.

In the Matter of
HANSEA CORPORATION
Claim No. 1076. Docket No. 40

Statement of the Case

This proceeding was initiated by Notice of Claim No. 1076 (dated September 3, 1943) filed by Hansea Corporation pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 1239, dated April 15, 1943 (8 Fed. Reg. 7041) vested the following property:

a. All interests and rights (including all accrued royalties and other monies payable or held with respect to said interests and rights and all damages for breach of the agreement hereinafter described, together with the right to sue therefor) created in Hans Thoma by virtue of an agreement by and between said Hans Thoma and Hansea Patent Service Corporation, dated January 25, 1935, relating among other things to Patent No. 1,931,969 and to the disbursements of certain royalties due to said Hans Thoma by virtue of an agreement dated January 1, 1935 between Hans Thoma and Vickers, Inc., a Michigan corporation and

b. All interests and rights (including all accrued royalties and other monies payable or held with respect to said interests and rights and all damages for breach of the agreement hereinafter described, together with the right to sue therefor) created in Hans Thoma by virtue of an agreement by and between said Hans Thoma and Vickers, Inc., a Michigan corporation, dated January 1, 1935, relating among other things to Patent No. 1,931,969.

Notice of Claim No. 1076 alleges in substance that the claimant, Hansea Corporation, is entitled to 40 percent of the royalties payable under the royalty license agreement between Hans Thoma and Vickers, Inc.

The Order for and Notice of Hearing was published on August 15, 1944 (9 Fed. Reg. 9926) and a copy was served upon the person designated in Section 2 of the Notice of Claim. The hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, 120 Broadway, New York City, on September 11, 1944. Allen A. Dicke, President of Hansea Corporation, appeared on behalf of claimant, and John Ernest Roe, General Counsel, by Thomas J. McBride, appeared on behalf of the Custodian.

Briefs were submitted by the claimant on October 12, 1944, and by the General Counsel on October 26, 1944. The claimant submitted a reply brief on November 15, 1944.

A tentative determination allowing the claim was issued on May 24, 1945. No proposals to modify the tentative determination having been made, the tentative determination is hereby adopted and issued as the final determination in the matter.

The claim is hereby allowed for the reasons hereinafter set forth.

Determination

In this proceeding the claimant, Hansea Corporation, contends that it is the owner of 40 percent of the royalties payable by Vickers, Inc., a Michigan corporation, under a patent licensing agreement dated January 1, 1935, between Vickers and Hans Thoma of Karlsruhe-Baden, Ger-

many. The Custodian vested the interests of Thoma in this license agreement by Vesting Order No. 1239, dated April 15, 1943. By the same vesting order the Custodian vested Thoma's interest in a related agreement dated January 25, 1935, between Thoma and the claimant. The Vickers license refers to certain patents issued to Thoma and pertaining to "positive infinitely variable hydraulic power transmissions." The Thoma agreement with the claimant related to the royalties payable by Vickers under its license from Thoma. The claimant is a New York corporation organized in 1934 under the name of "Hansea Patent Service Corporation." Its name was changed in 1935 to "Hansea Corporation," and it will sometimes be referred to hereafter as "Hansea."

The claimant's contention, in brief, is that it had acquired prior to vesting a proprietary interest in the claimed royalties as distinguished from a creditor's claim against Thoma. The case was heard and considered solely on this issue, because the Office of Alien Property Custodian is not presently considering creditors' claims. See *Cabell* v. *Markham*, (Civ. Action No. 26–302, S.D.N.Y., January 3, 1945, reversed, No. 279, C.C.A. 2d, April 3, 1945. Petition for Certiorari to the U. S. Supreme Court, No. 1271, granted June 4, 1945). General Counsel contends in substance that the claimant has failed to establish that "its rights, if any, are more than those of a general creditor."

We have concluded that the claim should be allowed. Section 9 (a) of the Trading with the enemy Act, as amended, calls for the allowance of a claim of any person eligible as to nationality who establishes that he had at the time of vesting "any interest, right or title" in the vested property. It is not disputed that an effective assignment, whether partial or total, of a chose-in-action transfers to the assignee such a proprietary interest as is within the meaning of "any interest, right or title" and the claimant has, in the opinion of the Committee, satisfactorily carried its burden of establishing that Thoma did assign to it a 40 percent share of the Vickers royalties.

The principles determinative of an effective assignment are well established. "The ultimate test is the intention of the assignor to give and the assignee to receive present ownership of the claim." *Williston on Contracts,* (Rev. Ed.), Sec. 428. Or stated otherwise, the assignor must intend a present specific appropriation of the subject matter to the assignee. *Springer* v. *J. R. Clark Co.,* 138 Fed. (2d) 722 (C.C.A. 8th, 1943). Stated negatively, if the alleged assignor retains control over the subject matter, the transaction has not resulted in an effective assignment. The evidence hereafter set forth indicates to the Committee that—in light of these principles—Thoma had made an effective partial assignment of the royalties to the claimant prior to vesting.

In 1933 the New York and Hanseatic Corporation, a New York corporation (sometimes referred to hereafter as "Hanseatic"), entered into an agreement with Thoma, and acquired thereby the exclusive right for the option period to exploit in the United States certain of Thoma's inventions. This agreement was amended in 1934, to extend the option period and to include the hydraulic machine-tool transmission invention which is the subject of the Vickers license. The 1933 agreement provided that Hanseatic was to be compensated for its efforts as follows:

"As compensation for its labors and disbursements, the 'principal' [auftraggeber] grants to 'Hanseatic' a forty per cent share in all payments which flow directly or indirectly out of the commercialization of the

'inventions' in the United States from any party with whom a contract has been negotiated by 'Hanseatic' to the point of closing, within the option period. The share of 'Hanseatic' is payable in U. S. dollars in New York and it shall be provided in the agreement, as a direct obligation of the purchaser or licensee or their legal successors, that such third party will make his payments pro rata to the 'principal' [auftraggeber] and to 'Hanseatic.' "

This clause clearly imports an intention on the part of Thoma in 1933 to transfer to Hanseatic a 40 percent ownership interest in any royalty rights created in Thoma pursuant to the contract. The specific agreement to provide in any license agreement that 40 percent of the royalties were to be paid to Hanseatic "as a direct obligation of the * * * licensee" seems to preclude any meaning other than that Thoma had agreed to part with dominion and control over 40 percent of the royalty rights. Neither the claimant corporation nor the Vickers license was in existence in 1933, however, and while the 1933 agreement may have been an effective equitable assignment of a future right—or a contract to assign—the claimant does not pitch his case upon the 1933 agreement alone.

In 1933 one Allen A. Dicke, later the principal shareholder and president of the claimant Hansea Corporation, was performing services for Hanseatic under an agreement with one Gerhard Wagner who was connected with Hanseatic. The claimant Hansea was organized in 1934 for the purpose, among others, of taking over the patent commercialization activities of Hanseatic, and by an instrument dated September 12, 1934, Hanseatic assigned to Hansea "all of our rights in connection with patent exploitation and commercialization activities," specifically including the rights of Hanseatic under its 1933 agreement with Thoma. By the same instrument Hansea assumed all of Hanseatic's obligations in respect of the assigned agreement.

By a letter dated September 14, 1934, Hanseatic advised Thoma that Hansea had been organized and that:

"Assuming your approval we have transferred to the new Corporation all rights and obligations connected with the agreement we made with you and we would like to request you to send us your approval thereof in accordance with the enclosed form. The Hansea Patent Service Corporation [Hansea] will also write you separately in connection with this matter."

It appears, therefore, that in September 1934 Hansea was the assignee of Hanseatic's rights under the 1933 agreement, and that Thoma had been advised of the assignment.

Then on January 25, 1935, Thoma, who had been in the United States participating in negotiations with Vickers, executed the Vickers license agreement. And Thoma as of the same day entered into an agreement with Hansea which contains the following recitals, among others:

"WHEREAS Thoma previously had entered into an agreement with New York and Hanseatic Corporation, dated May 6, 1933, a copy of which is attached hereto as Exhibit 'A', and into a supplemental agreement of June 26, 1934, a copy of which is also attached hereto as Exhibit 'B', in both of which agreements with the consent of both parties, the designation of New York and Hanseatic Corporation has been replaced by 'Hansea'; and

"WHEREAS Hansea has contributed to the making of a license agree-

ment between Thoma and Vickers, Inc., which license agreement was entered into on January 15, 1935, and became effective as of January 1, 1935, a copy of which agreement is attached hereto as Exhibit 'C', and WHEREAS Hansea is authorized and intends to make, on behalf of Thoma, other license agreements with respect to the inventions referred to in Exhibits 'B' and 'C', the improvements on those inventions, and also other inventions which Thoma may now or later on wish to exploit in the United States of America by Hansea as his agents and representative, * * *."

The clauses quoted above show that as of the date of the execution of the Vickers license, Thoma "substituted" Hansea for Hanseatic with respect of the 1933 agreement between Thoma and Hanseatic;—that is, that Thoma assented to the September 1934 assignment by Hanseatic to Hansea. In other words, the provisions of the 1933 agreement whereby Thoma assigned to Hanseatic a 40 percent share of prospective royalties were made applicable to Hansea by Thoma in 1935 by Thoma's act in substituting Hansea for Hanseatic. At this point all of the essential elements of an effective legal assignment seem to be present. Thoma had assigned to Hanseatic 40 percent of its prospective claim against Vickers; Hanseatic had assigned in turn to Hansea; the Vickers license was in existence; and Thoma had assented to and confirmed the assignment to Hansea.

Consideration has been given to the fact that the Hansea-Thoma agreement of 1935 contains elaborate and detailed provisions for the disbursement by Hansea of "Thoma's share of 60 percent" but does not contain any direct reference to the ownership or disbursement of the remaining 40 percent. This omission is not, in the opinion of the Committee, inconsistent with Hansea's claim of an assignment to it of the 40 percent interest. On the contrary, it seems that the proper inference to be drawn from the repeated use of the phrase "Thoma's share of 60 percent" and the absence of any direct reference to the remaining 40 percent, is that Thoma did not intend to change the terms of the 1933 agreement related to the 40 percent. And by those terms Thoma had, as stated above, assigned the 40 percent to Hansea's predecessor in interest.

It is significant in this respect that the 1935 agreement between Thoma and Hansea did not purport to supplant in its entirety the 1933 agreement between Thoma and Hanseatic but merely to modify it by substituting Hansea for Hanseatic and by permitting Hansea to retain for its security a portion of the royalties otherwise payable to Thoma. It appears from the 1935 agreement that the primary concern of Hansea at the time was to protect itself against any loss which might be incurred as a result of expenditures made by it on Thoma's behalf which Thoma under the German currency restrictions might be unable to reimburse. No inference unfavorable to the claim of an assignment of the 40 percent interest should for that reason be drawn from the presence in the contract of the elaborate provisions in respect to "Thoma's share of 60 percent" and the absence of any *direct* reference to the remaining 40 percent. The two agreements, if read together, make a consistent whole, and the references to the 1933 agreement in the above quoted "Whereas" clauses of the 1935 agreement seem to require that effect be given where possible to both agreements. It is apparent, therefore, that Thoma by not making a direct reference in the 1935 agreement to the ownership of the 40 percent did not intend to

render inoperative the provisions of the 1933 agreement whereby he had agreed to assign the 40 percent interest in the royalties.

We now turn to the Vickers license. It provides in respect of the payment of royalties that "* * * The licensee hereby agrees to pay to Hansea Patent Service Corporation [Hansea], the nominee of the licensor, royalties as follows * * *." It further appears that Hansea did not notify Vickers—at least prior to the date of the vesting of Thoma's interest in the license—that it claimed to be an assignee of the royalties. It is urged by General Counsel that Hansea's conduct in not notifying Vickers, coupled with the absence from the Vickers license of a reference to an assignment, is evidence that Hansea did not have an assignment of the royalties. The absence of notice to the obligor, Vickers, would not, of course, invalidate an assignment otherwise effective. And, although the absence of such a notice is of some evidentiary value, it is not, in the opinion of the Committee, of controlling weight in this case in view of the clarity with which Thoma's intention to assign is otherwise manifested.

Another item of evidence requires comment. On January 25, 1935—the same day on which Thoma executed his agreement with Hansea—Thoma wrote to Hanseatic as follows:

"Under date of May 6th, 1933, an agreement was entered into between your company and me relating to the commercialization in America of certain inventions made by me pertaining to transmissions adapted for use in automobiles, etc. On June 26th, 1934, a supplemental agreement was entered into between us relating to a transmission especially adapted for machine tools and other devices where an infinitely variable drive is required.

"As you know an agreement was entered into between Vickers Inc. of Detroit, Mich. and me on January 15th, 1935, in which I appointed Hansea Patent Service Corporation, which I understand is associated with your company, to receive the payments to be made in accordance with said contract with Vickers, Inc.

"I would like to have a letter from you stating that this appointment is approved by you. Furthermore, I hereby approve the substitution of your associated company, the Hansea Patent Service Corporation, in place of your company in connection with said agreements between us, dated May 6th, 1933 and June 26th, 1934, and that said Hansea Patent Service Corporation may deduct 40% from all payments received by it under said agreement with Vickers, Inc., provided, however, that, if Hansea Patent Service Corporation should become dissociated from your Company, my approval of such substitution may be withdrawn at my option."

And Hanseatic replied on February 6, 1935, as follows:

"We acknowledge receipt of your letter of. January 25th and are glad to note your appointment of Hansea Patent Service Corporation, with which company we are closely connected, to collect certain moneys and to forward your share thereof to you.

"We are also pleased to note that you have given your approval to the suggestion made by us in our letter of September 14, 1934 that Hansea Patent Service Corporation be substituted in place of our company in connection with the agreements between us, dated May 6, 1933 and June 26, 1934 on the conditions stated."

This exchange of letters appears to be merely the medium whereby

Hanseatic formally confirmed the substitution of Hansea for itself. Furthermore, the phrase "Hansea Patent Service Corporation [Hansea] may deduct 40 percent from all payments received by it * * *" is not, in the opinion of the Committee, inconsistent with an assignment intention. Nor does the final proviso of the letter wherein Thoma purports to reserve the right to withdraw the substitution affect the validity of the present claim of assignment. There is no evidence to the effect that Thoma exercised the option; the existence of a right to do so would not affect the validity of the assignment at least prior to the exercise of the right: and finally, to the extent that the reservation is inconsistent with the terms of the contract that Thoma executed on the same day with Hansea, the reservation cannot be given effect in the absence of adequate evidence that it was assented to by Hansea.

It is contended that the bookkeeping records of Hansea show conclusively that it "considered itself as working on a commission basis with Dr. Thoma and not as the absolute owner of 40 percent of the royalties." The evidence to support this contention consists principally of the following testimony of one Alfred Lachhein, Hansea's bookkeeper:

"Q. You say the entry made on April 29, 1937 is a typical entry that is made in your books?

"A. It is.

"Q. Would you read that entry?

"A. We received from Vickers, Inc. a check dated April 26, 1937, for a total amount of $3,111.50. Of this amount we credited——.

"Q. Just a minute Mr. Lachhein. Will you read it just as it is written in your book, in other words, on one line you have——

"A. In this connection we made the following entries on our books:

April 29, Cash Debit	$3,111.50	
Professor Dr. Hans Thoma Credit		$1,680.21
Federal Tax Withheld		186.69
Commissions		1,244.60

Check, Vickers, Incorporated 4/26/37."

While the word "commission" does generally refer to compensation to an agent calculated on a percentage basis, and while its use in Hansea's case is of some evidentiary value, the relationship between Thoma and Hansea must be determined by a consideration of the whole transaction between them. The use of the word "commission" by Hansea's bookkeeper was, we believe, merely a shorthand description made for the purpose of identifying the entry and not for the purpose of describing the precise relationship between Thoma and Hansea. It does not change the tenor of the whole transaction which sounds in assignment. In other words, the use of the word "commission" in an entry on Hansea's books is not adequate evidence, in the opinion of the Committee, of such a course of conduct between Hansea and Thoma as would permit—in the face of the other evidence in the record—a finding that Hansea was merely an agent for collection with authority to withhold 40 percent of the royalty as compensation.

No question arises in this case as to the nationality of the claimant. It is a New York corporation and all of its shares have been owned since 1940 by Allen A. Dicke and Alfred Lachhein. Dicke is a lifelong resident and citizen of the United States and has engaged in the practice of law in the United States since 1917. Lachhein became a resident of the United States in 1920 and a citizen of the United States in about 1926.

We conclude, therefore, that the claimant, Hansea Corporation, had, at the date of vesting, a proprietary interest to the extent of 40 percent in the royalties payable under the royalty licensing agreement dated January 1, 1935, between Dr. Hans Thoma of Karlsruhe-Baden, Germany, and Vickers, Inc., and referred to in Vesting Order No. 1239.

THEREFORE, for the purposes of this proceeding, Claim No. 1076 is hereby allowed.

JULY 11, 1945.

IN THE MATTER OF

PAUL SCHULZE-BERGE *and* HEINE & COMPANY

Claim No. 3331. Docket No. 87

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 3331, dated January 9, 1945, filed by Paul Schulze-Berge pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian, by Vesting Order No. 4123 dated September 12, 1944 (amended January 8, 1945), vested 1886 shares of the common stock of Heine & Company, a New York corporation, registered in the name of Paul Schulze-Berge, as property beneficially owned by Heine & Co., A. G., a national of a designated enemy country (Germany), and three claims of Heine & Co., A. G., against Heine & Company of New York, represented by three promissory notes of Heine & Company of New York, all dated May 17, 1935, in the aggregate sum of $368,056.97.

Notice of Claim No. 3331 alleges in effect that the claimant, Paul Schulze-Berge, was the sole owner of the vested shares.

The Order for and Notice of Hearing was served upon the person designated in Section 2 of the Notice of Claim. A hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, Washington, D. C., on September 20, 1945. John R. Davies, of New York, appeared on behalf of the claimant, and John Ernest Roe, General Counsel, by George B. Searls and Edward M. Murphy, appeared on behalf of the Custodian. Briefs were submitted by the claimant on October 29, 1945, by General Counsel on December 12, 1945, and a reply brief was submitted by the claimant on February 14, 1946. A tentative determination disallowing the claim was issued on April 5, 1946. No proposals to modify the tentative determination were filed. The tentative determination as hereinafter set forth is hereby adopted and issued as the final determination.

The transcript of the testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for the reasons hereinafter set forth.

DETERMINATION

The claimant, Paul Schulze-Berge, is an American citizen by birth and has resided in New York at all material times. In this proceeding he seeks 1,886 shares of stock of Heine & Company, a New York corporation, alleging in effect that the shares were improperly vested by the Alien Property Custodian because they were vested pursuant to a finding that they were beneficially owned by Heine & Co., A. G., a German corpora-

tion. The claimant contends in substance that he is the sole and exclusive owner of the shares in question. General Counsel maintains in effect that the claimant has failed to sustain his burden of proving an exclusive right, title, and interest in the vested property sufficient in law to support a right to the return of the shares.

It appears to be expedient to state at the outset the general principles which are applicable to this administrative proceeding which parallels the relief provided a claimant under the provisions of Section 9 (a) of the Trading with the enemy Act. Property vested by the Alien Property Custodian becomes property of the United States, at least in the sense that proceedings to recover it are against the United States and must therefore be based upon statutory permission to maintain the action. *Cummings* v. *Deutsche Bank & Disconte Gesellschaft,* 300 U. S. 115, 120-121 (1937). The necessary statutory permission is found in Section 9 (a) of the Trading with the enemy Act, which affords relief to any person—eligible as to nationality—who proves that he had at the time of vesting an interest in the property within the established categories of proprietorship. *Lust* v. *Miller,* 4 F. (2d) 293 (App. D. C. 1925), *Ebert* v. *Miller,* 4 F. (2d) 296 (App. D. C. 1925). And the burden of establishing such a legal or equitable right to the property rests upon the claimant. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

The evidence before the Committee consists of the testimony of the claimant and of Theodore H. Thiesing, pre-war attorney for Heine & Co., A. G., of Leipsig, Germany, and several exhibits. This evidence may be summarized as follows: Heine & Company of New York, hereinafter called the New York Company, was incorporated in 1908 for the purpose, among others, of marketing in the United States essential oils and aromatic chemicals manufactured and prepared in Germany by the Heine & Co., A. G., hereinafter called the German Company. For a considerable period of time following the incorporation of the New York Company, the claimant was its secretary and treasurer. There is no evidence as to the initial stock ownership of the New York Company. Claimant testified that in 1920 he became the owner of 1886 shares of its stock. At about the same time he became president of the New York Company and continued in that position until the shares of stock were vested by the Custodian in 1944. After 1920 all of the capital stock of the New York Company was held by the claimant, his brother Theo. Schulze-Berge, and one Fred Keidel, each an officer of the company and a resident citizen of the United States.

From 1920 until the outbreak of World War II, the New York Company bought from the German Company merchandise which was shipped to the New York Company from Germany as ordered and on open account. The New York Company was not the exclusive sales outlet of the German Company. The New York Company also handled merchandise acquired from sources other than the German Company.

By 1927 the New York Company was indebted to the German Company, for merchandise, in the sum of approximately $91,000. To secure the indebtedness the officers of the New York Company, in 1928, pledged

to the German Company 1,107 of their shares of stock in the American Company. The initial indebtedness of $91,000 was increased in March 1931 to approximately $162,000 by an agreement referred to hereafter. The New York Company executed a note in this amount payable in six months, bearing 6 percent interest, and endorsed by Paul and Theo. Schulze-Berge. This March 1931 note was secured by a pledge to the German Company of 2886 shares of the capital stock of the New York Company. The shares so pledged were then owned by Paul and Theo. Schulze-Berge. The shares were endorsed in blank and delivered to Thiesing who deposited them in a New York Bank in a safety deposit box of the German Company. At the time the note was executed it was agreed that it could be extended for six months upon application of the New York Company, and further that the New York Company would not transfer the shares on its books until after the maturity of the note.

During the period from 1931 to 1935 the note of March 1931 was periodically renewed and the principal amount remained the same although no interest or principal payments were made thereon. The next step in the transaction occurred in May 1935. At that time the New York Company executed three demand notes in the amounts of $15,706.97, $163,350, and $189,000 respectively in favor of the German Company, each endorsed by Paul and Theo. Schulze-Berge. The $15,000 note, according to the claimant's testimony, represented a principal sum and interest thereon which the claimant as attorney-in-fact for the German Company had received from the then Alien Property Custodian as an authorized return of the property of the German Company which had been seized in World War I. This note was not paid and is one of the claims against the New York Company which was vested by Vesting Order No. 4123. According to the claimant's explanation of the other two notes, the note for $163,000 was executed first and later on the same day it was noted that this amount did not include any charge for interest and therefore the note for $189,000 was executed and delivered as a substitution for the $163,000 note. The claimant also testified that it was his understanding that the larger note was intended to cover, in addition to accumulated interest charges, losses sustained by the German Company as a result of the devaluation of the dollar—the initial indebtedness having been paybale in Dutch guilders. The $163,000 note was not cancelled or returned but remained with the $189,000 note and the pledged shares in the safety deposit box. Both of the claims against the American Company represented by these two notes were vested by Vesting Order No. 4123. General Counsel contends that the note for $189,000 represented a separate obligation and was not in fact a substitution for the $163,000 note.

At about the same time the three notes above described were executed, the claimant executed his personal note to the German Company in the amount of $100,000 as additional security. The Committee observes that this claim against the American Company apparently was not vested. The claimant in describing this $100,000 note testified as follows:

"At the time I was possessor of all of the shares of the building at 54 Cliff Street; and the $100,000 note was merely in case I sold that building. In that event, proceeds up to that amount would go to the European concern."

According to the claimant's testimony no payment of any kind whatso-

ever was made at any time on any of these notes. Periodically Thiesing obtained from the claimant and furnished to the German Company information relative to the business activities and financial standing of the New York Company. He testified that no payments were made by the New York Company on the indebtedness at any time because of the financial condition of the New York Company.

On June 17, 1940 Thiesing responded to a series of requests from the German Company that all the documents in the safety deposit box be sent to an agent of the German Company, one Erich Heinze, in Osaka, Japan. Thiesing's letter of transmittal to the German Company's agent in Japan listed the items forwarded and the list included, among other things, the certificates for the 1886 shares of stock, the claimant's personal note for $100,000 and "the following notes payable on demand by Heine & Co., New York, to Heine & Co., A. G.:

"(a) $189,000, dated May 17, 1935.
"(b) $163,350, dated " 17, 1935.
"(c) $15,706.97, dated " 17, 1935.
"(d) $162,565.48, dated April 1, 1935.
"(e) $162,565.48, dated Dec. 31, 1934.
"(f) $162,565.48, dated Sept. 11, 1934.
"(g) $162,565.48, dated July 13, 1933.
"(h) $162,565.48, dated Dec. 15, 1932.
"(i) $162,565.48, dated June 15, 1932.
"(j) $162,565.48, dated March 15, 1932.
"(k) $162,565.48, dated Jan. 12, 1932.
"(l) $162,565.48, dated March 13, 1931."

The documents sent to the agent in Japan by Thiesing in 1940 were further described by Thiesing in his testimony as "notes, cancelled notes, letters, collateral security consisting of stock * * *." In a supplemental affidavit dated July 24, 1944 and filed with the Foreign Funds Division of the Treasury Department, the claimant stated that the German Company "was a creditor by virtue of three promissory notes * * * one in the sum of $189,000, the other in the sum of $163,250 and the last in the sum of $15,706.97."

In a letter to the German Company dated May 21, 1935, Thiesing reported to the German Company on the matter of the American Company's obligations to the German Company and the security pledged therefor. The letter described four notes, one for $189,000, one for $163,350, one for $15,706.97 and one for $100,000 and stated:

"The above-mentioned four notes were executed and deposited in the safe of the Marine Midland Trust Company on May 17, 1935 * * *."

And further stated:

"The shares deposited as security in March 1931 * * * continue to serve as security for the above-mentioned notes and are deposited in the safe."

As related above the certificates representing these shares and the four notes so described were transmitted by Thiesing to Japan to an agent of the German Company in June 1940.

Assuming for the purposes of this proceeding that the testimony and exhibits summarized above reflect the facts, it is obvious that the claim must be disallowed to the extent that it seeks possession of the 1886

shares in question. According to the claimant's own theory the shares in question were at the time of vesting pledged to a German corporation, that is, to an "enemy" as defined in Section 2 of the Trading with the enemy Act, as amended. The exact amount owed by the American Company to the German Company which was secured by the pledge of the shares is in dispute. It is apparent from the evidence as summarized above that the claimant's own testimony at the hearing is in material conflict with his report to the Treasury Department and with Thiesing's report to the German Company. Since the claim to the possession of the shares must be disallowed regardless of the specific amount secured by the pledge thereof, there is no occasion for a present determination of the specific amount of indebtedness so secured—the record not warranting such a determination in any event.

Since it appears by the claimant's testimony that the Custodian is at least in the position of a pledgee of the shares and since admittedly no tender of any kind whatsoever has been made to the Custodian by the alleged pledgor, the claimant, the Custodian obviously would not be warranted in parting with either his possession of or his rights in the security.

In sum, the claimant by his own testimony is in the position of a defaulting pledgor who seeks a return of the pledged security without tender of performance of the principal obligation. Under these circumstances the claimant has not established, in the opinion of the Committee, such an "interest, right, or title" in the vested shares as entitles him to possession thereof as against the Custodian.

To the extent that the claimant seeks "forbearance" on the part of the Alien Property Custodian beyond his strict legal rights, the claimant is seeking relief which is patently beyond the jurisdiction of the Committee. To the extent that the claimant also complains of the supervision and control exercised over the New York Company by the Alien Property Custodian since the vesting of the shares in question and the related promissory notes, it is merely necessary to refer to the plenary power placed by Congress in the President—and his delegatee, the Alien Property Custodian—by Section 301 (1) (B) of the First War Powers Act of 1941, which provides that the President may:

"Investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, * * *."

Furthermore the pertinent Vesting Order No. 4123 recites that the Alien Property Custodian:

"HEREBY UNDERTAKES the direction, management, supervision and control of said business enterprise and property of any nature whatsoever situated in the United States, owned or controlled by, payable or deliverable to, or held on behalf of or on account of, or owing to said business enterprise, to the extent deemed necessary or advisable from time to time by the Alien Property Custodian."

In view of the very substantial interest held by the Germany Company, a foreign national, in the New York Company, the Custodian's supervision of the New York Company was obviously well within the plenary power under which the Custodian exercised his supervision of the Company.

Furthermore, by the terms of the Vesting Order the Custodian acquired the entire right, title, and interest in the shares regardless of the quantum of the enemy interest therein. *Stern* v. *Newton,* 39 N.Y.S. (2d) 593 (Sup. Ct. N. Y., 1943). And there is no evidence to the effect that his activities in relation to the Company were inconsistent with the proprietorship of the shares attained through such a Vesting Order.

The Committee has considered Public Law 322—adding Section 32 to the Trading with the enemy Act, as amended, and approved on March 8, 1946—in relation to this claim and concludes that it does not affect the conclusion set forth in this determination.

THEREFORE, for the purposes of this proceeding it is the determination of the Committee that the claimant, Paul Schulze-Berge, did not have, at the time of vesting, a title or interest in the vested property sufficient in law to support a right to recovery.

Accordingly, Claim No. 3331 is hereby disallowed.

May 13, 1946.

IN THE MATTER OF

RICHARD D. HEINS

Claim No. 1962. Docket No. 64

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 1962, dated March 31, 1944, filed by Richard D. Heins, pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 201, dated October 2, 1942 (8 Fed. Reg. 625) vested, among other things, all right, title and interest in United States Patent No. 2,151,398 as property of Fabrik Chemischer Praeparate, a national of a foreign country (Germany).

Notice of Claim No. 1962 alleges that the claimant, Richard D. Heins, "is the sole owner of the whole right, title and interest in and to said patent."

The Order for and Notice of Hearing was published on November 4, 1944 (9 Fed. Reg. 13172) and a copy was served upon the person designated in Section 2 of the Notice of Claim. Pursuant thereto a hearing was held on November 22, 1944, before the Committee at the New York Office of the Alien Property Custodian. Kenyon & Kenyon by Timothy E. Raftery appeared on behalf of the claimant. Harry J. Kimball appeared on behalf of American LaFrance Fomite Co., non-exclusive licensee under license from the Custodian, as intervenor, and John Ernest Roe, General Counsel, by Edward M. Murphy and David Williford appeared on behalf of the Alien Property Custodian. Proposed findings and supporting briefs were filed by the claimant on December 18, 1944, and by General Counsel on January 15, 1945. Claimant's reply brief was filed on February 27, 1945. A tentative determination disallowing the claim was issued on May 17, 1945. Proposals for modification of the tentative determination were filed by the claimant on July 11, 1945.

The transcript of the testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for reasons hereinafter set forth.

DETERMINATION

This proceeding concerns United States Patent No. 2,151,398, which was issued by the United States Patent Office on March 21, 1939, to Fabrik Chemischer Praeparate (a German firm hereinafter referred to as Fabrik), as assignee of the inventor Adolf Weissenborn of Germany, and which was vested by Vesting Order No. 201. The claimant, Richard D. Heins, contends in substance that by an assignment dated November 1, 1939, "full legal title passed" to him. General Counsel maintains that the assignment constituted a cloaking transaction for the purpose of concealing the beneficial interest of Fabrik.

The eligibility of the claimant as to nationality not being in dispute in this proceeding, the sole question is whether the claimant has sustained his burden [1] of proving that the legal and beneficial interest in the patent was transferred from Fabrik to him by the assignment of November 1939.

The pertinent facts are as follows. The claimant came to the United States from Germany in 1924 and he has been a naturalized citizen of this country since 1931. Before leaving Germany he was employed as a department manager of the drug and chemical firm of Meht and Daniel, Hamburg.

From 1924 to 1933 the claimant continued in the employ of Meht and Daniel as manager of its New York branch office. The New York office, as sales representative in the United States for various foreign manufacturers, imported from Fabrik a product called saponin. Early in 1933 the New York office of Meht and Daniel was discontinued. The claimant then became a sole trader in drugs and chemicals as "representative or sole agent for various concerns in various countries—foreign countries." As such he represented Fabrik as its sole selling agent in the United States for its product saponin—a product not related to the commodity covered by the patent in question. Saponin was manufactured in Germany and shipped to the United States on claimant's order. The relationship between the claimant and Fabrik in the sale of saponin continued until shipments were discontinued due to the outbreak of war in Europe in 1939.

In July 1937 Fabrik as assignee of the inventor made application for letters patent on an invention called "Schaumgeist" which relates to a method of producing air foam for various uses, particularly for fire extinguishing purposes. The "Schaumgeist" patent was issued to Fabrik on July 21, 1939 and is the subject of this proceeding.

Apparently the first reference by the claimant to "Schaumgeist" was in August 1937, about a month after Fabrik applied for the patent, for by letter dated August 25, 1937 to Fabrik, the claimant referred to "Schaumgeist" and indicated a desire to "act as sole representative in the U.S.A." It appears from the letter that the claimant had in mind the exploitation of "Schaumgeist" as a sales representative under an arrangement similar to that employed in the sale of saponin. The letter did not suggest an assignment or licensing of the patent. Fabrik's reply to the August 25th letter was unavailable as an exhibit. The claimant wrote again to Fabrik on October 5, 1937 stating in substance his plan of marketing "Schaumgeist." The tenor of the letter is consistent with the previously expressed desire on the part of the claimant to conclude an arrangement whereby claimant

[1] *Sturchler* v. *Hicks*, 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace*, 269 Fed. 827, 840 (S.D.N.Y. 1920); affirmed sub nom *Stoehr* v. *Wallace*, 255 U. S. 239 (1921); *Thorsch* v. *Miller*, 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley*, 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

was to act as a sales representative. Then, over a year later, on January 20, 1939, the claimant in a letter to Fabrik acknowledged receipt of various letters from Fabrik—which were unavailable as exhibits—, the receipt of a sample of "Schaumgeist", and further stated "you have given us the sole representation of your 'Schaumgeist' for the U.S.A. for one year."

It appears that the claimant then made an effort to market the product and advised Fabrik of his endeavors in two letters, one dated June 20, 1939 and another dated July 18, 1939. Apparently the only communication received by the claimant from Fabrik during this period was a postcard which was mentioned in the July 18th letter. The postcard was unavailable as an exhibit. Then Fabrik in a letter to the claimant, dated July 27, 1939, stated in substance that Pyrene Co. of London had indicated an interest in the "Schaumgeist" patent and that negotiations were pending which might result in the acquisition by Pyrene of the manufacturing rights for the United States, and stated further that "if, during these negotiations, anything should come up which might interfere with the American business, I shall advise you immediately." On August 18, 1939 the claimant replied to Fabrik's letter as follows:

"* * * * * * *

"You state that the English Pyrene Co. eventually has in mind to acquire the rights of manufacture also for the U.S.A. and if this is the case we sincerely trust, in view of the time and interest we have spent on this article already in former years and on the pioneer work which we have been doing since we took this matter up again and are still continuing, that you will not forget us in any arrangements which you might make with London for the U.S.A. You no doubt will understand that we some day would very much like to reap the fruit of our work and interest which incidently we shall always closely identify with your own ideas and interests.

"As you have already stated to us previously at various times, that you are willing to start manufacture of this Schaumgeist in the U.S.A., if you can be assured that your manufacturing process and your interest are fully protected, you having given us your confidence which we appreciate very much and which we shall fully live up to, we, of course, have more or less been looking forward to the day when all this would materialize under our management. In any event we still hope and trust that we will closely work together in the future and though it is really not necessary to say, as you know us well enough, we nevertheless wish to state once more that we shall protect and look fully after your interest. * * *."

The claimant's next letter to Fabrik of September 8, 1939 stated:

"* * * * * * *

"SCHAUMGEIST. Due to the unfortunate outbreak of hostilities in Europe it looks as if we have to abandon this article temporarily due to the fact that it will be impossible to secure any deliveries from you. On the other hand if the mail connection via Holland is not interrupted it might yet be possible that we can get together and eventually come to some sort of agreement and arrangement by which we can start manufacturing in the U.S.A. We would appreciate it very much if you will let us know what you think can be done and in the meantime, we remain * * *."

On October 11, 1939 Fabrik replied, stating:

"* * * * * * *

"I have instructed my Patent Attorneys * * * to examine into the form and manner of a transfer or assignment to your firm of my 'Schaumgeist' patent in the United States. The pertinent investigations are still being carried out at the present time so that I am not yet able to give you any definite news in this connection today. My Patent Attorneys, however, in all probability will get in touch with you directly, within a short time for I have instructed them to try to clear up this matter with you for the time being directly by letter. Therefore, when these gentlemen get in touch with you, you will know that they are acting upon my instructions.

"As I have already confirmed to you, I would desire, in principle, that the manufacture of 'Schaumgeist' be taken up by your firm; however, this matter is not quite so simple for there is required in this connection some technical knowledge and later on, it will be absolutely necessary to again discuss these matters, namely as soon as times have become more settled. It is not possible to unduly hurry the matter because everything must be taken care of in the proper manner. Above all, I would like to ask you to kindly advise me of your opinion, under the conditions prevailing at the present time and possibly with a view to the future development of the foam process, regarding the sales possibilities of 'Schuamgeist.' In this connection, there would, of course, also have to be taken into consideration the sale to the Pyrene in Newark.

"For the time being, in the event that there should be an urgent need, we will be able, in my opinion, to also ship 'Schaumgeist' to the United States.

"In the meantime, you have heard of the manner in which this can be done and I trust that this will not be subject to any difficulties or interference in the near future."

We cannot find a contract to assign the patent in the correspondence quoted above. It clearly appears to be merely an exploration of the possibility of manufacturing "Schaumgeist" in the United States.

Then on November 10, 1939 the claimant wrote Fabrik at some length discussing in the letter unrelated matters but in the postscript to the letter the claimant acknowledged receipt of Fabrik's letter of October 11th and stated:

"* * * * * * *

"In reply to our letter of September 8th we received your letter of October 11th which arrived on November 6th the contents of which had our careful attention. We have taken note that you have instructed your patent attorneys to look into the matter of assigning your Schaumgeist patent to us. We furthermore have taken note that you requested them to get in touch with us direct and we shall therefore await to hear further from them."

No further correspondence passed between claimant and Fabrik or the patent attorneys of Fabrik until sometime in February 1940 when, as claimant testified, he received through the mail an envelope containing an assignment to him of the patent in question. He testified that the face of the envelope carried no identification of the sender and that there was no letter of transmittal. Thus the assignment came to the claimant as

somewhat of a surprise, without an accompanying letter of explanation and without the instructions or know-how for its utilization. The claimant testified that he did not correspond with Fabrik for the purpose of clarifying the transaction because he represented various concerns in foreign countries other than Germany and feared that further correspondence with Fabrik in Germany might result in his being placed on a "black list." The assignment was recorded by the claimant in the United States Patent Office on February 21, 1940 and recites as consideration for the transfer the sum of one dollar. Admittedly the claimant did not at any time either agree to pay, or pay, any consideration for the assignment.

Since the correspondence between the parties gives ample indication of Fabrik's judgment that the product had commercial possibilities and ample indication that Fabrik was proceeding with deliberation and caution, the receipt by the claimant of an unrequested, unpaid-for, and not-to-be-paid-for assignment, is in sharp contrast to the normal earmarks of a bona fide arms-length sale and purchase but is consistent with the theory that the claimant was to be in respect of the patent merely the trusted agent of Fabrik.

No helpful inference can be drawn, in the opinion of the Committee, from the claimant's subsequent activity. He apparently did not attempt to exploit "Schaumgeist" until late in 1942 or early in 1943 when he discussed the sale of the patent with Pyrene Co. of New Jersey. He testified that he was then offered $5,000. for the patent and countered with an offer to sell for $20,000. These negotiations for the sale to Pyrene Co. were discontinued as a result of the vesting of the patent by the Alien Property Custodian in October 1942. This activity of the claimant appears to be as consistent with the theory that he was acting as an agent of Fabrik as with the theory that he had acquired by virtue of the assignment an unencumbered proprietorship of the patent.

We think it clear from the evidence that the transfer of the legal title to the claimant was not intended to carry with it the beneficial interest therein. The transfer appears to have been made, in the opinion of the Committee, for the purpose of enabling the claimant to act effectively as Fabrik's agent in the manufacturing and selling of "Schaumgeist" in the United States. This does not necessarily mean or imply that the claimant planned to act as a "cloak" in the sense of assisting to create a situation that would conceal Fabrik's interest in the patent in order to avoid its seizure by the Government in the event of war. There is, however, a complete absence of that bargaining as to terms and conditions such as price and method of payment thereof which would normally take place if it had been intended to transfer the beneficial as well as the legal interest. In other words, the transfer was not, in the opinion of the Committee, either a gift, or a sales transaction based upon the ordinary considerations of mutual commercial advantage but an arrangement whereby Fabrik could manufacture and sell "Schaumgeist" in the United States through its established agent and thus salvage a value otherwise to be lost as a result of the embargo and the breakdown of communications. We conclude, therefore, that the claimant was at least a constructive trustee of the patent for Fabrik, and as such in no better position to establish his asserted personal ownership than if he were admittedly acting as a trustee.

The claimant's chief contention is that he has carried his burden of proof by showing the execution and delivery of the instrument of assignment. As related above, however, there are other facts in the record which have convinced the Committee that Fabrik did not intend to convey the

beneficial ownership to the claimant. To hold otherwise would be to blind oneself to the realities of the situation; the delivery of an instrument purporting to convey a legal title is not an uncommon practice even in the absence of blockades, disruption of communications and the imminence of war.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Richard D. Heins, had at the date of vesting no title or interest in the claimed patent sufficient in law to support a right of recovery.

Accordingly, Claim No. 1962 is hereby disallowed.

AUGUST 3, 1945.

IN THE MATTER OF

ESTATE OF HERMANN M. KIND; GRAEF & SCHMIDT, INC.

Docket No. 3. Claim No. 401

STATEMENT OF THE CASE

This proceeding was commenced upon Notice of Claim filed March 2, 1943, by Hermann H. Kind, co-trustee of the Estate of Hermann M. Kind, pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290), which were amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 770, dated January 27, 1943 (8 Fed. Reg. 2453), vested 100 shares of the common capital stock of Graef & Schmidt, Inc., a New York corporation. The order recites, among other things, findings that the said 100 shares of stock, although registered in the names of Johanna M. Kind, Emilio (sometimes known as "Emil") Iwersen and Hermann H. Kind, as trustees of the Estate of Hermann Kind, are beneficially owned by J. A. Henckels, Kommandit Gesellschaft; and that J. A. Henckels, Kommandit Gesellschaft, having its principal place of business in Solingen, Germany, is a national of a designated enemy country (Germany).

The claimant alleges that the Estate of Hermann Kind is and has been since November 6, 1939 the legal and beneficial owner of the shares so vested.

The Order for and Notice of the Hearing was published on September 2, 1943 (8 Fed. Reg. 12107) and copies thereof were served by registered mail on the persons designated in Section 2 of the Notice of Claim. A hearing on the claim was held before the Vested Property Claims Committee in Room 411, National Press Building, Washington, D. C. on September 23–24, 1943. Briefs were filed by the claimant and by General Counsel on November 3, 1943; a tentative determination was issued by the Committee on January 18, 1944; claimant's proposal for modification of the tentative determination, and a brief in support of the proposed modification were received on February 11; and the General Counsel's brief in opposition to the proposed modification was received on March 4, 1944.

O'Connor and Farber, Esqs., appeared by Arnold T. Koch, Esq., on behalf of the claimant. The General Counsel, Office of Alien Property Custodian, by Messrs. Irwin L. Langbein and Elmer Cunningham, appeared on behalf of the Custodian.

The transcript of the testimony at the hearing and all exhibits admitted

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into evidence are hereby incorporated by reference into and constitute the basis of this determination.

DETERMINATION

The parties to this proceeding are, for the purpose of the proceeding, in substantial accord on the facts occurring prior to 1939. The validity of the claim to ownership of the vested shares depends principally upon the interpretation to be attributed to certain action taken in and after 1939 by the Estate of Hermann Kind, hereinafter referred to as the Estate, and J. A. Henckels, Kommandit Gesellschaft, a German partnership, hereinafter referred to as Henckels, K. G. The material facts occurring prior to 1939 may be summarized as follows:

Hermann M. Kind, the father of the claimant Hermann H. Kind, became a naturalized citizen of the United States in 1908. At the time of his death in 1928 he resided in Richmond County, New York. His will, duly admitted to probate, provided that his Estate be placed in trust with directions that the income therefrom be paid to his wife during her lifetime and on her death, the principal be divided among his three children or their survivors. All the beneficiaries were and are residents and citizens of the United States. The following were appointed trustees of the Estate; Johanna M. Kind, the testator's widow; Montague Lessler, an attorney of New York; and Emilio Iwersen, a business associate. The testator's son, Hermann H. Kind became also a trustee in 1937. Trustee Lessler died in 1939 and a successor was not appointed. Trustee Iwersen is now and has been since 1936 in Germany and some time in 1939 made application for naturalization as a German citizen. Since Lessler's death in 1939 the only active trustee here has been Hermann H. Kind.

The assets of the Estate, among other things, included 50 percent of the shares of Graef & Schmidt, Inc. (a corporation no longer in existence and not to be confused with the Graef & Schmidt, Inc. now in existence and whose stock is the subject matter of this claim) and 50 percent of the shares of J. A. Henckels, Inc. both New York corporations, and both engaged in the importation and sale of cutlery. The other 50 percent of the stock of these corporations was owned by Henckels, K. G. The Estate in 1928 sold its stock in both corporations to Henckels, K. G. for approximately $170,000.00 of which Henckels, K. G. paid at the time of the transfer approximately $37,000.00 and agreed to pay the remainder at the rate of $25,000.00 annually. The purchaser also agreed to pay interest at the rate of 6 percent per annum on all unpaid balances.

After the death of Hermann M. Kind there was paid Graef & Schmidt, Inc. approximately $100,000.00 from certain insurance policies on the life of Hermann M. Kind, which amount was distributed as a cash dividend, each of the two shareholders receiving approximately $50,000.00. The Estate loaned to Graef & Schmidt, Inc., the $50,000.00 plus the $37,000.00 paid by Henckels, K. G. under the stock purchase agreement. The Estate's total loan of $87,000.00 was reduced by payments in 1928 to $58,000.00.

In 1929 Graef & Schmidt, Inc. merged into J. A. Henckels, Inc. (hereinafter referred to as Henckels, Inc.) and the surviving corporation assumed the debt. Further loans from the Estate to Henckels, Inc. during 1929 increased the debt to $99,000.00 which Henckels, Inc., acknowledged and agreed to pay by 1934. In 1929 Henckels, K. G. which owed the Estate $55,000.00 on the original stock purchase agreement, guaranteed payment of the Henckels, Inc., debt to the Estate of $99,000.00.

In 1934 it was agreed by the Estate, Henckels, Inc. and Henckels, K. G. that the stock in Henckels, Inc. owned by Henckels, K. G. be pledged as security for the joint debts of $99,000.00 and $55,000.00 and the payment thereof be extended to 1937. The agreement further provided that in the event of insolvency or of the impossibility of making the required payments the pledged shares, after notice of default to the escrow holder, namely, Iwersen, were to be sold at public auction in New York upon notice by publication. The right to redeem was reserved in Henckels, K. G., and the pledge agreement further provided that if the Estate purchased the shares at the sale and operated the business the Estate undertook to satisfy all claims including its own and upon satisfaction thereof to re-transfer the shares to Henckels, K. G. or its nominee. This "reversionary" interest of Henckels, K. G. under the 1934 pledge agreement is a significant factor in the interpretation of the action of the Estate and Henckels, K. G. after 1938.

In 1935 Henckels, Inc. was either liquidated and dissolved or changed its name to Fifth Avenue Cutlery, Inc. Fifth Avenue Cutlery, Inc., carried on the retail business and a new Graef & Schmidt, Inc., was then organized to carry on the other activities of Henckels, Inc. Henckels, Inc., in liquidation, paid its debt of $99,000.00 to the Estate in merchandise. The merchandise was then "lent" by the Estate to Iwersen who transferred it to Graef & Schmidt, Inc. in exchange for all of the stock of Graef & Schmidt, Inc. As a part of the same transaction, Iwersen assigned to Graef & Schmidt, Inc. his newly executed agency agreement covering the sale in the United States of Henckels, K. G. cutlery. As a result Iwersen became the owner of record of all the stock of Graef & Schmidt, Inc. but admittedly held the stock as nominee for Henckels, K. G. and in escrow as security for the total debt of $154,000.00. The 1934 pledge agreement was continued in full force and effect by express provision of one of the 1935 reorganization contracts and Graef & Schmidt, Inc. by the same contract undertook to pay the $99,000.00 debt to the Estate. We note that although the parties to this proceeding did not dispute the existence of this undertaking the 1938–1939 balance sheets of Graef & Schmidt, Inc. as reported by Arthur Young & Company did not reflect such undertaking.

The joint debt to the Estate was reduced to $130,000.00 in 1937 but no further payment of principal was made until after a new liquidation of Graef & Schmidt, Inc. was commenced in December 1940.

Thus, we find, for the purpose of this proceeding, that immediately prior to January 1939, Henckels, K. G., a German partnership, owned all of the shares of Graef & Schmidt, Inc., a New York corporation, and that these shares were pledged as security on a debt jointly owed by Henckels, K. G., Iwersen and Graef & Schmidt, Inc. to the Estate of Hermann M. Kind, all of whose beneficiaries and whose active trustee here were residents and citizens of the United States.

The area of substantial disagreement between the parties to this proceeding covers the events transpiring after 1938. The sharp disagreement on the interpretation of the events makes necessary the following extensive recital of the events and the Committee's interpretation of them.

By a letter [1] dated October 24, 1939 to Henckels, K. G. and Iwersen,

[1] "We have been consulted by Mr. Hermann H. Kind with reference to protecting the interests of the Estate of Hermann Kind in the collateral pledged as security for the indebtedness of J. A. Henckels Gesellschaft and Emilio Iwersen to the Estate.

"We understand that a major portion of the business done by the American and Canadian

O'Connor & Farber, counsel for the Estate, apparently offered on behalf of the Estate to release the debt in exchange for the transfer of the pledged shares. By cable dated November 6, 1939 Henckels, K. G. and Iwersen responded:

"We accept offer contained in your letter of October 24th".

The claimant's basic argument is that the letter-cable of October 24 and November 6, 1939 constituted a contract effecting a transfer of the legal and beneficial interest in the shares. General Counsel's basic argument is that other correspondence exchanged prior to, concurrently with, and subsequent to these dates establishes that the parties intended the letter-cable exchange of October-November 1939 as a cloak under which Henckels, K. G. retained the beneficial ownership of the stock.

Following a consideration of all the evidence, the Committee concludes that the parties to the correspondence did not intend to effect a transfer of the legal and beneficial interest in the stock, but, on the contrary, intended, under the cloak of an apparent transfer, to conceal the retention in Henckels, K. G. of its ownership, although the record does contain items of evidence which, if isolated and weighed apart from the entire record, tend to show that the parties intended a bona fide transfer of the shares in consideration of the extinguishment of the debt. There is, moreover, particularly in the correspondence which is hereinafter set forth in detail, an element of irrationality, which leaves room for a wide variation of interpretation. Because of the conflicting nature of some of the evidence and because of this element of irrationality in the correspondence, the Committee was able to find the actual intention of the parties only after an exhaustive study of each item in the record and a consideration of each

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Henckels corporations consists of the sale of imported German goods. As a result of the war, the trustees here and we, as their attorneys, are of the opinion that the security which the Estate holds is in jeopardy.

"We understand that the total indebtedness owed by the German partnership and Mr. Iwersen has been reduced to $130,000.00 plus accrued interest and that default has been made in the payments of $2,000.00 per month agreed to be paid to the Estate.

"We have given consideration to the available remedies of the Estate. The Estate may foreclose on the collateral pledged. An alternative method of procedure would be for the Estate and you to agree upon a release of the interest of the German partnership in the pledged securities in consideration of the discharge of the remaining indebtedness plus accrued interest.

"We believe that the latter proposition should appeal to the German partnership because if the Estate should be obliged to foreclose by public sale, there is a likelihood of our not being able to obtain an independent bid of $130,000.00. If less than that amount is bid, the Estate would have a claim for the deficiency.

"Accordingly, we are authorized on behalf of the Estate of Hermann Kind to make the following offer:

"The Estate of Hermann Kind hereby offers to release the indebtedness now reduced to $130,000.00 plus accrued interest owed by J. A. Henckels Kommandit Gesellschaft and Emilio Iwersen to the Estate of Hermann Kind in consideration of the release and transfer by J. A. Henckels Kommandit Gesellschaft to the Estate of Hermann Kind of all of its right, title and interest in and to the following securities now pledged with the Estate of Hermann Kind as collateral security for said indebtedness:

"100 shares of the capital stock of Graef & Schmidt, Inc., New York, standing in the name of Emil Iwersen;

"2,000 shares of the capital stock of Fifth Avenue Cutlery Shop, Inc., New York, standing in the name of Dr. Paul Beckmann as trustee;

"350 shares of the capital stock of J. A. Henckels, Ltd., Canada, standing in the name of Dr. Paul Beckmann as trustee.

"Upon the acceptance by you, this offer shall become a binding agreement between you and the Estate. Thereupon, it is understood that the Estate may take whatever steps are deemed necessary or advisable to transfer said securities to its name or the name of its trustees. Such agreement shall operate as a release of both J. A. Henckels, Kommandit Gesellschaft and Emilio Iwersen individually of their obligations to the Estate respecting said $130,000.00 indebtedness and you will agree to execute or procure such documents as may be required to effect a transfer of said securities on the books of the respective corporations.

"If this offer is acceptable to you, kindly indicate your acceptance as follows:

"'O'Connor & Farber, 120 Broadway, New York.
We accept offer contained in your letter October 24th.
J. A. Henckels Kommandit Gesellschaft—Emilio Iwersen.'

"We trust that this offer will be acceptable to you and that we may receive your cabled reply immediately."

item in its relation to all others. The degree of conflict and of irrationality is, in itself, persuasive evidence that the parties intended to retain and conceal and not to transfer and expose. The Committee has set out hereinafter in verbatim fashion not all the material exhibits but a sufficient number to illustrate the type of evidence upon which the Committee bases its finding.

The correspondence cannot be adequately weighed without a fairly detailed description of the authors, their relationship inter se and to the business enterprise. Most of the correspondence emanated from Emilio Iwersen in Germany. It appears that Iwersen dominated the affairs of the Estate and the business enterprise. Born in Mexico, he entered the United States in about 1920 and became a naturalized citizen of the United States in about 1923. He became associated with the old Graef & Schmidt corporation shortly after his arrival here, and at the time of the death of Hermann M. Kind in 1928, he was President of the Company. Hermann M. Kind's will designated him as a trustee of the Estate. When he left for Germany in 1936, he was president of the new Graef & Schmidt, Inc. and continued to hold that office until late in 1940. The corporation continued to pay him a salary until 1941. After his arrival in Germany he became a managing partner of Henckels, K. G. and some time in 1939 he applied for German citizenship. His relationship to the Estate can be best described by Hermann H. Kind's testimony: "* * * and if you will look at the background of Mr. Iwersen's position toward us, he was the boss, he had always been the boss of the Estate affairs." Iwersen was seemingly the key character and the dominant character in the Estate affairs and the affairs of Graef & Schmidt and its predecessors following the death of Hermann M. Kind. He was not available as a witness in this proceeding and it is idle to speculate on what the effect of his testimony would have been.

Hermann H. Kind, born in the United States, was, in 1927, employed at the age of 25 by his father as a salesman for the original Graef & Schmidt, Inc. He continued as an employee of the enterprise and became president in 1940. Kind's status as president was defined by Iwersen in a letter to him dated January 20, 1940 as follows:

"We preferred to make you President of the company over there solely because you have to represent the interests of the Estate. But in spite of this position, Mr. Voss is completely responsible for the purely commercial management of the firm over there."

Again on May 9, 1940, Iwersen wrote to Voss:

"It is purely a matter of form that I do no longer appear officially as President and I ask you to please not forget this now as before, I am very closely associated with you not only as trustee but also in my capacity as manager, even though officially I do not appear any more."

It will be noted that the Iwersen letters, quoted immediately above, were written after the date on which, according to claimant's contention, the entire legal and beneficial interest in the shares had been transferred to the Estate. The Committee believes that if the shares had been so transferred, the response to these letters would have been immediate, direct, and forceful, disabusing Iwersen of his belief that he was entitled to issue such peremptory mandates. The record is void of such response. There is ample additional evidence to support the conclusion that Iwersen's domination of Kind in Estate matters was paralleled by his domination of

Kind in the affairs of Graef & Schmidt, Inc., and that this domination continued after the date of the alleged transfer of the shares. There is some evidence tending to show that Kind's subservient attitude towards Iwersen was caused by Kind's inexperience and the fact that he was dealing with an insistent, aggressive, and experienced superior. Subservience so caused is, however, not only not inconsistent with a finding that Henckels, K. G. retained its ownership of the shares, but also may tend to support the finding by explaining, at least partially, why Kind assented to participate in cloaking the Henckels, K. G. ownership.

Many of Iwersen's letters from Germany were addressed to Arthur Voss. Voss was initially employed by Hermann M. Kind as Assistant Sales Manager of the old Graef & Schmidt, Inc. in 1926. He became a naturalized citizen of the United States in 1934. Upon Iwersen's departure in 1936, Voss took charge of the new Graef & Schmidt, Inc. as Executive Vice-President; all policy problems were submitted in advance to Iwersen and subsequent to the summer of 1939, Voss likewise consulted Hermann H. Kind on such problems. There is ample evidence indicative of Iwersen's domination of Voss in the affairs of Graef & Schmidt, Inc.

Iwersen also addressed letters from Germany to Richard Bonner. Bonner was the treasurer and bookkeeper of the new Graef & Schmidt, Inc. subsequent to 1938; was completely familiar with the relationship of Iwersen to Voss and Kind, and acted accordingly. He was not a witness at the hearing.

It appears from the evidence that at least as early as August 1939 Iwersen was aware of the advisability of making some adjustments to changing conditions brought about by the disturbed international situation and had corresponded on the subject with Voss and Kind. A letter [2] dated September 26, 1939 from Iwersen to Voss, containing references to several earlier communications, pertained to a plan to avoid seizure by the United States government of the Graef & Schmidt stock in the event of war and the paragraph marked (6) of that letter indicated that a plan had been defined to the mutual satisfaction of Kind, his mother and Iwersen by August 1939. Any other conclusion would seem

[2] "For good order's sake I should like to acknowledge the exchange of telegrams which took place after my last letters Nos. 251 and 252:

"(1) My letter No. 251 had been sent off and as you can imagine I began to think about details, *especially as to how the enterprises over there could be saved from a foreign seizure in spite of the fact that you had no access to my safe.*—(Italics supplied)

"* * * My first duty is naturally to protect the ESTATE OF HERMANN KIND. For this reason I ordered by telegraph the *judicial* seizure of all three firms for the ESTATE which is entirely feasible on the basis of the contracts concluded.

"I take this opportunity to tell you most expressly that I have, of course, consulted the Foreign Exchange Control beforehand concerning all of my steps, to which they gave their approval, *after I gave the assurance that the ESTATE OF HERMANN KIND would only make use of the seizure in so far as it was necessary to satisfy its claims against the firm and against me. In other words: I assured them that my co-trustees merit full confidence and that at the end of the war, the ESTATE OF HERMANN KIND would gladly give a fair settlement of accounts.* (Italics supplied)

"Please have this letter with all details read by Hermann so that he will know my remarks. I should like to emphasize especially that I gave my instructions with the fullest confidence in Hermann and in the hope that he will not allow himself to be influenced in this matter either now or later by his brothers-in-law or other persons.

* * * * * * *

"(6) Please give my regards to all the employees over there and especially to Hermann. I shall not answer his letter No. 50 of August 18 and his personal letter of August 16 since there is little point. *I have taken due note of the contents and have confidence that he will now take care with you of all pending matters over there in such manner as our mutual interest demands.—Please ask Hermann also to thank his mother for her letter of August 18 and to assure her once more that I have now turned the whole matter over to her son, Hermann, in good faith and with the greatest confidence and that everything will be done to avoid any losses.* (Italics supplied)

"I am limiting my remarks to the most important matters at the moment and know that you will understand if I only mention the most pressing business matters."

to disregard the obvious meaning of the following three statements contained therein:

"I began to think about details, *especially as to how the enterprises over there could be saved from a foreign seizure in spite of the fact that you had no access to my safe.*" (Italics supplied.)

"In other words: *I assured them that my co-trustees merit full confidence and that at the end of the war, the Estate of Hermann Kind would clearly give a fair settlement of accounts.*" (Italics supplied.)

"Please give my regards to all employees over there and especially to Hermann. I shall not answer his letter No. 50 of August 18 and his personal letter of August 16 since there is little point. *I have taken due note of the contents and have confidence that he will now take care with you of all pending matters over there in such manner as our mutual interests demand.*" (Italics supplied.)

It is reasonable to infer that the seizure of Graef & Schmidt, Inc., Canada, by the Canadian Alien Property Custodian in September 1939 caused the parties to focus their attention immediately upon the adoption of a specific device to cloak the German interest in Graef & Schmidt, Inc., New York. By letter dated October 5, 1939, Voss informed Iwersen of the Canadian seizure and stated:

"The Graef & Schmidt, Inc. and the Fifth Avenue Cutlery Shop, Inc. affair; better expressed; the proper procedure to be followed with these two firms depends to some extent on the result in Canada. If we are able to settle the Canadian affair our attorneys here intend to make a simple transfer of the firms to the Estate to extinguish the debt. If, however, we should not succeed and the Canadian Alien Property Custodian insists upon an auction there it may be necessary to resort to a public auction of all three firms. Our lawyers have no fears in this connection, but I should like to avoid this if possible. In any case nothing will be done in this connection without our having informed you beforehand by wire or without your permission.

"Of course these are present plans. We have considered many others and it remains to be seen whether we will stay by this plan."

Disposition of the claim to the legal and beneficial interest in the vested property pivots on this finding that Iwersen, Voss, Kind and Kind's mother had an understanding prior to October 24, 1939 to the end that the interest of Henckels, K. G. be retained by Henckels, K. G. and cloaked. It is not to be expected that an intent to cloak will be expressed as explicitly and lucidly as an intent to engage in a transaction within the law. On the contrary, one expects an intent to cloak to be wrapped within obscure generalities, meaningless to the first glance of an investigator. Similarly the presence in correspondence of what today is neatly described as "double talk" is persuasive evidence that the parties to the correspondence were not engaged in a normal business transaction within the law. Iwersen's awareness of the need of cautious statement and obscure generalities is best illustrated by his letter to Kind, dated January 20, 1940 (see footnote 7 infra) in which, in answer to a very clear radiogram he states:

"* * * We were very much surprised that you telegramed about such a thing at all. I must say we never thought it possible that you could

be so clumsy. We did not want any official documents from the Estate but as letter (January 6, 1940) explained clearly enough we simply wanted a private assurance from you. Therefore, a couple of lines would have sufficed, as, for example 'of course we will agree to all points mentioned in your letter (January 6, 1940)' * * *."

The correspondence illustrated by Iwersen's letter to Voss, dated September 26, (see footnote 2 supra) is similarly clandestine in its use of generalities seemingly devised to obscure the underlying thought. The claimant maintains that the reference in the September 26 letter to "our mutual interests" is a reference to the mutual interests of Henckels, K. G. and the Estate as creditors of Graef & Schmidt, Inc. It was hardly beyond Iwersen's competence to so state clearly. This he failed to do. The committee believes that the reference, when considered in the light of the entire letter, was to some interest of Henckels, K. G. over and beyond its interest as a debtor to the Estate and a creditor of Graef & Schmidt, Inc.

The purported offer of the Estate, through O'Connor & Farber, of October 24, 1939 [3] must therefore be considered in the light of the relationship between Iwersen, Voss and Kind, the previous correspondence pertaining to a plan to avoid seizure, and the consciousness of the need to accelerate the adoption of a specific device.

On November 6, 1939, the date on which Iwersen and Henckels, K. G. cabled what purported to be an absolute acceptance to O'Connor & Farber, Iwersen wrote to O'Connor & Farber confirming the cable but adding the following statement:

"If we have given our unconditional consent it is with the clear understanding that the Estate will pay itself by administering or possibly liquidating the corporations of our property, and, therefore, all values saved over and above the claims of the Estate of Hermann Kind will be held at my disposal or at the disposal of J. A. Henckels, K. G. as the interests may be. In due time we expect a full and detailed statement of all transactions made."

Iwersen then on the following day, November 7, 1939, manifested his understanding of the meaning of the letter-cable exchange of October 24-November 6, 1939 by writing to Voss as follows:

"The facts are now as follows: J. A. Henckels and I with great faith have placed the fate of our interests and the responsibility in the hands of yourself and Hermann. The terrible complicated situation which effects the interests of so many distinct individuals should cause you to do a lot of reflecting and figuring. If we unhesitatingly place this great trust in you, it is on account of the close connections which have existed for so long between the factory here and the business over there. Our confident collaboration goes back to the year 1883. It is entirely evident that when the time comes we shall expect an exact reckoning with respect to the events which will now take place and the fullest responsibility now rests on the shoulders of Hermann Kind. I should like sincerely to ask both you and Hermann always to consider all steps which you take so as to protect our interests here. I gave a pledge to the Foreign Exchange authorities that our firms over there would be in the best of protection in

[3] See Footnote No. 1.

the hands of the trustees and that nothing will occur which we might later have cause to regret."

This understanding as expressed by Iwersen on November 7, 1939 was unmistakably consistent with the desire manifested by the parties earlier to cloak the German ownership. This letter cannot reasonably be interpreted as referring to a creditor's insistence on payment. Repeated reading of this and similar correspondence exchanged prior to, concurrently with and subsequent to the letter-cable exchange of October 24–November 6, strengthens the belief that Iwersen knew: that he was acting outside of the law; that the effectiveness of the cloaking was conditioned on the "great faith" and "great trust" reposed by him in Voss and in Kind; and that routine legal sanctions and procedures would not be available to him if Voss and Kind violated the "great faith" and "great trust" so reposed. Further proof that Iwersen was disposed to employ cloaking devices is the following statement in his letter of November 13, 1939 to Voss:

"From the paragraph in your letter I gather that the Canadian government has become aware that the Estate holds as collateral not only the Canadian shares but also the shares of Graef & Schmidt, Inc. and Fifth Avenue Cutlery Shop, Inc. for only if the Canadian government knows these facts can it insist that all three firms be auctioned before it hands over the shares to the Estate of Hermann Kind. *If you have made these disclosures to the Canadian government, either through your lawyer or directly, then a grave mistake has, of course been made.*" (Italics supplied)

It appears that Voss knew that Iwersen understood the true intendment of the letter-cable exchange of October 24–November 6 because in his letter of November 14, 1939 to Iwersen he did not say that Iwersen (in his letter dated November 6, 1939 to O'Connor & Farber) had inserted a qualification materially varying the offer of the Estate, a response to be expected if the transaction were a normal and within-the-law negotiation at arms length. On the contrary he emphasized in the letter of November 14, 1939 what he asserted to be the reaction of the lawyers to the qualification, implying that he, Voss, understood the qualification,[4] because it was in accord with the understanding of the parties.

On November 28, 1939 O'Connor & Farber in a letter to Iwersen restated the original offer, stated that Iwersen's qualification of November 6 was not contemplated by the original offer, and requested a retraction of

[4] "The lawyer's firm was very glad to receive your letter and I was informed that they will proceed to draw up the necessary papers as soon as possible. Evidently, they are very busy and it is for this reason that it cannot be done at once. I expect, however, to have everything ready during the course of the next week.

"I was informed that they do not like the last paragraph on the first page of your letter of November 6, addressed to them, reading as follows: 'If we have given our unconditional consent it is with the clear understanding * * *'. They feel that this would give an opening to a possible U. S. A. Alien Property Custodian and they will write to you to this effect.

"I was told that in a way they were very much pleased that you have written this paragraph as, in their opinion, it makes the whole transaction look very genuine but as stated before, they wish that it would be eliminated.

"* * * The reason why I have not written during the period of October 5 to October 31 is that everything was quite unsettled with our lawyers. They had changed their plans almost from day to day and it would have been really unpractical and unwise to write to you their thoughts. It would have only excited you and would have led to nothing else. Finally on October 24 their opinions had crystallized and they submitted their plans to you.

"During the time I had received your letters No. 255 and 256 to 259, the first one on October 19 and the rest on October 24th. Hermann was away from New York from October 15 to October 26 and before answering these letters I wanted to be sure to have an opportunity to talk the contents over with him.

"It is furthermore to be considered that during those October days everybody here was almost convinced that after the Polish campaign the war would come to a close and that our activities could be taken up again in a regular way. Unfortunately, we were all wrong."

the qualification. Iwersen had written to Voss on November 7, 1939 stating:

"J. A. Henckels and I with great faith have placed the fate of our interests and the responsibility in the hands of yourself and Hermann." (For full quotation see page 10).

And then on November 28th, the same day on which O'Connor & Farber requested of Iwersen the retraction of the qualification, Voss by letter to Iwersen stated:

"You can fully rely upon the fact that both Hermann and I in cooperation with Mr. Bonner carefully discuss and weigh all steps that we take and that everything is being done to protect the interests of the Henckels firm. * * * Finally, I would like to add that there is perfect understanding between us (Hermann and Voss) and that all matters that come up are discussed and only after a thorough discussion a final decision is made."

Having the assurance of Kind and Voss "that everything is being done to protect the interests of the Henckels firm", Iwersen gave to O'Connor & Farber the requested unqualified release. Again at this point Iwersen, Kind and Voss were unmistakably treating the correspondence through the intermediary, the law firm, merely as a cloaking device while expressing to each other by direct correspondence their mutual intention not to disturb the German ownership. Iwersen's belief that his correspondence to O'Connor & Farber was merely "window dressing" is further illustrated by his statement to Voss by letter dated November 29, 1939:

"Our firm here and I have accepted the proposition of Farber and as the shares have now been transferred we (the firm and I) should receive a receipt in full, and, simultaneously, *also the assurance that whatever 'Ueberschuesse' (Excess, balance or surplus), which remain after payment of our debts, will be restored to us;*" (Italics supplied)

And by his statement in a letter to Voss dated two days later, December 1, 1939,

"Referring to letter No. 319 (November 14, 1939) I am sending you enclosed a version of my letter of November 6 to O'Connor & Farber in which I omitted the last paragraph (the qualification). I am doing this already today because I am anxious that you get this letter soon. Maybe it would be a good thing for Farber to have both letters so that he can use whichever one he considers proper;"

a statement clearly indicating that the use of an unconditional release of the interest of Henckels, K. G. would in no wise affect the previous understanding of the parties.

The claimant contends that Voss was not authorized to represent the trustees of the Estate. Under the view taken by the Committee of the transactions which commenced as early as August 1939, no question arises as to Voss's authority to act as a representative of the trustees, Kind's assent to the cloaking device did not require affirmative action by the trustees. To be effective, however, it did require that Kind at no time take seriously the appearance of a transfer created by the October 24–November 6, 1939 letter-cable. Kind's knowledge of and assent to Voss's statements, shown by his act of initialling some of Voss's letters and by other evidence to the same end, established his direct assent to the subterfuge of the

transfer of the stock. Many of Voss's letters to Iwersen were initialled by Kind including Voss's letter of November 28, 1939 which states:

"Finally I would like to add that there is perfect understanding between us (Hermann and Voss) and that all matters that come up are discussed and only after a thorough discussion a final decision is made."

And the letter from Voss to Iwersen dated December 12, 1939, likewise initialled by Kind, which states:

"Everything which happens here is discussed with Hermann and Mr. Bonner and both of them read your letters as well as mine, in fact your letters are not answered before we have a thorough discussion about them and the answers have been given."

Finally on December 18, 1939 Kind wrote to Iwersen:

"I should like to state again that Mr. Voss, Mr. Bonner and I have constantly been working in cooperation and I assure you that every letter from you and J. A. Henckels since the beginning of the war has been carefully studied by me. The same is true of every letter which was written to you by Mr. Voss and Mr. Bonner."

We conclude, therefore, that Iwersen believed and was justified in believing that Voss's letters represented, unless otherwise indicated therein, the understanding of both Voss and Kind. By Kind's testimony he alone was the active trustee of the Estate in the United States, his mother relying upon his judgment. For the purpose of this proceeding, therefore, we conclude that Kind, as the sole active trustee here, not only had knowledge of but assented to the subterfuge.

On January 6, 1940 Iwersen wrote two letters, one to Voss and one to Kind, the letters containing cross-references.[5] In these letters Iwersen

[5] The letter from Iwersen to Voss reads:

"The O'Connor & Farber firm works so slowly in its thoroughness that I am almost scared. In the meantime the transfer of all the shares to the Estate will have taken place and I hope that I shall then receive the receipt showing that the obligations of J. A. Henckels and myself in the total amount of $130,000.00 have been satisfied. Meanwhile our letter of December 12 will have arrived over there so that the small mistake which came about when I made reservations in a letter to O'Connor & Farber has been eliminated.

"Hermann has not answered my letter No. 1 of November 29, 1939 yet. However, I did receive his letter of December 5 in which he assured me briefly that you and he are cooperating closely; but most of his letter was concerned with purely private matters.

"On November 28 you wrote me a letter without a number from which I see that you understand completely that the transfer of the shares in place of payment is a pure formality; that, of course, one day, an exact settlement must take place. In my letter No. 294 of December 13 in which I answered your letter without a number, I wrote that I should like very much to receive a letter from Hermann confirming this view.

"You know that I gave a solemn promise to the Henckels firm and the Foreign Exchange Control that the whole matter would be properly taken care of. That is to say: I assured them that the firms over there were transferred to the Estate on a confidential basis, on the self evident condition that the Estate would claim the assets of the firms only in the amount necessary to satisfy its claim of $130,000.00. In other words, the real worth of the firms over there is considerably greater than $130,000.00—and some day everything over $130,000.00 must be refunded. We can talk later about the form in which this repayment should be made; but it must be perfectly clear to you, as manager whom we have appointed, as well as to Hermann and his mother. The lawyers do not need know anything about this but the brothers and sisters of Hermann should, so that there will not be any unpleasant controversies later on.

"I have tried at various times to suggest to you in my correspondence to get Hermann to write to me in the sense outlined above; but nothing has happened so far. As I have said, such a letter has nothing to do with the steps which the lawyer takes. We only want confirmation with regard to our mutual understanding in the matter. Please get Hermann to write me this letter as soon as possible; and I would be grateful to you if you would help him in drafting the text.

"The letter must be signed by his mother and by his brothers and sisters in order that we can submit it to the Foreign Exchange Control here.

"Hermann and his relatives should not have any hesitations in this matter, for we did not hesitate either when it was the question of transferring the shares. We assumed as a matter of course that mutual confidence exists and it is on this basis that Hermann and his family must write the letter. Please see to it that the letter arrives here as soon as possible so that our records are complete in the matter. I shall also write to Hermann today about it."

The letter from Iwersen to Kind reads:

"Until now I have received no answer from you to my letter No. 1.

"I received your letter of December 5 at Christmas, which, however only contained private news.

re-stated his understanding "that the Estate would claim the assets of the firm only in the amounts necessary to satisfy its claim of $130,000.-00"; requested Kind to confirm their understanding by a letter; advised Voss and Kind to conceal the understanding and the letter of confirmation from O'Connor & Farber. We note that Iwersen was not demanding from Kind a reconveyance of the stock. On the contrary, he was demanding confirmation of their understanding that the O'Connor & Farber correspondence was not controlling. In other words, the Committee believes that the evidence establishes that the ownership of the shares remained in Henckels, K. G. regardless of whether or not Kind saw fit to confirm the understanding in the specific manner and form urged by Iwersen. The "confirmation" pertained to the question of whether or not the "understanding" was to be integrated or embodied into a writing formally committing Kind and did not pertain to the question of the existence or non-existence of the "understanding".

On January 18, 1940 in response to the two letters from Iwersen of January 6, Voss sent by radiogram to Iwersen the following very significant message acknowledging the receipt of the two letters and stating:

"303, 304 and Hermann 5 received. Should like to point out once more in interest of Henckels not in interest of Estate that through desired letter in case of war everything could be seized over $130,000.00. Stop. Wire whether you still wish acknowledgment. Stop. Estate is willing to give this. Stop. Attorneys have nothing to do with it."

The Committee finds that Kind had knowledge of and assented to the terms of this message and the Committee notes the evasive character of Voss's testimony on this point.[6] Kind's knowledge of and consent to the terms of the radiogram were manifested further by his letter dated January 20, 1940 to Iwersen addressed to "Mrs. Bailey" who was admittedly a mail-drop in Switzerland for Iwersen.

"Your letter (January 6, 1940) has been answered by our wire of January 18 and we await your further instructions before proceeding with this matter."

In your letter No. 325 of November 28 you and Voss already confirmed the fact to me that you are cooperating closely with Voss.

"Today I wrote again to Voss in detail and requested a letter from you in which once more you and your relatives should confirm the manner in which the transfer of the shares to the Estate is to be understood. Will you please send the requested letter here as quickly as possible and not let yourself be influenced by the lawyers. The lawyers need not know anything about the letters. Legalistically, the matter is as the lawyers have described it but in reality and in view of our confidential relationship the matter is nevertheless somewhat different.

"I am looking forward to your letter. Please give my best regards to your wife, your mother and your brothers and sisters."

[6] "Q. You talked to Mr. Kind at the time you wrote this wire of January 18, 1940, you told us?
"A. Yes.
"Q. Did you talk the whole wire over with him?
"A. Well, I set up the wire myself.
"Q. Did you consult him on it, though?
"A. Not on its composition.
"Q. You didn't consult him on the phrasing of it?
"A. No.
"Q. You at least showed him the phrasing of it, though?
"A. I think so, I might have.
"Q. Before you sent it?
"A. I might have, I don't recall.
"Q. You might have?
"A. I don't recall it.
"Q. Well, you realized that the matter was an extremely important one, if only to avoid a misunderstanding?
"A. That is right.
"Q. You phrased it rather carefully, didn't you?
"A. Yes."

Kind on direct examination characterized the radiogram as:

"So when we sent that telegram it was, to my way of thinking, no more than stating a fact that the Estate is willing to discuss a surplus if any should ever be there, but I didn't look on it as an obligation on my part, or on the part of the Estate, to guarantee Mr. Iwersen or the Kommandit Gesellschaft or anybody else over there, a return of that surplus."

The Committee rejects this characterization and finds the radiogram and "Bailey letter" to be what on their faces they purport to be, i.e.,

(1) An admission of the ownership of the vested shares by Henckels, K. G.: "Should like to point out once more *in interest of Henckels* not in interest of Estate." (Italics supplied.)

(2) A Warning that if the Henckels ownership were placed on record by the execution of the letter of confirmation requested by Iwersen, the United States government would seize the shares: "Through desired letter in case of war everything could be seized over $130,000.00."

(3) An expression of willingness nevertheless to execute the letter if Iwersen despite the danger of seizure insisted: "Wire whether you still wish acknowledgment. Stop. Estate is willing to give this."

(4) Then the last sentence of the radiogram, "Attorneys have nothing to do with it", apparently expressed agreement with Iwersen's statement in his January 6, 1940 letter to Voss, "* * *' such a letter has nothing to do with the steps which the lawyer takes." That is, that if upon Iwersen's further insistence the letter of confirmation were executed Voss and Kind would conceal it from O'Connor & Farber thereby not disturbing the appearance of the transfer fashioned by the O'Connor & Farber correspondence of October 24-November 6, 1939.

Iwersen in a letter to Kind dated January 20, 1940 acknowledged receipt of the radiogram; interpreted it as it is interpreted by the Committee and having done so he was prophetic in his characterization of it as an instrument containing dangerous disclosures.[7]

The "bombardment," as Kind described Iwersen's insistence on getting an expression from the Estate as to a confirmation, subsided after the radiogram and the "Bailey letter". The correspondence which passed between the parties subsequently followed uniformly the previous pattern. For example, Kind in a letter to Iwersen dated April 12, 1940 said:

"There is really nothing further which I can write to you on the subject discussed here. Mr. Voss has written you several letters *explaining our reasoning* in this matter and I believe we should now let it rest until we can have a personal discussion about the whole thing at some future time." (Italics supplied.)

We note also that, although the correspondence of October 24-November 6, 1939 purported to be an offer from the Estate and an acceptance

[7] "Today we received the long telegram from Voss in reply to my letter (January 6, 1940). *We were very surprised that you telegraphed about such a thing at all. I must say we never thought it possible that you could be so clumsy.* We did not want any official documents from the Estate but as letter (January 6, 1940) explained clearly enough we simply wanted a private assurance from you. Therefore, a couple of lines would have sufficed as, for example, 'of course we will agree to all points mentioned in your letter (January 6, 1940).' You could have signed and both your mother and two sisters could have signed their names. In this way we should have had the facts straight amongst us so that if unluckily one of us should die, the survivors would know what had been agreed. But judging from your telegram you seem to have doubts; for this reason we are no longer insisting on a declaration. I must say, however that we were very astonished, for in our opinion the official matter would not have been jeopardized in any way. Proof that I am right is to be made in Voss's telegram where he writes that the Estate is willing to give assurance. But as I have already said we do not want a document from the Estate under any circumstances; we only want a private communication." (Italics supplied.)

of that offer by Iwersen, in a letter dated November 1, 1940 from Kind to Henckels, K. G. Kind described the October 24-November 6, 1939 exchange as a proposition by Henckels, K. G. accepted by Kind:

"If we accepted at the beginning of the war your proposition for a transfer of the three firms"——;

a characterization consistent with a finding that the October 24-November 6, 1939 correspondence was pursuant to a plan initiated by Iwersen to avoid seizure of the Graef & Schmidt, Inc. stock. Furthermore, a November 26, 1940 letter from Bonner to Iwersen, initialled by Kind, assumed beneficial ownership by Henckels, K. G.:

"Although a possible surplus would be taken care of in accordance with Mr. Voss's letter of November 28, 1939 the legal basis is quite different because the unconditional transfer of the stocks does not allow a payment of a possible surplus."

The letter of Mr. Voss of November 28, 1939 was not introduced into the record of this proceeding. It was, however, referred to in the January 6, 1940 letter from Iwersen to Voss as follows:

"On November 28 you wrote me a letter without a number from which I see that you understand completely that the transfer of the shares in place of payment is a pure formality; that, of course, one day, an exact settlement must take place."

The apparent importance of this letter makes its absence from the record regrettable.

Again on February 3, 1941 Iwersen in a letter, likewise initialled by Kind, to Voss emphasized:

"We always come back to the same question 'after the Estate has been satisfied what is left over belongs to us and nothing can change this fact.' It was under this condition that the transfer was made and though for formal reasons this transfer was unconditional, nevertheless all of you are fully and completely informed concerning the real state of affairs."

One of the many actions inconsistent with the contention that the October 24–November 6, 1939 correspondence effected a transfer of the Henckels, K. G. interest in exchange for a discharge of the Henckels, K. G. liability was the proposal by the Estate in March 1941 that if further payments were to be made on the debt of Graef & Schmidt, Inc. to Henckels, K. G. the interests of the Estate would be affected and therefore, Henckels, K. G. should guarantee a possible deficit.[8]

The claimant contends that the letter-cable exchange of October 24–November 6, 1939 was motivated by a desire to protect the Estate's interest as a creditor and not by a desire to cooperate with Henckels, K. G. in cloaking its ownership. Such desires were not, of course, necessarily mutually exclusive. The machinery to effectuate a desire to protect the Estate's interest as a creditor would likewise lend itself to a

[8] "The Estate which, as I said before is affected, by the future payment to you, is of the opinion that under these circumstances the firm of J. A. Henckels, should assume a guarantee for a possible deficit. Such a guarantee need not necessarily be in the form of an agreement, but a simple letter stating that the firm J. A. Henckels in case of a deficit is responsible towards the Estate would suffice. You make a hint to this effect both in the penultimate paragraph of your letter No. 365 as well as in your letter No. 368 so that we assume that there is nothing to prevent fulfillment of this request."

cloaking of the German interest. The Estate could, provided, of course, the cloaking remained undetected, strengthen its position as a secured creditor and at the same time cooperate in concealing the position of Henckels, K. G. as the legal and beneficial owner of the stock. In the absence of evidence of a design to cloak the German interest, the transfer of the stock in exchange for a discharge of the debt might well represent a normal transaction, and one reading merely the letter-cable exchange would undoubtedly so conclude. The point is that the Committee finds that the Estate was not motivated exclusively by a desire to protect its interest, but that there was a further intention and design to cloak the German ownership.

The claimant heavily relies upon the fact that the Estate, following the letter-cable exchange of October 24–November 6, released its claim against Henckels, K. G. and Iwersen. If isolated from the rest of the record, this would indicate that the stock had been validly transferred and that, through the release, the Estate had given the agreed exchange. Completion of the cloaking, however, required the delivery of the release and, if the finding of cloaking is sound, the release is merely a part of the machinery necessary to effectuate the cloaking. If, as contended by the claimant, there was no intent to cloak the interest of Henckels, K. G. and the Estate was a secured creditor with doubts on the value of the security, one is then faced with the question of why, under such circumstances, the Estate was willing to release Henckels, K. G. against the possibility of a deficiency judgment. Granted, however, the intent to cloak the answer is apparent for the release is then part and parcel of the cloaking, adding to the appearance of reality of the transfer. The Committee is, therefore, unable to attach any unusual significance or weight to the release. The claimant further contends that the conduct of the parties after the letter-cable exchange is the best evidence of what the parties thought they had agreed to and that the Estate in fact acted as the owner of the stock by: (1) voting to liquidate the corporation and obligating itself to conclude the liquidation within three years; (2) receiving in 1941 $58,000.00 as a liquidating dividend; and (3) endeavoring to find a purchaser for the factory after the outbreak of war with Germany in 1941. Such acts are, however, not inconsistent with the intent to cloak for such an intent required the Estate to act as though it were the owner of the stock. Such action, consistent with both the theory of cloaking and the theory of a bona fide transfer, cannot control the preponderance of the evidence, which shows an intent to cloak.

In reaching this conclusion, we have been controlled by the cloaking decisions arising out of World War I.[9] The evidence of cloaking in this proceeding is, in the opinion of the Committee, more extensive and persuasive than the evidence described in any of the cases cited. The courts in those cases were compelled generally to rely upon the inferences to be drawn from all the circumstances and were not aided by manifestations of intent as specific as those found in this record. In every case except *Hodgskin* v. *U. S.*,[9] the stock was seized by the Custodian on the theory that a transfer, absolute on its own face, by an "enemy" to a "non-enemy" was an attempt to cloak the "enemy" interest. In each case it

[9] *Stoehr* v. *Wallace*, 269 Fed. 827 (S.D.N.Y. 1920), affirmed 255 U. S. 239 (1921); *Metz* v. *Garvin*, 3 Fed. (2d) 182 (S.D.N.Y. 1921); *Hodgskin* v. *U. S.*, 279 Fed. 85 (C.C.A. 2d, 1922); *Magg* v. *Miller*, 296 Fed. 973 (App. D. C. 1924); *Lust* v. *Miller*, 4 F. (2d) 293 (App. D. C. 1925); *Ebert* v. *Miller*, 4 F. (2d) 296 (App. D. C. 1925), appeal dismissed, 296 U. S. 666 (1926); *Thorsch* v. *Miller*, 5 Fed. (2d) 118 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Matheson* v. *Hicks*, 10 Fed. (2d) 872 (E. D. N. Y. 1926).

was possible that the transaction was: (1) a bona fide sale motivated by normal considerations of mutual commercial advantage; (2) a bona fide "sale of the burning house to Crassus"; (3) a bona fide sale for some other reason, e.g., to comply with the Sherman Anti Trust Act; (4) a gift; or (5) a cloaking device, having no substantive effect on the enemy ownership. In each case the claimants offered testimony, as in this proceeding, tending to show the good faith of the transaction. Except in *Metz* v. *Garvin*,[9] the courts seemingly attached more weight to the surrounding circumstances than to the direct affirmations of good faith and, in the attempt to classify correctly the transactions, compared the normal incidents of each category with the incidents of the transaction in question. Similar analysis of the evidence in this proceeding places the transaction in question, in the opinion of the Committee, in the category of a cloaking device.

At the hearing, the various letters exchanged between Iwersen, Voss, Bonner and Kind subsequent to the letter-cable exchange of Octobr 24-November 6, 1939, were admitted into evidence over the objection of the claimant. The objection was grounded on the contention that neither Voss nor Bonner were employees or agents of the Estate and therefore that nothing they said could be binding on the Estate, and on the contention that since the letter-cable exchange of October 24-November 6, 1939 set forth a complete contract, no subsequent correspondence could have amended the contract unless the amendment was supported by adequate consideration. These contentions are answered by the Committee's finding that the purported transfer was not intended to be an effective transfer and that Kind as the sole active trustee had knowledge of and assented to that fact. The evidence therefore was properly admitted not to establish a subsequent modification of an existing contract, but as primary evidence of the intention of the parties at the time of the purported transfer. If the preponderance of the evidence showed a valid transfer of the stock followed by negotiations in respect of any surplus realized, and if the negotiations resulted in an exchange of offer and acceptance, the question would then arise whether a promise to account for a "surplus" was supported by detriment to the promisee bargained for as an exchange for the promise. It would likewise then be necessary to consider General Counsel's argument that if Kind intended to create a new contract through the letter-cable exchange of October 24-November 6, 1939, Iwersen did not and Kind would be estopped from disputing Iwersen's interpretation. In the light of the finding that the stock was not effectively transferred, it is not necessary to discuss either argument.

Following the issuance of a tentative determination disallowing the claim on the finding that Henckels, K. G. owned the stock at the date of vesting, the claimant submitted a proposal for modification, supported by a brief. The proposal was to recognize the transfer of the stock to the Estate and to find that "—as a condition of the said transfer, the Estate agreed with Henckels, K. G. and Iwersen that in the event the Estate succeeded, as the result of the sale of said stock, or a liquidation of the corporation, in realizing more than the amount of the Estate's claim against Henckels, K. G., Iwersen and Graef & Schmidt, Inc., then such surplus funds should be paid over to Henckels, K. G. and Iwersen". It was also proposed that this finding be "without prejudice, however, to the making and issuance of a new Vesting Order relating to the aforementioned possible surplus". This proposal is, apparently, bottomed on the

idea that, as stated in the supporting brief, "Iwersen never sought more than a right to receive any surplus which the Estate might realize on the disposition of the stock". This proposal is based, however, on a failure to grasp the full significance of the finding that the transfer of the stock was a cloaking device. The Committee finds that there was not a bona fide contract to transfer and not a bona fide transfer. Any arrangement for the disposition of the "surplus" was necessarily subsidiary to and dependent upon the effectiveness of the transfer. The proposal is, in effect, a suggestion that the cloaking be made partly effective. To give recognition to such an arrangement would be to sanction a means designed to evade the Trading with the enemy Act. If the transfer of the stock from Henckels, K. G. to the Estate had been valid, and if, following the transfer, a binding contract had been entered into, obligating the Estate, if it realized more than the amount of its claim as a creditor, to pay any surplus funds realized to Henckels, K. G., the claimant's contention would be sound and would necessitate a divesting of the stock and a vesting of the interest of Henckels, K. G. in the "surplus". General Counsel points out, in his brief replying to claimant's brief supporting the proposed modification, that the references to "surplus" found in the correspondence are not restricted to a transfer of cash remaining after the claimant has obtained $130,000.00 from the sale of the stock or of the assets of the corporation, but extend broadly to cover post-war return of the stock or the business itself, that is the equity in whatever form it may be after payment of the debt to the Estate. It seems patent to the Commitee that Henckels, K. G., a debtor, in communicating with the Estate, a secured creditor, used the word "surplus" and any similar word or phrase as descriptive of the beneficial interest in the subject of the pledge. Any reference then to the right of Henckels, K. G. to a "surplus" is by necessary implication a denial that the shares have been effectively transferred to the Estate.

The gravamen of the claim, both in the broad form in which the claim was originally presented and in the limited form in which it was stated in the brief supporting the proposal to modify the tentative determination, was that the 1939 transaction transferred to the claimants the entire legal and beneficial interest in the vested stock. While the claimant, therefore, proceeded on the theory of the abandonment by the Estate of a security interest in the stock, it has been assumed for the purpose of this proceeding that such a security interest did exist. The Committee, therefore, in disallowing the claim does so without prejudice to whatever rights the claimants may have as secured creditors in the premises.

The Committee, therefore, finds that: Henckels, K. G. did not intend to transfer to the Estate its interest in the Graef & Schmidt, Inc. stock; the record transfer was intended by Henckels, K. G. to conceal and cloak the retention and the continuance of the Henckels, K. G. ownership; Hermann H. Kind, as the sole active trustee here, had knowledge of and assented to the subterfuge; and at the date the Alien Property Custodian vested the shares they were owned by Henckels, K. G., a national of a designated enemy country (Germany).

Claim No. 401 to 100 shares of the common capital stock of Graef & Schmidt, Inc. vested by Vesting Order No. 770, dated January 27, 1943, is accordingly disallowed without prejudice, however, to the security rights, if any, of the trustees of the Estate of Hermann M. Kind.

MARCH 21, 1944

696512—46—8

In the Matter of
LEOPOLD H. P. KLOTZ, *and* NORTH AMERICAN INVESTING CO., INC.

Dockets No. 9 and 10. Claims No. 553 and 554.

Statement of Case

This proceeding was initiated by Notice of Claim No. 553 (dated March 29, 1943) filed by Leopold H. P. Klotz and by Notice of Claim No. 554 (dated March 25, 1943) filed by the North American Investing Company, Inc., a Delaware Corporation, pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 1943 (8 Fed. Reg. 16709). The claims were consolidated for a hearing.

The Custodian by Vesting Order No. 3, dated April 7, 1942 (7 Fed. Reg. 2698), vested certain properties consisting of notes issued by Luscombe Airplane Corporation (hereinafter referred to as Luscombe) to Leopold H. P. Klotz, (hereinafter referred to as Klotz), collateral notes issued by North American Investing Company, Inc., (hereinafter referred to as the North American Company) to Klotz, collateral security deposited with Klotz to secure payment of the collateral notes, a contract between the North American Company and Klotz, and all the interest of Klotz in shares of Luscombe; all of which property is described in detail in Exhibit "A" attached to Vesting Order No. 3. The vesting order also recited, among other things, a finding that the property was the property of nationals of a foreign country designated in Executive Order 8389.

Klotz's Notice of Claim alleges that the claimant is a "* * * subject of a friendly country, Liechtenstein * * *" and the Notice of Claim of the North American Company alleges that the claimant is "* * * a Delaware corporation, all its stockholders, officers and directors are American citizens residing in the United States." Each Notice of Claim apparently asserts title to all the property vested by Vesting Order No. 3.

The Order for and Notice of Hearing was published on January 8, 1944 (9 Fed. Reg. 350) and copies were served on the persons designated in Section 2 of the Notices of Claims and on the persons described in Exhibit "A" of the Vesting Order as registered owners of shares of stock of Luscombe.

A hearing was held in the National Press Building, Washington, D. C., before the Committee on January 20, 1944.

McMahon, Dean & Gallagher, by Brien McMahon and R. J. Connor, and Robert Perret appeared on behalf of the claimants; A. Matt Werner, General Counsel of the Office of Alien Property Custodian, by Elmer Cunningham, appeared on behalf of the Custodian. The claimants submitted a proposed determination on January 31, 1944, and General Counsel filed a responsive brief on March 16, 1944. A tentative determination was issued to the parties on April 8, 1944. No proposals for modification were submitted.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

Determination

The claimants so clearly satisfied their burden of proving ownership on the date of vesting of the property subject to Vesting Order No. 3, that

an extensive recital of the evidentiary facts relating to ownership seems unnecessary. The facts, as found, may be briefly summarized as follows:

One Leopold Koppel, a citizen and resident of Germany, was the grandfather of claimant Klotz. He died in 1933 leaving an estate of an estimated value of one hundred million reichsmarks (approximately forty million dollars). Klotz's mother, one of the three children of Leopold Koppel, shared in his estate. During the period 1937 to March 1939, the claimant Klotz received from his parents as a gift approximately one million dollars. He used this fund to acquire an interest in Luscombe, purchasing Luscombe shares and making loans to Luscombe either directly or indirectly through the North American Company. There is no evidence tending to contradict Klotz's testimony that he owned the assets so used and there is no reason to believe that he held such assets in trust for any person or that he had acquired the assets in any manner other than that indicated above. In corroboration of Klotz's testimony as to the ownership of the funds used in financing Luscombe, his parents, who acquired Liechtensteinian citizenship in 1927 and who now reside in New York City, asserted through an affidavit that they gave the claimant, their only child, $1,114,000.

North American Investing Company, Inc., is a Delaware corporation organized by Klotz for the purpose of acquiring and holding shares and other interests in Luscombe. The vesting was apparently on the assumption that Klotz was acting as a cloak for enemy interests. A cloaking transaction was indicated, at the time of vesting, not only by the obscurity of the source of the funds employed, but also by the circumstances relative to the organization of the North American Company. Although the company was organized and financed by Klotz, apparent control over it was placed in an American citizen, whose capital contribution was merely nominal. Furthermore, there was a labored attempt through the use of stock options and similar devices to effect a change in the relationship between Klotz and Luscombe. The evidence establishes however that the purpose of placing apparent control in an American citizen—and thereby apparently bringing about a change in the relationship between Klotz and Luscombe—was not to mask the true relationship from the eyes of the Alien Property Custodian, but to satisfy a regulation of the Civil Aeronautics Administration. Luscombe was engaged in manufacturing and selling a small sports airplane and the custom of the trade required the issuance of a certificate of air worthiness before consummation of a sale. It was, therefore, a competitive necessity that such certificates be issued to the seller, Luscombe. A regulation of the Civil Aeronautics Administration, however, apparently prohibited issuance of such certificates to a company in which more than 25 percent of its stock was owned or controlled by one not a citizen of the United States, and Klotz was not a citizen of the United States. The Committee is persuaded that these considerations motivated the organization of North American and the placing of apparent control over it in the hands of an American citizen. Whether the regulations of the Civil Aeronautics Administration were in fact satisfied by this device is not an issue in this proceeding. For the purpose of this proceeding it is merely necessary to find, and the Committee does so find, that the vested property was owned by North American or by Klotz as their respective interests may appear, and that neither North American nor Klotz was acting on behalf of or as a cloak for any other person.

The claimant, Klotz, is a resident of the United States and was a resi-

dent of the United States at the date of vesting. He was for many years a citizen of Germany, but we find, for the purpose of this proceeding, that he became a citizen of Liechtenstein not later than 1939. Liechtenstein is a neutral and unoccupied state. A certificate of Liechtensteinian citizenship was issued to him on August 25, 1939, but was made retroactive to 1937 at which date it appears that his parents had acquired similar citizenship. Klotz, furthermore, twice obtained a State Department visa on his Liechtenstein passport. Klotz was, therefore, at the date of vesting, a national of a foreign but neutral and unoccupied state.

It becomes necessary to consider whether the claimants, on the basis of the facts found above, are entitled to a "divesting" of the property.

If the property had been vested after July 6, 1942—the date of Executive Order 9193 which amended Executive Order 9095—the answer would be in the affirmative because Executive Order 9095 as amended by Executive Order 9193 clearly contemplates that, unless good reason to the contrary appears, business enterprises and litigated claims of residents of the United States, even though they be citizens of enemy countries,[1] are not to be vested.

In this respect Executive Order 9095 as amended by Executive Order 9193 paralleled in substance Section 2 (c) of the original Trading with the enemy Act which did not permit citizens of an enemy country who were residents of the United States to be treated as enemies unless the President so required by proclamation. Such a proclamation was not issued.

The Vesting Order in this proceeding was, however, issued prior to July 6, 1942 and recites that it is an expression of Presidential authority under Section 5 (b) of the Trading with the enemy Act as amended. On the date of the issuance of the vesting order the Presidential power to vest "any property or interest therein, of any foreign country or national thereof," had been delegated to the Custodian by Executive Order 9095 of March 11, 1942 (7 Fed. Reg. 1971). Executive Order 8389, as amended April 10, 1940 (5 Fed. Reg. 1400) relating to the freezing powers of the Secretary of the Treasury, granted to the Secretary, among other things, the power to regulate transactions and property interests of "any foreign country designated in this order or any national thereof" (Executive Order 8389, Section 1). Executive Order 8389 also contains an elaborate definition of the term "national" which includes "any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of the order." [Executive Order 8389, Section 5E(i)]. This definition of "foreign national" was incorporated by reference into Section 302 of the First War Powers Act, 1941, which amended 5 (b) of the Trading with the enemy Act into the form operative in this case.[2] Therefore, the term "foreign national"

[1] "The term 'designated enemy country' shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term 'national' shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a *designated enemy country* unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. * * *" (Section 10 of Executive Order No. 9193.) (Italics supplied.)

[2] "All * * * orders * * * heretofore * * * issued by * * * the President or the Secretary of the Treasury under the Trading with the enemy Act of October 5, 1941 (40 Stat. 411) * * * are hereby * * * ratified * * *." (Italics supplied.)

as defined in Executive Order 8389 and as employed in Section 5 (b) as amended and as used in Executive Order 9095 before its amendment on July 6, 1942, seemingly encompasses Klotz for he is by his own claim and testimony a citizen of Liechtenstein which is a foreign country designated in Executive Order 8389, as amended, and hence is a "foreign national." For the same reason it would seemingly include the claimant, North American Investing Company, Inc., because although it is a Delaware Corporation, Klotz, a foreign national, held a "substantial part" of its "notes" and other "obligations". [Executive Order 8389, Section 5E(ii)].

The grant to the Custodian of the wide authority to vest [3] was accompanied, however, by authority to adopt, in his discretion, a vesting practice less extensive.[4] The Custodian did adopt a vesting practice less extensive than his authority, a practice substantially corresponding to the provisions of the July 6, 1942 amendments to Executive Order 9095 and to the policy expressed in Section 2 (c) of the original Trading with the enemy Act. The vesting practice—as far as pertinent to this proceeding—was not to vest the property of residents of the United States regardless of citizenship, except on information serving as the basis of an administrative judgment of cloaking.[5]

A similar development has taken place under Executive Order 9193. By Section 2 (d) of this Executive Order, the Custodian has granted the right to vest any such property "in which any foreign country or national thereof has any interest." However, in the publication in which the Custodian announced his program thereunder there was no mention of seizure of neutral owned patented property, but only of enemy and enemy-occupied property. See "Patents At Work 1943," especially pp., 5–7. This practice, less extensive than the right granted in Section 2 (d) of Executive Order 9193, has resulted in divesting orders in patent cases in which the divesting is on the ground of a mistake in vesting—corrected by finding that the claimant is not a national of a designated *enemy* country—but without traverse of the finding recited in the vesting order that the claimant is a national of a *foreign* country. See Divesting Orders 32, 33, 35, 37, 38, 57.

We conclude that the administrative practice of the Custodian during the 9095 period is based upon a construction of the broad terms of Section 5 (b) as amended and of Executive Order 9095 which reflects the earlier legislative policy expressed in Section 2 (c) of the Trading with the enemy Act and which is itself reflected in the July 6, 1942 amendments to Executive Order 9095. We further conclude that while an administrative construction is open to change by the agency—as the exigencies of the situation change—the unchanged practice does outline the standards whereby the agency purports to act as effectively as if they were expressed in a regulation. It follows, therefore, that, in the

[3] "* * * and *any property* or interest of *any foreign country* or *national* thereof *shall vest*, when, as, and upon the terms directed by the President * * *". (Section 302 of First War Powers Act of 1941.) (Italics supplied.)

[4] "* * * and any property or interest of any country or national thereof shall vest *when, if*, and *upon the terms*, directed by the President * * *." It seems incontestible that Congress intended that the Custodian should be free to adopt a vesting practice, according to the exigencies of the situation, less extensive than the power to vest property of any person who has been "domiciled in, or a citizen or resident of a foreign country on or at any time since the effective date of this order" [Executive Order 8389, Section 5E(i)]. Executive Order 8389 was directed to the task of regulating transactions in the economic warfare which ante-dated Pearl Harbor and obviously was not directed to the narrower problem of vesting property—a problem not arising until the outbreak of the war. (Italics supplied.)

[5] General Counsel's brief states "so far as we are aware no cases arose during the 9095 period in which the vesting was on the ground of 'national interest' apart from cloaking."

light of the Custodian's practice, a vesting which proceeded from the assumption—subsequently proved to be erroneous—that there was a "cloaking" transaction involves such a mistake of fact as authorizes a "divesting."

In so holding, we do not mean that the Custodian may not by regulations alter the construction manifested by his practice; nor do we mean that a practice in respect to vesting is relevant to the exercise of supervisory powers. We do not suggest, furthermore, that an administrative practice is controlling in purely discretionary judgments on matters not relating to the construction of jurisdictional statutes or Executive Orders; nor do we suggest that a divesting is possible merely because experience has demonstrated that a given vesting was less sound as a matter of policy than it at first appeared. We hold merely that the well established administrative practice of the Custodian with respect to vesting during the 9095 period justifies the finding that the vesting of the property of one who was at the time of vesting a resident of the United States and a citizen of a neutral and unoccupied foreign country—based upon the mistaken belief that he was a "cloak"—constitutes such a mistake of fact as authorizes a remedial divesting.

THEREFORE, for the purpose of this proceeding, it is the determination of the Committee that:

1. The properties vested by Vesting Order No. 3 were owned at the date of vesting by Leopold H. P. Klotz and the North American Investing Company, Inc., as their respective interests may appear.

2. Leopold H. P. Klotz was at the date of vesting and is now a resident of the United States.

3. Leopold H. P. Klotz was not at the date of vesting and is not now a national of a designated enemy country.

4. North American Investing Company, Inc., a Delaware Corporation was not at the date of vesting, and is not now a national of a designated enemy country.

5. That the national interest does not require the retention of the vested property.

Accordingly, the claims of Leopold H. P. Klotz and North American Investing Company, Inc., are hereby allowed.

MAY 2, 1944.

IN THE MATTER OF
JULIUS KOHN
Claim No. (APC–17) A–418. Docket No. 85.

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim (APC–17) No. A–418, dated March 12, 1945, filed by Julius Kohn pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 201, dated October 2, 1942 (8 Fed. Reg. 625), vested, among other things, all right, title, and interest in United States Patent No. 2,027,294, as property of Hans Silberknopf, a national of a foreign country (Austria).

The Notice of Claim alleges that the title to the patent was assigned to the claimant, Julius Kohn, on December 11, 1936.

The Order for and Notice of Hearing was served upon the claimant.

Pursuant thereto a hearing was held before the Vested Property Claims Committee in the Office of the Alien Property Custodian, 120 Broadway, New York City, on July 25, 1945. Henry Ruhl appeared on behalf of the claimant, and John Ernest Roe (and subsequently his successor, Raoul Berger), General Counsel, by George B. Searls and David M. Williford, appeared on behalf of the Custodian. The General Counsel's brief was filed on September 21, 1945. A Tentative Determination disallowing the claim was issued on October 24, 1945. No proposals to modify the Tentative Determination having been received, the Tentative Determination as hereafter set forth is hereby adopted and issued as the Final Determination in the matter.

The transcript of testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for reasons hereinafter stated.

Determination

This proceeding concerns United States Patent No. 2,027,294, which was issued in January 1936 to the inventor, Hans Silberknopf, a citizen and resident of Austria, and vested by Vesting Order No. 201. The invention relates to a device for lighting pipes, cigarettes, or cigars.

The claimant, Julius Kohn, is without question an eligible claimant as to nationality. The only question in this proceeding, therefore, is whether the claimant has sustained his burden of proving that he had at the time of vesting any "interest, right, or title" in the patent in question within the meaning of Section 9 (a) of the Trading with the enemy Act, as amended. See *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920); affirmed sub nom *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

The claimant contends that the legal and beneficial ownership of the patent in question was transferred to him without consideration as a gift by the inventor, Silberknopf, in December 1936. General Counsel urges that the claimant has failed to carry his burden of proof on the issue as to his complete ownership of the patent.

Because of the lack of definitive testimony, the Committee is constrained to conclude that the claimant has failed to satisfy his burden of proving that the legal and beneficial interest in the patent was transferred to him by Silberknopf.

The claimant, Julius Kohn, came to the United States in 1927 and became a citizen in 1933. Before his arrival in the United States in 1927, he was for some time a customer of Hans Silberknopf, the inventor of the patent in question. Silberknopf was engaged in the business of manufacturing the lighter and related products in Vienna, Austria. Apparently the claimant purchased the products of the Silberknopf manufacturing concern for resale in the markets of Continental Europe. It appears that the claimant did not have at any material time a financial interest in the Silberknopf manufacturing concern. In addition to the claimant's association with Silberknopf as a customer, he was for a long time a close and intimate personal friend of the inventor but not a relative.

After the claimant came to this country in 1927 and up to the time of Silberknopf's death in 1938, the claimant acted as Silberknopf's exclusive sales representative in the United States. During the period from 1927 to 1938 it appears that the claimant imported from the manufacturing firm in Austria substantial quantities of merchandise on open account. In 1938, at the time of Sliberknopf's death, it appears that the claimant owed Silberknopf for goods purchased in the sum of approximately $24,000.

Some time in 1936 or 1937 the claimant began manufacturing in New York, under the trade name of Imco Company, a lighter which the claimant testified was unrelated to the Silberknopf invention and which he claimed was a superior device. It appears that the Imco Company was solely owned by the claimant. It is further noted that the claimant, after commencing the manufacture in New York of a competitive lighter, apparently continued to import lighters from Silberknopf, and that in 1938 the claimant was indebted to Silberknopf for merchandise imported up to that time in the sum of approximately $24,000. The claimant testified that some time in 1936 he discovered that a firm in New York was marketing a "copied" lighter which was manufactured in Japan, and the claimant then notified Silberknopf of the alleged infringement. The claimant testified that he advised Silberknopf "to do something about it," and that Silberknopf responded by stating, "It will be hard for him to sue the people, so I give you the patent and if somebody infringes * * * you go to court and stop them." According to claimant's testimony, Silberknopf stated further, "Here is the patent, do what you want with it."

That the document of assignment was executed in December 1936, immediately following the above discussion relative to the alleged infringement, warrants the conclusion that at the time both the assignor and the assignee had in mind the transfer only of the bare legal title for the purpose of placing the claimant in a position to take whatever court action he considered appropriate under the circumstances.

There is no evidence in the record indicating that claimant did take any court action to prevent the infringement of the patent after he received the assignment. It may be that no action was taken because of the diminished commercial value of the patent, but the claimant's testimony that the patent had only a nominal value is apparently out of line with his further testimony that in 1938 he owed Silberknopf the sum of $24,000 for goods purchased presumably after 1936. The record does not contain any evidence that indicates that the $24,000 obligation arose out of transactions not related to the patent in question.

The conclusion reached by the Committee is not based upon disbelief of the factual testimony offered by the claimant. Accepting all of the testimony in this proceeding as true, the Committee is nevertheless constrained to conclude that the evidence falls short of being sufficient to establish an absolute gift of the patent. The evidence offered more readily warrants a conclusion that the assignment was made solely for the claimant's convenience in handling infringement suits rather than that it was an outright gift of the legal and beneficial interest.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Julius Kohn, has not established by satisfactory and convincing evidence that he had at the time of vesting such a title or interest in the vested property as would support a right of

recovery under Section 9 (a) of the Trading with the enemy Act, as amended.

Accordingly, Claim No. (APC–17) A–418 is hereby disallowed.

DECEMBER 10, 1945.

IN THE MATTER OF
DOROTHY KRETS LEHMANN
Claim No. 398. Docket No. 16.

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 398 (dated February 26, 1943), filed by Dorothy Krets Lehmann pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 29 (dated June 18, 1942, 7 Fed. Reg. 4633) vested the following property:

"All of the right, title and interest of Franz B. Lehmann, Philipp Elimeyer, and the Deutsche Bank Filiale Dresden of Dresden, Germany * * * in the 1,225 shares of the common stock of J. M. Lehmann Company, Inc. (a New York corporation), registered in the name of Franz B. Lehmann * * *."

The Vesting Order recited, among other things, a finding that the shares were the property of nationals of a foreign country (Germany) designated in Executive Order No. 8389, as amended.

By Special Order No. 1, dated July 16, 1942, the Custodian, upon the basis of a determination that "the right, title and interest of Franz B. Lehmann, Philipp Elimeyer or the Deutsche Bank Filiale Dresden of Dresden, Germany, in said shares of stock is the absolute, full and complete title thereto," ordered the J. M. Lehmann Company, Inc., to cancel the record of ownership of Franz B. Lehmann and to issue a new certificate for the shares in the name of the Alien Property Custodian. The Company complied with the order.

The Notice of Claim alleges in substance that the claimant, Dorothy Krets Lehmann, has an interest in the shares by virtue of certain orders of the Supreme Court of the State of New York, New York County, which were issued in a separation of marriage action against her husband, Franz B. Lehmann.

The Order for and Notice of Hearing was published on August 10, 1944 (9 Fed. Reg. 9755), and a copy was served upon the claimant's attorneys of record.

A hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, Room 614, National Press Building, Washington, D. C., on August 23, 1944. Guggenheimer and Untermyer, by Mitchell Salem Fisher, appeared on behalf of the claimant. John Ernest Roe, General Counsel, by George B. Searls and David M. Williford, appeared on behalf of the Alien Property Custodian. J. M. Lehmann Company, Inc., intervened by leave of the Committee, and Berle and Berle, by Winthrop H. Kellogg, appeared on its behalf. Proposed findings and supporting briefs were submitted by the claimant on September 18, 1944, by the General Counsel on October 3, 1944, and by J. M. Lehmann Company on October 5, 1944. Reply memoranda were sub-

mitted by the claimant on October 12, 1944, by J. M. Lehmann Company on October 18, 1944, and by the General Counsel on October 28, 1944. A tentative determination disallowing the claim was issued on January 31, 1945, and oral argument thereon was heard on March 22, 1945.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The Committee hereby disallows the claim for the reasons hereinafter stated.

DETERMINATION

By Vesting Order No. 29 and Special Order No. 1 the Alien Property Custodian vested 1,225 shares of the common stock of J. M. Lehmann Company, Inc., a New York corporation. The shares so vested were carried on the books of the Company in the name of one Franz B. Lehmann, a citizen and resident of Germany, and, pursuant to the directive in Special Order No. 1, the Company issued to the Custodian a certificate representing the shares.

The claimant, Dorothy Krets Lehmann, was born in Hungary in 1892 and in May 1927 became a citizen of the United States by naturalization. In December 1927 she married Franz B. Lehmann and resided with him in Dresden, Germany, until her return to the United States in 1934. It is not contended that she was not a resident and a citizen of the United States at all times material to this proceeding, and, therefore, as to her nationality, not an eligible claimant to the vested property.

Franz B. Lehmann, the husband of the claimant, is and has been at all material times a resident and citizen of Germany. It appears that he was the sole owner of J. M. Lehmann Machinen Fabrik of Dresden, Germany, and had acquired by 1927—from the estate of his former wife, one Laura Kranz of Chicago, Illinois—the shares of J. M. Lehmann Company, Inc., which are the subject of this proceeding.

In March of 1938 the claimant instituted in the New York Supreme Court an action for separation of marriage against her husband. He appeared by his attorneys, and a final judgment of separation—awarding alimony in the sum of $550 a month—was granted on January 13, 1942. This judgment does not refer to the shares in question.

In a supplemental proceeding within the framework of the matrimonial action for separation and under Section 1171-a [1] of the New York Civil

[1] Section 1171-a provides:

"*Sequestration of defendant's property in action for divorce, separation, or annulment where defendant cannot be personally served and there is property within the state.* Where in an action for divorce, separation, annulment or declaration of nullity of a void marriage it appears to the court that the defendant is not within the state, or cannot be found therein, or is concealing himself therein, so that process cannot be personally served upon him, the court may at any time and from time to time make any order or orders without notice directing the sequestration of his property, both real and personal and whether tangible or intangible, within the state, and may appoint a receiver thereof, or by injunction or otherwise take the same into its possession and control. The property thus sequestrated and the income therefrom may be applied in whole or in part and from time to time, under the direction of the court and as justice may require, to the payment of such sum or sums as the court may deem it proper to award, by order or judgment as the case may be, and during the pendency of the action or at the termination thereof, for the education or maintenance of any of the children of a marriage, or for the support of the wife, or for her expenses in bringing and carrying on said action and the proceedings incidental thereto or connected therewith; and if the rents and profits of the real estate, together with the other property so sequestrated, be insufficient to pay the sums of money required, the court, upon such terms and conditions as it may prescribe, may direct the mortgage or sale of sufficient of said real estate to pay such sums. The court may appoint the wife receiver or sequestrator in such cases. The court may authorize the wife to use and occupy, free of any liability for rent or use and occupation or otherwise, any house or other suitable property of her husband as a dwelling for herself or herself and her children, and may likewise turn over to her for the use of herself or herself and her children any chattel or chattels of her husband. The relief herein provided for is in addition to any and every other remedy to which the wife may be entitled under the law."

Practice Act, the New York Supreme Court issued the two orders upon which the claimant rests her present claim;—one on April 30, 1938, appointing her matrimonial receiver and sequestrator of the property within New York of Franz B. Lehmann, and one on January 29, 1942, which in substance ordered J. M. Lehmann Company, with certain qualifications hereinafter described, to issue to her as receiver and sequestrator a certificate representing the shares in question.

The Company resisted the order of April 30, 1938, on the ground, among others, that Franz B. Lehmann had pledged the shares in 1937 to the Deutsche Bank Filiale Dresden of Dresden, Germany (hereinafter referred to as the "Deutsche Bank"), and that upon default by Lehmann on the obligation secured by the pledge, the bank had foreclosed and sold the shares to one Philipp Elimeyer, who then had requested the Company to issue a certificate in his name. Elimeyer is and has been at all material times a citizen and resident of Germany. The claimant pressed her application for an order directing the Company to issue a certificate to her, contending that the pledge and foreclosure were fraudulent and collusive as to her, and the Company applied, without success, for a modification of the April 30, 1938, order so as to permit it to comply with Elimeyer's demand. Then, after an official reference for fact finding purposes, the Supreme Court of New York, Special Term, Part I, entered the order of January 29, 1942, which, as stated above, directed the Company, subject to certain qualifications, to issue a certificate representing the shares in question to the claimant as receiver and sequestrator. Franz B. Lehmann appealed from the January 29, 1942, order and in May 1942 the Appellate Division granted a motion to dismiss the appeal unless the record was filed on or before September 17, 1942. The record was not filed. On June 18, 1942, however, the Custodian executed Vesting Order No. 29 and pursuant to the Custodian's Special Order No. 1, a certificate representing the shares was issued in the name of the Alien Property Custodian. Admittedly neither the Deutsche Bank nor Elimeyer was a party to the proceedings in the New York Supreme Court.

In this proceeding the claimant seeks to have the Alien Property Custodian cause the Company to issue to her a certificate for the shares pursuant to the two orders of the New York Supreme Court; that is, she asks for possession of the vested property. She contends that the shares were subject to the orders of April 30, 1938, and January 29, 1942, prior to the vesting and that "by reason of these orders * * * any title which, at the time of the Vesting Order, the enemy alien had, was a title encumbered by the lien and force of the receivership."

General Counsel contends in substance that the orders of the New York Supreme Court were not binding as to the interests of Elimeyer and the Deutsche Bank, and that their interests under the 1937 pledge and the subsequent foreclosure were senior to the interest of the claimant which "starts with the sequestration order of April 30, 1938" unless the claimant proves "that, as a matter of fact and apart from those orders, the 1937 pledge was fraudulent as to her."

The intervenor, J. M. Lehmann Company, Inc., takes the position in substance that under the Trading with the enemy Act, as amended, and Executive Order 9095, as amended, the Custodian is empowered in the national interest to vest and administer property which is affected with an enemy interest and "it would be contrary to the policy of the Act and

the policy of the President's order, to turn over the stock and the attendant control of the Company to the claimant" regardless of whether or not "Mrs. Lehmann, as receiver, acquired any interest in the stock under any state law or grant of authority." The intervenor further contends in the alternative that the claimant has not shown any interest in or right of possession to the shares because (1) she has not impeached Elimeyer's title, (2) the orders of the New York Supreme Court did not effect a valid sequestration of the shares and (3) if Section 8 of the Trading with the enemy Act is presently effective, nevertheless the claimant does not come within its provisions.

The question presented in this proceeding—and the merits of the several contentions—will be clarified by a statement of the general principles which are applicable. Property vested by the Custodian becomes property of the United States at least in the sense that proceedings to recover it are against the United States and must be based upon statutory permission to maintain such an action. *Cummings* v. *Deutsche Bank & Disconte Gesellschaft,* 300 U. S. 115, 120-121 (1937). The necessary statutory permission is found in Section 8 and in Section 9 (a) of the Trading with the enemy Act of 1917. Section 9 (a) affords relief to any person—eligible as to nationality—who proves that he had at the time of vesting "any interest, right, or title" in the vested property, and Section 8 protects such a person who had a security interest as therein defined. A Section 9 (a) reclamation suit is made by Section 7 (c) of the Act "the sole relief and remedy" available to a claimant. *Ahrenfeldt* v. *Miller,* 262 U. S. 60 (1923); *Kahn* v. *Garvan,* 263 Fed. 909 (S.D.N.Y. 1920); *Cummings* v. *Hardee,* 102 Fed. (2d) 622 (App. D. C. 1939), certiorari denied 307 U. S. 637 (1939). The administrative relief provided by Section 9 (a) and by the Claims Regulations of the Agency is based on the same statutory permission and subject to the same limitations as a Section 9 (a) reclamation suit.

We may state at the outset that the Committee does not in this determination pass upon the disputed question of the validity of the 1937 pledge. Whether the pledge was valid and the shares were therefore owned at the time of vesting by Elimeyer, or whether the pledge was invalid and the shares were therefore owned at the time of vesting by Franz B. Lehmann—in the sense that the pledge transaction constituted fraud upon the claimant—is immaterial in this proceeding in view of the Committee's conclusion as to the Custodian's authority in the premises. Both Franz B. Lehmann and Elimeyer were and are "enemies" under Section 2 of the Trading with the enemy Act, as amended, "foreign nationals" under Executive Order 8389, as amended, and "nationals of a designated enemy country" under Executive Order 9095, as amended. The Custodian is not, in the opinion of the Committee, authorized to divest himself of possession of stock owned by "enemies" under the facts before us in this proceeding. It is assumed arguendo, therefore, throughout this determination that, as contended by the claimant, Franz B. Lehmann owned the shares at the time of vesting.

The question then is whether the claimant is entitled to possession of the shares under the two orders of the New York Supreme Court. This depends, in the first instance, upon what interest the two orders purported to give to her.

The Order of January 29, 1942, directing J. M. Lehmann Company

to issue a certificate to the claimant as receiver and sequestrator concluded with the following paragraph:

"ORDERED, ADJUDGED AND DECREED, That the foregoing directions and order to J. M. Lehmann Company, Inc. and the Clerk of the County of New York, are subject to the obtaining of such license issued by the Secretary of the Treasury of the United States, pursuant to and as required by the Executive Order of Hon. Franklin D. Roosevelt, President of the United States, No. 8389, of April 10, 1940, as amended, and subject to any necessary permission from the proper authorities of the United States of America under the First War Powers Act of 1941, and in the event any such license or permission be necessary, said J. M. Lehmann Company, Inc. and the Clerk of the County of New York be and are hereby directed to apply for said license and permission and to take all necessary and appropriate steps for the obtaining of same."[2]

To the extent that the claimant rests her claim upon this order, it must, in the opinion of the Committee, be disallowed. The order is clearly not absolute in its terms but contains a condition precedent making the approval of an appropriate federal authority necessary to the effectiveness of the order. Inasmuch as the Secretary of the Treasury was then the appropriate federal authority we observe that a license was not issued by him pursuant to Executive Order No. 8389. Insofar as the Alien Property Custodian became the appropriate federal authority, he vested

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[2] Other pertinent portions of the January 29, 1942, order are as follows:

"ORDERED, ADJUDGED AND DECREED, that the report of Honorable James A. O'Gorman, Official Referee, dated the 10th day of December, 1941, and the supplemental report of Honorable James A. O'Gorman, Official Referee, dated the 12th day of December, 1941, be and the same hereby are in all respects confirmed, and in accord with said reports it is hereby

"FOUND, ORDERED AND DECREED, that the alleged pledge by the defendant Franz B. Lehmann of 1,225 shares of stock of the J. M. Lehmann Company, Inc. to the Deutsche Bank Filiale Dresden of Dresden, Germany, and the alleged foreclosure sale by said bank to Philipp Elimeyer were part of a fraudulent and collusive arrangement devised by the defendant Franz B. Lehmann to impair and destroy the rights and remedies of the plaintiff, and it is further

"ORDERED, ADJUDGED AND DECREED, that J. M. Lehmann Company, Inc. pay over to the plaintiff as receiver and sequestrator, the fund of $2,589.49, the property of the defendant Franz B. Lehmann, now in the possession of said company, and it is further

"ORDERED, ADJUDGED AND DECREED, that J. M. Lehmann Company, Inc. make entries on the stock transfer book showing transfer of title of the 1,225 shares of stock now upon its books in the name and title of the defendant Franz B. Lehmann, from the defendant Franz B. Lehmann to Dorothy Krets Lehmann as receiver and sequestrator appointed pursuant to the order of Hon. Julius Miller, a Justice of the Supreme Court, dated the 30th day of April, 1938, and it is further

"ORDERED, ADJUDGED AND DECREED, that said plaintiff-receiver is not to exercise any rights to such stock until the further order of this Court, and it is further

"ORDERED, ADJUDGED AND DECREED, that J. M. Lehmann Company, Inc. accept certificates for 1,225 shares of stock of J. M. Lehmann Company, Inc. tendered by Rudolf Wullen, which tender was made on behalf of Philipp Elimeyer, an alleged purchaser, and thereupon said J. M. Lehmann Company, Inc. be and is hereby ordered and directed to make said certificates of stock surrendered and thereupon to issue in lieu therefor a certificate for 1,225 shares of stock of J. M. Lehmann Company, Inc. in and to the name of the plaintiff as receiver and sequestrator and upon the issuance of said certificates for 1,225 shares of stock in and to the name of the plaintiff as receiver, the company is to mark said certificate with a notation that said certificate is subject to such claim, if any, as shall be made by the Deutsche Bank Filiale Dresden of Dresden, Germany, and subject to such claim, if any, as shall be made by Philipp Elimeyer the alleged purchaser on the alleged foreclosure sale, and to deliver to the plaintiff as receiver and sequestrator the certificate for said 1,225 shares of stock so issued and with said notation, by delivery of same personally to the plaintiff as receiver and sequestrator, and it is further

"ORDERED, ADJUDGED AND DECREED, that said plaintiff-receiver is not to exercise any such rights to such stock until the further order of this Court, and it is further

"ORDERED, ADJUDGED AND DECREED, that the Clerk of the County of New York be and is hereby ordered and directed to deliver to J. M. Lehmann Company, Inc. for the sole purpose of compliance by said company with the foregoing order and directions, the certificates for an aggregate of 1,225 shares of stock of J. M. Lehmann Company, Inc., heretofore introduced and marked as exhibits in evidence at the hearings before Hon. James A. O'Gorman, Official Referee, and it is further

"ORDERED, ADJUDGED AND DECREED, that the foregoing directions and order to J. M. Lehmann Company, Inc. and the Clerk of the County of New York, are subject to the obtaining of such license issued by the Secretary of the Treasury of the United States, pursuant to and as required by the Executive Order of Hon. Franklin D. Roosevelt, President of the United States, No. 8389, of April 10, 1940, as amended, and subject to any necessary permission from the proper authorities of the United States of America under the First War Powers Act of 1941, and in the event any such license or permission be necessary, said J. M. Lehmann Company, Inc. and the Clerk of the County of New York be and are hereby directed to apply for said license and permission and to take all necessary and appropriate steps for the obtaining of same."

the shares pursuant to Executive Orders which were issued by the President under, among other things, the authority granted to him by Title III of the First War Powers Act which amended Section 5 (b) of the Trading with the enemy Act. The act of vesting was, of course, antipodal to the granting of "permission" to issue a certificate to the claimant. In other words, the Committee interprets the concluding paragraph of the order to be a recognition by the New York Court of the possibility that the outbreak of war and the then enemy ownership of the shares might result, as it did, in the exercise of the federal war powers in respect to the shares and to be a manifestation by the New York Court of its intent in that event that its order not be inconsistent with action so taken by the federal government. In short, the vesting of the shares necessarily negatived any "permission" to issue the certificate to the claimant; a condition precedent to the effectiveness of the order was therefore left unsatisfied; and the claim to possession is, according to the terms of the order, as though the order had not been issued.

To whatever extent the order of April 30, 1938—appointing the claimant receiver and sequestrator of the "shares of stock of the J. M. Lehmann Company, Inc. (a New York corporation) owned by Franz B. Lehmann" and restraining the company from transferring the property within the state of New York of Franz B. Lehmann—is inconsistent with the order of January 29, 1942, it must be held to have been superseded by the later order and thus subject, in its effect, to the condition qualifying the later order. We would disregard the awareness of the New York Court of the new factor inserted into the picture by the outbreak of war and we would disregard the very terms of the later order, were we to hold, as contended by the claimant, that the later order did not supersede the prior order as to possession of the shares. The words of the later order were not, in the opinion of the Committee, surplusage.

Since the claim to possession of the vested shares rests upon these orders of the New York Court, and since the orders did not, for the reasons above stated, purport to give to the claimant possession of the shares as against the exercise by the federal government of its power to capture enemy property, we conclude that the claim to possession must be disallowed.

The intervenor contends that regardless of any interest that may have been acquired by the claimant under the state laws, it would be contrary to the policy of the Act and of Executive Order 9095, as amended, to allow the present claim. The Committee believes this argument to be sound, at least to the extent that it is applicable to the instant claim; that is, we agree that had the January 29, 1942, order been unconditional, the claimant would nevertheless not be entitled as against the Custodian to possession of the vested shares under the Trading with the enemy Act, as amended, and Executive Order 9095, as amended.

In the treatment of this argument of the intervenor, it must be emphasized that the present claim does not present the question which would arise if the claimant had been armed at the time of vesting with an absolute judgment for a sum certain then due and owing, and if the shares had been allocated to the payment of the judgment by appropriate state action. That is not the case here. Here the shares were at the most merely in custodia legis; that is, merely subject to the futher order of the court. Additional steps were required in the state court before the shares could be sold or otherwise used to satisfy the judgment.

But Executive Order 9095, as amended, provides in part:

"2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

"(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof."

If the relief sought in this proceeding were granted and the Custodian caused a certificate to be issued to the claimant as matrimonial receiver and sequestrator, it would appear that the shares would then be "property * * * in the process of administration by [a] person acting under judicial supervision * * * which is claimed by * * * an [enemy] national" which the Custodian would be "authorized and empowered" to vest. If so, the Custodian would not be called upon to perform the "idle ceremony" of divesting the property and then re-vesting it. *Sturchler* v. *Sutherland,* 19 F. (2d) 999 (E.D.N.Y. 1927), reversed on other grounds 23 F. (2d) 414 (C.C.A. 2d, 1928). No reason has been advanced, or decision cited, to the effect that the property presently claimed is not squarely within the four corners of this paragraph of Executive Order 9095, as amended.

Although the Custodian's authority to vest the subject shares under Executive Order 9095, as amended, seems determinative of the instant claim, it is well to note that there is no inconsistency between this result and Sections 8 and 9 (a) of the Trading with the enemy Act, as amended. In other words, we do not find in Sections 8 and 9 (a) of the Act any intent to grant possessory relief to a creditor who had at the time of vesting pursued his state remedy merely to the point of causing his debtor's property to be in custodia legis.

Section 9 (f) of the Act provides:

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

This section specifically bars a creditor from pursuing, after vesting, his ordinary in rem remedies of attachment, garnishment, or receivership. *Anglo-Continentale Trust Maatschappij* v. *Allgemeine Elektricitaetsgesellschaft,* 12 N.Y.S. (2d) 964 (Kings Co., 1939); *La Mettrie* v. *James,* 6 F. (2d) 479 (App. D. C. 1925), affirmed 272 U. S. 731 (1927); *Koscinski* v. *White,* 286 F. 211 (E. D. Mich. S. D., 1923). Section 9 (a), however, grants two distinct substitutional remedies to a creditor. A person "to whom any debt may be owing from an enemy" whose property was vested, is entitled not to possession of the property but to payment of the debt.[3] On the other hand, a creditor who has a security interest within the meaning of Section 8 of the Act "may continue to hold said property;" that is, is entitled to its possession. A person establishing any proprietary interest in vested property is, of course, entitled to possession thereof as

[3] Such claims are not presently being processed by the Office of Alien Property Custodian. See *Cabell* v. *Markham* (Civ. Action No. 26–302, S.D.N.Y., January 3, 1945, reversed, No. 279, C.C.A. 2d, April 3, 1945. Petition for Certiorari to the U. S. Supreme Court, No. 1271, granted June 4, 1945).

one with an "interest, right, or title" in the property within the meaning of Section 9 (a). *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom, *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

It appears, therefore, that under the scheme of the Act a creditor who seeks possession of vested property must bring himself within Section 8 of the Act. Section 8 provides:

"Any person not an enemy * * * holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy * * * which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law * * *. * * * Provided further, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President * * * and such surplus shall be held subject to his further order."

By its very words the benefit of Section 8 was obviously *not* intended to be extended to *all* security interests. Creditors holding some types of security interests are relegated to money claims as distinct from possessory claims because Section 8 contains words of limitation; its benefit was restricted to a

"* * * mortgage, pledge, or lien, or other right in the nature of security in property * * * which by law or by the terms of the instrument creating such mortgage, pledge, or lien, or other right may be disposed of on notice or presentation or demand * * *."

These are not apt words, in the opinion of the Committee, to describe a matrimonial receivership. Comparison of Section 9 (f) with Section 8 (a) supports this construction. When the Congress undertook, through Section 9 (f), to bar post-vesting receiverships, it described specifically "lien, attachment, garnishment, trustee process, or execution or subject to any order or decree of court," thus encompassing within the bar of Section 9 (f) all of the in rem remedies. If the Congress had intended to include a pre-vesting receivership within the special protection of Section 8, it undoubtedly would have manifested its intention to do so specifically. *Expressio unius persona vel rei, est exclusio altarius.*

Furthermore, Section 9 (f) may have direct applicability to the present claim. While the dominant purpose of Section 9 (f) is to bar a creditor from acquiring, after vesting, an interest in the vested property through the use of the ordinary in rem remedies, the phrase "subject to any order or decree of any court" is so susceptible by its very terms of application to the present claim—that is, of similarly barring possessory relief to a creditor who had pursued his remedy in a state court only so far as to cause the property to be subject to the order of the court—that an administrative disallowance of the claim is required.

One further contention of the claimant requires comment. She maintained that if the present claim were disallowed, the disallowance would

bring about the exact situation which the New York Supreme Court sought to prevent; that is, the claimed shares would, in effect, be transferred to non-resident enemies and thus be beyond the reach of the claimant in the event of a default by her husband in the payment of alimony. This is not so. The Trading with the enemy Act does not so provide. The Custodian is under a duty to administer the property, to sell it if the national interest so requires, but in any event to hold either the property or its proceeds until further directions from the Congress.

Finally, it is to be noted that this determination does not consider the status as a claimant of a person who had acquired prior to vesting a "specific and perfected lien." See *U. S.* v. *Waddill, Holland & Flinn,* 65 Sup. Ct. 304 (January 2, 1945). Nor does this determination consider or pass upon the issues which would be presented if the claimant herein were presently seeking relief as a creditor of Franz B. Lehmann. We hold merely that the claimant is not entitled to possession of the vested securities as matrimonial receiver and sequestrator.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Dorothy Krets Lehmann, did not have at the time of vesting a title or interest to the vested property sufficient to support a right of recovery.

Accordingly, Claim No. 398 is hereby disallowed.

JUNE 15, 1945.

IN THE MATTER OF

FRANZ E. LOES

Claim No. 802. Docket No. 31.

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 802 (dated June 22, 1943) filed by Franz E. Loes, pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 110, dated August 24, 1942 (7 Fed. Reg. 7058), vested all of the capital stock of Riedel-de Haen, Inc., a New York corporation, consisting of four hundred and fifty shares of common stock, as the property of a national of a designated enemy country (Germany).

The Notice of Claim alleges that the claimant, Franz E. Loes, was the owner of one share of the stock so vested.

The Order for and Notice of Hearing was published on July 15, 1944 (9 Fed. Reg. 7961) and a copy was served upon the person designated in Section 2 of the Notice of Claim. The hearing was held before the Vested Property Claims Committee, at the Office of Alien Property Custodian, 120 Broadway, New York, New York, on July 28, 1944. The claimant, Franz E. Loes, appeared personally, without counsel, and John Ernest Roe, (and subsequently his successor in office, Raoul Berger) General Counsel, by George B. Searls and Robert A. Fulwiler, appeared on behalf of the Alien Property Custodian. Claimant did not submit a brief. Proposed findings and a supporting brief were filed by General Counsel on October 4, 1944. A tentative determination allowing the claim was issued on February 10, 1945, and on February 22, 1945 General Counsel submitted a memorandum in opposition to the proposed allowance.

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The transcript of the testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby allowed for the reasons hereinafter set forth.

DETERMINATION

By Vesting Order No. 110 the Custodian vested all of the capital stock —450 shares—of Riedel-de Haen, Inc., a New York corporation. One of the shares, represented by Certificate No. 14, was registered at the time of vesting in the name of Franz E. Loes, who contends in this proceeding that he then had the entire "interest, right, or title" in this share. The Committee has concluded that the evidence satisfactorily sustains this contention of ownership.

The share in question was at one time issued by Riedel-de Haen, Inc. to its parent, J. D. Riedel-E. de Haen, A. G. of Berlin, Germany, and in October, 1934 the share was transferred on the books of Riedel-de Haen, Inc. to the claimant. At the time of the transfer, the claimant had been a director of Riedel-de Haen, Inc. for about four years and had been advising the company on questions related to its advertising.

The vesting was apparently on the assumption that the share had been transferred on the books of the company merely as a director's qualifying share;—the parent German corporation thus retaining the beneficial interest therein. The claimant testified, however, that the share was transferred to him as compensation for services rendered, and his testimony was corroborated by a letter to him, dated October 23, 1934, from one Paul de Haen, at the time the president and manager of Riedel-de Haen, Inc. The letter reads as follows:

"It is with genuine pleasure that I present to you herewith, with my compliments, one share of our company stock. It was originally planned to hand this share to you, a director of our firm, at our this year's annual meeting. Inasmuch as our whole issues are owned by the J. D. Riedel-E. de Haen A. G. Berlin, we had to secure an endorsement of the directors of our parent house. Due to foreign exchange regulations in Germany, it unfortunately took an exceedingly long time to obtain the permission from the German Government for this transaction.

"I am asking you to accept this share as a small token of the principals' and my personal appreciation for the valuable counsel you have rendered to me. I would like to add that I have rarely found a person like you who gives such wholehearted advice and devotes so much of his time to the affairs of other people. You have assisted me in such numerous ways and encouraged me so often in my work that the gratitude I feel toward you is securely anchored, and I sincerely hope that the occasion will arise which will offer me an opportunity to reciprocate your many favors."

There is nothing in the record inconsistent with the claimant's testimony. Furthermore, the attendant circumstances seem to preclude any reasonable inference that the transaction was in any manner irregular or that the share was merely a qualifying share. In short, we find that the claimant was the owner of the entire legal and equitable interest in the share at all material times.

The claimant has been a naturalized citizen of the United States since 1921 and has resided in New York at all material times. His activity as a member of the Board of Directors of Riedel-de Haen, Inc., and

otherwise, was not such, in the opinion of the Committee, as to bring him within the meaning of the definition of a national of a "foreign country" as set out in Section 5E of Executive Order 8389, as amended, nor within the meaning of the definition of a national of a "designated enemy country" as set out in Section 10 (a) of Executive Order 9095, as amended, and, of course, he is not an "enemy" as defined in Section 2 of the Trading with the enemy Act, as amended.

The Vesting Order determined that the national interest required that the claimant be treated as a national of a designated enemy country. It now appearing, however, that the claimant is the owner of the share of stock in question and that he is a citizen and resident of the United States whose activity in relation to a domestic corporation was entirely innocuous and not in violation of an ordinance of the sovereign, we find that the national interest does not require that he be treated as a national of a designated enemy country and further find that a retention of his property would not serve the purposes of the Trading with the enemy Act, as amended, and its related Executive Orders. He is, therefore, an eligible claimant as to nationality. See Final Determination of the Claim of George Yamaoka December 3, 1945 (Claim No. 573).

It is to be noted that the shares of stock of Riedel-de Haen vested by the Custodian, including the share in question, have been sold by the Custodian and that the present claim to one share of stock of Riedel-de Haen, therefore, is to be satisfied from the proceeds of the share so sold.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Franz E. Loes, has established by satisfactory and convincing evidence that he:

(1) Is not, and was not at the time of vesting, an "enemy or ally of enemy" as defined in Section 2 of the Trading with the enemy Act, as amended, or a "national of a designated enemy country" as defined in Section 10 of Executive Order 9095, as amended, or a "national of a foreign country" as defined in Section 5E of Executive Order 8389, as amended, and,

(2) was at the time of vesting the owner of the entire "interest, right, or title" in one share of stock of Riedel-de Haen, Inc.

Accordingly, Claim No. 802 is hereby allowed.

MARCH 6, 1946.

IN THE MATTER OF

LOUIS E. LOVETT

APC–1 Claim No. 1612. Docket No. 20.

DETERMINATION OF DISALLOWANCE BY CONSENT

Pursuant to the Claims Regulation (8 Fed. Reg. 16709), Louis E. Lovett filed Claim No. 1612, alleging that he held an exclusive license under Patents Nos. 1,719,754 and 1,815,761 which were vested by Vesting Order No. 112.

Pursuant to Notice (9 Fed. Reg. 3469), the claim was heard on April 11–12, June 12, and October 6, 1944. Riegelman, Strasser, Schwarz & Spiegelberg, by H. J. Frank, appeared on behalf of the claimant. John Ernest Roe, General Counsel, by George B. Searls, Elmer W. Cunningham, and James M. Fallon, appeared on behalf of the Alien Property Custodian. With leave of the Committee, American Viscose Corporation,

by Albert N. Webster, and Tubize Rayon Corporation, by Carl R. Dolmetsch, appeared as intervenors.

On January 22, 1945 General Counsel notified the Committee that an agreement in settlement of the claim had been executed on January 5, 1945 by the claimant and the Custodian. By the terms of the agreement, the claimant relinquished all claim under the patents in question, consented to a disallowance with prejudice of claim No. 1612, and received from the Custodian License No. 1167, a nonexclusive royalty-free license under the patents in question.

Pursuant to the agreement of settlement and as suggested by General Counsel, Claim No. 1612 is hereby disallowed.

FEBRUARY 12, 1945.

IN THE MATTER OF

SHINSAKU NAGANO—FUJI TRADING COMPANY, INC.

Docket No. 6. Claim No. 488.

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 488 (dated March 10, 1943) filed by Shinsaku Nagano pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian, by Vesting Order No. 813, dated February 2, 1943, (8 Fed. Reg. 2239) vested 8,780 shares of the capital stock of The Fuji Trading Company, an Illinois corporation. The vesting order recited, among other things, a finding that the shares were owned by Kaku Nagano, a national of a designated enemy country (Japan).

The Notice of Claim alleges that in respect to 3,105 of the shares so vested Kaku Nagano was a nominee for the claimant who was the beneficial owner thereof.

The Order for and Notice of Hearing was published on October 20, 1943 (8 Fed. Reg. 14250) and a copy was served upon the person designated in Section 2 of the Notice of Claim.

A hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, Field Building, Chicago, Illinois, on November 2 and 3, 1943.

C. Lysle Smith, Esq., appeared on behalf of the claimant, and A. Matt. Werner, General Counsel, by Irwin L. Langbein and Ronald N. Brown, appeared on behalf of the Alien Property Custodian.

Proposed findings and supporting briefs were filed by the claimant on January 10, 1944, and by General Counsel on January 19, 1944. The claimant submitted a reply brief on February 28, 1944. A tentative determination disallowing the claim was issued on April 25, 1944. The claimant submitted proposals to modify the tentative determination on May 27, 1944 and General Counsel submitted a memorandum in support of the tentative determination on June 12, 1944.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The Committee, following a consideration of the entire record, hereby disallows the claim for the reasons hereinafter set forth.

DETERMINATION

The claimant, Shinsaku Nagano, resides in Wilmette, Ill. He was born in Japan in 1881, came to the United States in 1906, and has resided continuously in Illinois. He is not a citizen of the United States. In 1914 he married in Japan; his wife, Kaku, was the record owner at the date of vesting of the shares involved in the instant claim. She resided in the United States with her husband from 1915 until 1923. She then returned to Japan where she has resided continuously except for a short period—from August 1932 to May 1933—when she visited her husband in Illinois. The Naganos have three children. A son, Shigeo, was born in Illinois in 1916 and, when last heard from, was residing in Shizuoka, Japan, with his mother and his two sisters. Both daughters were born in and are citizens of Japan. The younger daughter is married to a Japanese and, in the fall of 1941, a Japanese husband was being sought for the elder. Nagano habitually spent two or three months out of each year in Japan with his family, his last visit being in the summer of 1941.

In 1910 Nagano organized The Fuji Trading Company, which was incorporated under the same name in 1911, for the purpose of manufacturing and selling chop suey products. The company in the two years immediately prior to vesting had an average gross business of $250,000. On January 3, 1932, the claimant, Nagano, was President of The Fuji Trading Company, Chairman of its board, and actively directed its policies and activities. The Board was composed of Shinsaku Nagano, Kaku Nagano, and Yoshio Miya. Nagano's wife, Kaku, was also Treasurer of the corporation. Yoshio Miya, a brother of claimant Nagano's wife, also assisted Nagano in the business and was the Secretary of the corporation. Cecil B. Smeeton was the bookkeeper and accountant for the company. It appears that no one other than Nagano actually participated in the management. On January 3, 1932, the company had 10,000 shares of $10 par value stock issued and outstanding in the following names:

			Percent
Shinsaku Nagana	6,210	or	62.10
Kaku Nagano	3,780	or	37.80
Yoshio Miya	10	or	.10
Total	10,000		100.00

The directors on January 3, 1932, at a regular meeting, pursuant to the authority given at the annual stockholders meeting held the same day, declared a stock dividend of 5,000 shares, $10 par value, to the stockholders of record on January 3, 1932, "said stock dividend to be distributed to the stockholders in proportion to their present stock holdings." The Fuji Trading Company Stock Certificate No. 59, dated April 1, 1932, representing 5,000 shares, was issued in the name of Kaku Nagano pursuant to the direction of Shinsaku Nagano and was signed by Shinsaku Nagano, as President, and Yoshio Miya, as Secretary. The stub of Certificate No. 59 states that it was issued to Kaku Nagano. Thus, according to the stock book the stock ownership after April 1, 1932 was as follows:

			Percent
Shinsaku Nagano	6,210	or	41.40
Kaku Nagano	8,780	or	58.53
Yoshio Miya	10	or	.07
Total	15,000		100.00

The vesting order was issued apparently on the basis of the reflection in the stock book of ownership of the 8,780 shares by Kaku Nagano.

The claimant contends that as to 3,105 (i.e., 62.10% of the April 1932 stock dividend of 5,000 shares) of the 8,780 shares recorded in the name of Kaku Nagano, Kaku Nagano was a nominee for him and he was the beneficial owner thereof. General Counsel, on the other hand, contends that Kaku Nagano acquired ownership of the 3,105 shares in question as a gift from the claimant.

Kaku Nagano was at the date of vesting a citizen and resident of Japan. She is, therefore, an "enemy" under Section 2 of the Trading with the enemy Act of October 6, 1917, a "foreign national" under Section 5 (b) of that statute as amended by Title III of the First War Powers Act, 1941, and a "national of a designated enemy country" under Executive Order 9095, as amended. Therefore, if the claimed shares were owned at the date of vesting by Kaku Nagano, they were properly vested as in the case of the other shares which were admittedly owned by her.

The sole issue in this proceeding is whether the claimant had at the date of vesting a legal or equitable right to the 3,105 shares and the claimant has the burden of proof.[1]

It is the opinion of the Committee that the claimant has not sustained his burden. The evidence in the record tending to show that an effective gift of the 3,105 shares was made by the claimant to his wife is of such weight that a finding favorable to the claimant is not warranted.

Prior to 1932, the accountant, Smeeton, suggested that the claimant should give his wife some property for the purpose of diminishing the estate tax payable after his death. After the issuance of Certificate No. 59—which included the 3,105 shares in question—in the name of Kaku Nagano, claimant told Smeeton that the latter's suggestion had been carried out. Moreover, in an affidavit dated February 19, 1942 and filed with the Treasury Department, Nagano stated that "* * * it was the intention of this deponent to make a gift of said shares of stock to his said wife for estate tax purposes but that said shares of stock were never delivered to her * * *."[2] The probability that Nagano intended the issuance of the shares in 1932 to be a presently effective gift to her is further indicated by the admitted fact that he had made similar gifts to her previously, that is, one share in 1920, 500 shares in 1921, and 1,389 shares in 1927. Subsequent to April 1, 1932, the claimant placed Certificate No. 59 in a safe deposit box at the Continental Illinois Safe Deposit Box Company—the same box that contained the certificates of shares in The Fuji Trading Company admittedly given by Nagano to his wife, as well as certificates of shares issued in the name of and owned by the

[1] *Draeger* v. *Crowley*, — Fed. (2d) —, (Civil No. 19-385, D. C. So. Dist. of N. Y. May 29, 1944).

[2] The affidavit was filed with the Treasury Department, Division of Foreign Funds Control, to support an application for a license to transfer the shares from the name of Kaku Nagano to the claimant on the ground that an attempted gift to her was legally incomplete. It may be noted that, in an affidavit filed with the same application, Smeeton stated "* * * that in the early part of the year 1932 he called Mr. Nagano's attention to the large number of shares of company stock which stood on record in his name and to the closely held character of the stock of the corporation, and to the fact that with each year's additional operations of the company the said shares of stock were increasing materially in their value; that Mr. Nagano was constantly engaged in traveling for the company and that in the event of his death by way of accident or otherwise, the inheritance tax and Federal Estate tax payable at that time would be considerable and that it would be advisable to transfer a portion of said stock to his wife Kaku Nagano. * * * That he took no further interest in the matter but was advised by Mr. Nagano during a subsequent examination of the books at the company offices that he had accepted the advice and made a transfer of a portion of his shares to Mrs. Nagano * * *." The claimant testified in respect to the issuance of Certificate No. 59 in the name of Kaku Nagano "but I was just taking the first step along Mr. Smeeton's suggestion."

claimant. And on March 2, 1934 the claimant authorized his wife to open this safe deposit box at will. Although Mrs. Nagano had returned to Japan in the summer of 1933 and was not in Chicago at any time after she had been given access to the safe deposit box, the controlling fact is that Nagano deposited Certificate No. 59 in the box and performed the affirmative act of giving her power to open the box, which indicates an intention to make a presently effective gift to her. In 1936, The Fuji-Trading Company declared and paid a cash dividend of $3,000. It was paid by Fuji's check drawn payable to "cash". In March 1937 a federal income tax return was filed for Mrs. Nagano and in it $1,756 was reported as her income from dividends. This item of income obviously is that part of the cash dividend allocable to the 8,780 shares—which inclue the 3,105 shares in question—registered in her name on the books of the company. In addition to the facts related above, which, in the opinion of the Committee, clearly indicate an intention on the part of the claimant to make a presently effective gift to his wife, the claimant on July 8, 1943, at a conference attended by his counsel, and by Messrs. Ronald N. Brown and John E. Rohan of the Custodian's staff, stated that when the certificate was issued in 1932 in the name of Mrs. Nagano "I was only doing what other people were doing, giving property to my family."

In addition to this persuasive evidence indicating that the claimant had at all material times the donative intent essential to a valid gift of the shares to his wife, there is also persuasive evidence that the intention had been effectuated by a delivery of the shares.

In *Chicago Title and Trust Company* v. *Ward,* 332 Ill. 126, 163 N. E. 319 (1928), it was held that the following acts constituted a gift by one Benton of 350 shares of stock to his daughter. Benton, the President of a corporation and owner of approximately ⅓ of the 6,000 issued shares, paid $11,000 to the corporation and caused to be issued therefor four certificates, representing a total of 350 shares, in the name of his daughter. The stubs in the stock book, as in the instant case, recited that the certificates were issued to her. Benton at all times had possession and control of the certificates and his daughter did not have access to them. Following his daughter's death, Benton caused the certificates to be cancelled and new certificates to be issued in his name. It was held that the gift to the daughter had been perfected and that title had passed to her. The evidence of delivery in this proceeding, particularly the fact that Mrs. Nagano had access to the certificate and the fact that it was placed with certificates admittedly owned by her, seems more persuasive than the evidence of delivery in the *Ward* case. The Uniform Stock Transfer Act, adopted in Illinois (Smith-Hurd Ann. St. Ch. 416 et seq.) after the date of the operative facts in the *Ward* case, is not in the opinion of the Committee applicable to a transaction of this nature but, if controlling, does not, in the opinion of the Committee, change the law of Illinois as stated in the *Ward* case. It is unnecessary to consider whether Mrs. Nagano accepted the delivery of the stock because it is presumed that delivery of a beneficial gift is accepted by the donee.

The Committee has considered all of the evidence upon which the claimant based his argument that he did not intend to give the shares to his wife and is constrained to reject the several contentions for the following reasons.

Nagano testified in substance that he did not intend to give the shares to his wife and that any action taken by him which tended to indicate

such an intention, was merely a step preliminary to the making of a gift which was never perfected. An examination of the transcript of the hearing and the several exhibits received in evidence discloses such a degree of irregularity in the corporate records and such material variances in Nagano's testimony that the Committee feels compelled to disregard his direct testimony as to his intentions in the premises. The claimant further contends that Certificate No. 59 is void because not in conformity with the shareholders' and directors' resolutions of January 3, 1932, authorizing the share dividend. The resolutions authorized a distribution of 5,000 shares to the shareholders in proportion to "their present stock holdings." Although a certificate representing *all* the shares was issued to Kaku Nagano, it was so issued at the instance of the claimant, who, under the terms of the resolution, was entitled to them. In any event, the claimant having caused the certificate to be issued in this manner could not now be heard to complain of such an irregularity.[3] The claimant argues further that his ownership of the claimed shares is indicated by the fact that the check drawn payable to "cash" and representing the $3,000 cash dividend declared and paid in 1936 was deposited by him and, according to his testimony, used as his own. The argument lacks force in view of the fact that the dividend check included the dividends payable upon the shares admittedly owned by his wife. In any event, his use of her funds is of little moment considering the relationship between them. For a similar reason the claimant's argument that Mrs. Nagano did not in fact vote the stock in question has little weight, because she did not in fact vote the shares which were admittedly hers. Nagano at various times made statements of ownership of The Fuji Trading Company to the Continental Illinois Bank and Trust Company for credit purposes. These statements—consistent with the claimant's present contention—were however obviously self-serving declarations then made to induce the extension of credit to him. On February 18, 1942, The Fuji Trading Company filed an application with the Treasury Department for a license to cancel Certificate No. 59 and to issue a new certificate in the name of the claimant. The claimant argues that this application tends to show that Nagano at all material times considered himself to be the owner of the stock. We are constrained to believe however that the allegations of the application were merely self-serving in his predicament and note that it was filed with the Treasury Department two months after the war with Japan commenced.

Following a consideration of the entire record, the Committee concludes that the claimant has not sustained his burden of establishing a legal or equitable right to the claimed shares.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that:

(1) The claimant, Shinsaku Nagano, was not at the time of vesting the owner of the claimed shares, and

(2) Vesting Order No. 813 was properly issued.

Accordingly, Claim No. 488 is hereby disallowed.

JUNE 28, 1944.

[3] *Breslin* v. *Fries-Breslin Co.*, 70 N.J.L. 274, 58 Atl. 313 (1904).

IN THE MATTER OF

EUGENE R. PICKRELL

Claim No. 969 Docket No. 63

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 969 (dated August 19, 1943) filed on Form APC–1 by Eugene R. Pickrell pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Alien Property Custodian by Vesting Orders

No. 6, dated April 28, 1942 (7 Fed. Reg. 3465),
No. 21, dated June 9, 1942 (7 Fed. Reg. 4415),
No. 27, dated June 18, 1942 (7 Fed. Reg. 4629),
No. 47, dated July 8, 1942 (7 Fed. Reg. 5725),

vested all right, title, and interest in certain United States patents, including all accrued royalties, as property of nationals of a foreign country designated in Executive Order No. 8389, as amended. The property so vested included certain royalties due and owing from Rohm & Haas Co., Philadelphia, Pennsylvania, to I. G. Farbenindustrie, A. G., a German corporation.

Notice of Claim No. 969 alleges in substance: that the claimant, Eugene R. Pickrell, entered into a retainer agreement with I. G. Farbenindustrie, A. G., in 1931 under the terms of which the claimant represented I. G. Farbenindustrie, A. G., in a legal capacity; that there was and is due to the claimant under the contract forty-five hundred dollars; and that on August 29, 1941, I. G. Farbenindustrie, A. G. assigned to the claimant the sum of forty-five hundred dollars from the royalty account due I. G. Farbenindustrie, A. G. from Rohm & Haas.

The Order for and Notice of Hearing was published on October 3, 1944 (9 Fed. Reg. 12055) and a copy was served upon the person designated in Section 2 of the Notice of Claim. Pursuant thereto a hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, Washington, D. C., on October 19, 1944. O. R. Folsom-Jones appeared on behalf of claimant, and John Ernest Roe, General Counsel, by David M. Williford, appeared on behalf of the Alien Property Custodian. Proposed findings and supporting briefs were filed by claimant on November 21, 1944 and by General Counsel on November 25, 1944. A Tentative Determination disallowing the claim was issued on December 21, 1944. No proposals to modify the Tentative Determination having been submitted by either party, the Tentative Determination as hereinafter set forth is hereby adopted and issued as the Final Determination in this proceeding.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

As is understood by the parties to this proceeding, the Office of Alien Property Custodian is not presently considering pre-vesting creditors' claims—clarification of the Custodian's authority in the matter of creditors' claims being the subject of pending legislation—and the present proceeding is, therefore, confined to that aspect of Claim No. 969 which asserts an effective assignment to the claimant.

For reasons hereinafter set forth, Claim No. 969—to the extent that it is a claim of an effective assignment—is hereby disallowed.

DETERMINATION

Prior to 1942 Rohm & Haas Company of Philadelphia, Pennsylvania, owed to I. G. Farbenindustrie, A. G. (hereinafter referred to as Farben) accrued royalties and in 1942 the Custodian by a series of orders vested, among other things, the rights to these royalties. The sole issue in this proceeding is whether Farben had assigned to the claimant prior to vesting forty-five hundred dollars of the royalties.

The claimant contends in substance that Farben made the assignment in August 1941 as payment of the balance owed to him for his services under a contract. General Counsel contends in effect that the transaction in question was not an effective assignment.

The material evidentiary facts as hereinafter recited are not in dispute. Likewise there is no dispute relative to claimant's nationality. The controversy involves merely the proper inferences and the legal conclusions to be drawn from the undisputed facts.

The claimant, Eugene R. Pickrell, an American citizen and a long time member of the bar of the State of New York, was retained in 1931 by Farben at an annual retainer of Six thousand dollars to advise Farben relative to Custom matters generally. The retainer contract was not placed in evidence, but the claimant testified as to the services to be performed under it and the compensation to be paid therefor, and it may be assumed for the purposes of this proceeding that the contract was in effect at all material times. It was the practice of the claimant to send quarterly statements of account to the Farben representative in the United States. Responsive payments were made in quarterly installments of fifteen hundred dollars each out of Farben funds on deposit in the National City Bank in New York. The claimant testified that he received fifteen hundred dollars as the first quarterly installment of 1941, thus leaving an unpaid balance of forty-five hundred dollars for the last three quarters of 1941. The claimant stated that "Toward the close of the second quarter (June 1941) I got somewhat apprehensive as to how long the retainer would last and also there was practically a cessation in importation of merchandise from Germany. As a matter of fact, to my knowledge, it ceased in June 1941." And it appears that the claimant therefore proceeded to seek payment of the balance of the annual retainer directly from Farben in Germany.

Apparently in response to such a request for payment, Farben, on August 29, 1941, in a radiogram to Rohm & Haas stated:

"PLEASE APPLY FOR SPECIAL LICENSES TO PAY FOR OUR ACCOUNT WITH YOU DOLLARS 51.000 TO CHEMNYCO INCORPORATION NEW YORK N DOLLAR 4500 TO EUGEN PICKRELL 230 FIFTH AVENUE NEW YORK STOP HAVE INFORMED BOTH CHEMNYCO PICKRELL TO FURNISH NECESSARY DETAILS STOP PLEASE CABLE AFTER RECEIPT SPECIAL LICENSES WILL THEN ASK YOU TO EFFECT PAYMENT."

On same day Farben cabled Pickrell as follows:

"HAVE ASKED ROEHME HAAS PHILADELPHIA TO APPLY SPECIAL LICENSES FOR PAYMENT TO YOU OF DOLLAR 4500 BALANCE OF ANNUAL RETAINER FOR 1941 STOP PLEASE FURNISH ROEHME HAAS WITH NECESSARY DETAILS."

Then on September 4, 1941 Rohm & Haas executed and filed with the Treasury Department an application for a license to pay the sum of forty-five hundred dollars to the claimant pursuant to the August 29, 1941 cable from Farben. The Treasury Department on December 22, 1941 issued a license authorizing a payment, not to the claimant, but into a blocked account in the name of Farben. Such payment was not made. On two subsequent occasions in 1942 applications for Treasury licenses to make the payment of forty-five hundred dollars directly to the claimant were denied.

The claim that an assignment was effectuated by Farben must stand or fall upon a proper interpretation of the two cables from Farben. And in interpreting the cables the Committee has assumed that Farben was obligated to the claimant under the contract for the unpaid balance of forty-five hundred dollars, and that Rohm & Haas was obligated to Farben in an amount in excess of forty-five hundred dollars.

While no particular form of language, no word of art, is necessary to assign effectively a chose in action, it is necessary that the obligee manifest an unequivocal intention to make the alleged assignee the owner of the right. The only manifestation of the intention of the obligee in this case is the cables quoted above. We cannot infer an intention to transfer a right from the first two sentences of the Farben cable to Rohm & Haas. They consist merely of a request to Rohm & Haas to procure licenses and advice to Rohm & Haas that Chemnyco and the claimant had been asked to furnish the details necessary for the license applications. The last sentence of the cable—"Please cable after receipt special licenses will then ask you to effect payment"—not only does not manifest an intention to effect presently a transfer of rights but specifically reserves in Farben the power to grant or withhold the direction of payment. An indispensable element of a valid assignment was, therefore, omitted because the creditor retained control of the chose in action. *Christmas* v. *Russell,* 81 U. S. (14 Wall.) 69 (1871); *Farmers' Bank of Greenville* v. *Blount,* 8 F. (2d) 443 (C.C.A., 4th, 1925); *East Side Packing Co.* v. *Fahy Market,* 24 F. (2d) 644, (C.C.A., 2d, 1928); *Farmers' Bank* v. *Hayes,* 58 F. (2d) 34, (C.C.A., 6th, 1932); *Williston on Contracts,* (Rev. Ed., 1936), Secs. 424–425. This cable meant, in the opinion of the Committee, that Rohm & Haas were to obtain the necessary Treasury licenses, advise Farben when the licenses were issued, and then not "effect payment" until directed to do so by Farben. In other words, Rohm & Haas were not authorized to pay the claimant until they had received a further instruction from Farben.

The cable of the same date, August 29, 1941, from Farben to the claimant, either standing alone or read together with the previous cable, cannot be regarded as an assignment. It merely advises the claimant to furnish Rohm & Haas with the details necessary to enable Rohm & Haas to apply for Treasury licenses.

The Committee is, therefore, constrained to conclude, after a consideration of the testimony and the documents submitted in evidence, that to the extent that the claim rests upon proof of an effective assignment, the claimant's evidentiary burden has not been sustained.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Eugene R. Pickrell, did not have at

the time of vesting a title or interest to the vested property sufficient in law to support a right to recovery.

Accordingly, Claim No. 969 is hereby disallowed.

FEBRUARY 23, 1945.

IN THE MATTER OF

RADIO PATENTS CORPORATION

Claim No. 674. Docket No. 72.

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 674 (dated May 21, 1943), filed by Radio Patents Corporation, pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 27, dated June 18, 1942 (7 Fed. Reg. 4629), vested all right, title and interest in United States Patent No. 2,078,618 as property of Berthold Springer, a national of a foreign country (Germany).

Notice of Claim No. 674 alleges that the claimant has an "irrevocable one-half interest in Patent No. 2,078,618 on the basis of agreement dated September 7, 1934."

The Order for and Notice of Hearing was served upon the person designated in Section 2 of the Notice of Claim. The hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, 120 Broadway, New York City, on February 15, 1945. Karl Rath, Vice President and patent counsel, appeared on behalf of claimant, and John Ernest Roe, General Counsel, by Edward M. Murphy, appeared on behalf of the Custodian. A brief was filed by General Counsel on March 17, 1945; no brief was filed by the claimant. A tentative determination disallowing the claim was issued on June 9, 1945. No proposals for modification having been received, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in the matter.

The transcript of testimony taken at the hearing and the exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for the reasons hereinafter set forth.

DETERMINATION

This proceeding concerns United States Patent No. 2,078,618 which was issued by the United States Patent Office on April 27, 1937, to the inventor, Berthold Springer, and vested by Vesting Order No. 27. The record owner of the patent at the time of vesting was Berthold Springer, admittedly a citizen and resident of Germany. The invention is a transformer device for "converting low voltage direct current into high voltage current or vice versa."

The claimant contends in substance that a fifty percent interest in the patent was assigned to it by "an agreement made with the firm, Richard Jahre, a firm in Berlin, Germany, * * * dated September 7, 1934." General Counsel contends in substance that the claimant has failed to carry its burden of proof.

The question is whether the claimant has established that it had ac-

quired prior to vesting any "interest, right, or title" in the subject patent within the meaning of section 9 (a) of the Trading with the enemy Act, as amended. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom, *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123, (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

The claimant, Radio Patents Corporation, is a New York corporation engaged in the manufacturing and marketing of various electrical items. Approximately 90% of its stock is owned by William Dubilier, a citizen and resident of the United States, who is the President of the claimant corporation.

It appears that one Irving Rossi, then a Vice President of the claimant corporation, was in Berlin in 1934 and discussed with the Jahre firm the possibility of acquiring for the claimant corporation an interest in the Springer patent. Following this discussion, various communications were exchanged from May to September, 1934, between Rossi, Dubilier, and the Jahre firm. The claim to a 50% ownership interest in the subject patent is based upon these communications and upon the testimony of but one witness, Karl Rath, Vice President and patent counsel of the claimant corporation.

At the outset, it is clear that there is no evidence whatsoever in the record upon which the Committee could find that Berthold Springer, the record owner of the patent, at any time transferred his interest in the patent to anyone. The correspondence does contain a representation by the Jahre firm that it was the sole owner of the plant, but none of the correspondence carries the signature of Springer or even purports to be a transfer by Springer or the granting of any authority by Springer to transfer the subject patent. Furthermore, Mr. Rath testified in respect of Springer, "I never heard of him," and that Springer "must have been" an employee of Jahre, "otherwise Jahre couldn't have claimed the ownership." In other words, the absence from the record of satisfactory and convincing evidence that Springer, the record owner of the patent, parted with his ownership—or authorized anyone else to transfer his ownership—necessarily precludes an allowance of the present claim.

The principal documentary evidence relied upon by the claimant purports to be a copy of a letter from Rossi to Jahre dated September 7, 1934. Although the Committee is of the opinion that this document is not and does not purport to be a contract to transfer an ownership interest in the patent to the claimant, it is unnecessary to dwell upon this aspect of the document because there is no evidence that the Jahre firm either received the letter or confirmed in any way the "agreement" contained therein. Obviously, therefore, it is an inadequate basis to support a finding that the claimant acquired a proprietary interest in the patent prior to vesting. The Committee notes that there was apparently no communication between the claimant and the Jahre firm in respect of the subject patent after November, 1934, although the patent did not issue until 1937.

It appears that the claimant bore the expenses of prosecuting the patent application. The evidence as to why it did this is inconclusive, but there is no evidence that the parties intended the payment of the costs of the prosecution to be the consideration for a transfer of the patent.

Consideration of the entire record discloses that any finding favorable to the claimant's contention would perforce be based not upon satisfactory and convincing evidence, but upon conjecture. A claim cannot be allowed on the basis of uncorroborated hearsay evidence. *Edison Co.* v. *N.L.R.B.*, 305 U. S. 197 (1938).

THEREFORE, for the purpose of this proceeding, it is the determination of the Committee that the claimant, Radio Patents Corporation, did not have at the time of vesting a title or interest to the vested property sufficient in law to support a right of recovery.

Accordingly, Claim No. 674 is hereby disallowed.

JULY 9, 1945.

IN THE MATTER OF

C. MARTIN RIEDEL

Claims Nos. 130, 815 as Supplemented, and 1332
Dockets Nos. 41, 42, & 43

STATEMENT OF THE CASE

This proceeding was initiated by Notices of Claims Nos. 130, 815 as supplemented, and 1332 (dated December —, 1942, June 29, 1943 and December 30, 1944, and November 13, 1943, respectively) filed by C. Martin Riedel, pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 141, dated September 8, 1942 (7 Fed. Reg. 8311), vested, among other things, the following patents:

No. 1,815,876, issued on July 21, 1931, and vested as the property of Siemens-Bauunion G.m.b.H. K.G.

No. 1,820,722, issued on August 25, 1931, and vested as the property of Siemens-Bauunion G.m.b.H. K.G.

No. 1,827,238, issued on October 13, 1931, and vested as the property of Tiefbau-und Kalteindustrie Akt., Vormals Gebhardt and Koenig, and Siemens-Bauunion Gesellschaft m.b.H. K.G.

No. 1,846,815, issued on February 23, 1932, and vested as the property of Siemens-Bauunion G.m.b.H. K.G.

The Custodian by Vesting Order No. 201, dated October 2, 1942 (8 Fed. Reg. 625), also vested, among other things, Patent No. 2,081,541, issued on May 25, 1937.

The Notices of Claims allege in substance that at the time of vesting the claimant, C. Martin Riedel, was the exclusive licensee of the above identified patents with the right to grant sub-licenses and to retain one-third of the royalties received from sub-licensees.

The Order for and Notice of Hearing was published on August 9, 1944 (9 Fed. Reg. 9685) and a copy was served upon the person designated in Section 2 of the Notices of Claims. The hearing was held before the Vested Property Claims Committee on August 17, 1944, at the Office of Alien Property Custodian, 135 South LaSalle Street, Chicago, Illinois. The claimant appeared without counsel, and John Ernest Roe, General Counsel, by Thomas J. McBride, appeared on behalf of the Alien Property Custodian. Subsequently, additional evidentiary material was submitted by the claimant and received in evidence. Proposed findings and a supporting brief were filed by General Counsel on September 28, 1944. A

reply brief on behalf of the claimant was submitted by Attorneys Roy W. Hill and George A. Auer on December 9, 1944. A tentative determination disallowing the several claims was issued on June 21, 1945. After the receipt of the claimant's proposals to modify the tentative determination, and at the suggestion of the claimant and of the Minister Plenipotentiary of the Netherlands, further proceedings were stayed until the claimant by letter dated December 26, 1945 stated that he had no further objection to the issuance of a final determination in the matter. The tentative determination as hereinafter set forth is hereby adopted and issued as the final determination.

The transcript of the testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claims are hereby disallowed for the reasons hereinafter set forth.

Determination

The patents involved in this proceeding relate to a process of solidifying soil below ground level by the injection of chemicals. The principal patents are the Joosten patents, No. 1,827,238, dated October 13, 1931, and No. 2,081,541, dated May 25, 1937. The other three patents cover supplementary processes developed by Dr. Joosten's assistants. The basic process involved is that of Chemsealing subsoil and building foundations so as to prevent water leakage by bringing together a silicate compound and a salt such as calcium chloride so that they jell into a solidified water-proof mass.

The claimant, C. Martin Riedel, a civil engineer in the employ of the City of Chicago, was born in Germany in 1892, became a resident of the United States in 1922 and a citizen by naturalization in 1929. It is not contended that he is ineligible as a claimant by reason of nationality. The only question in this proceeding, therefore, is whether he has sustained his burden of proving that he had at the time of vesting an "interest, right or title" in the patents in question within the meaning of Section 9 (a) of the Trading with the enemy Act, as amended. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom, *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 122, 123 (App. D. C. 1925), appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

The claimant contends that he was, prior to vesting, the exclusive licensee of the patents in question, with the right to grant sub-licenses and to retain one-third of the royalties received from sub-licensees. General Counsel contends, on the other hand, that the claimant has failed to sustain his burden of proving that he had acquired prior to vesting an "interest, right or title" in the patents within the meaning of Section 9 (a) of the Trading with the enemy Act, as amended.

The Committee has concluded that the claimant was, at the time of vesting of the patents in question, merely a representative or agent of the German interests and not a licensee of the patents.

Dr. Hugo Joosten, the inventor of the principal processes, is a German resident and has been at all material times the head of Gesellschaft fur Chemische Verfestigung & Abdichtung m.b.H. (The "Chemical Soil

Solidification and Pressure Grouting Company, Ltd."—a German corporation hereinafter called "Cheverab"). Cheverab is apparently, among other things, a German patent holding company for the German engineering firm of Siemens-Bauunion G.m.b.H. (hereinafter called "Siemens"). The claimant testified in substance that Cheverab had either title to or rights under all of the patents involved in this proceeding and that Dr. Joosten was acting on behalf of Cheverab at all times.

Prior to September 1939, Cheverab had as its American representative the Edeleanu Company, Ltd., New York City, of which the local manager was one Dr. Saegebarth. Admittedly neither Edeleanu nor Saegebarth was a licensee of the subject patents. They merely represented Cheverab in bringing together Cheverab and prospective licensees.

In October 1939 the New York Office of Edeleanu was closed and Riedel subsequently received from Cheverab the two letters, immediately hereinafter quoted in part, which have convinced the Committee that Riedel than became not a licensee of the patents but the successor of Edeleanu as a representative of Cheverab.

Under date of December 28, 1939 Cheverab wrote to the claimant in part as follows:

"As you know, the New York office of the Edeleanu Co. was regrettably dissolved, and we do not know whether you have received our last correspondence of October, this year, which we sent to Dr. Saegebarth, asking him to transmit it to you. We asked Dr. S. to get in touch with you and to learn whether you would be willing to represent our interests in the U. S. A. for the time being, in return for a compensation to be presently determined in detail. We are exceedingly grateful to you for the valuable and great trouble which you have undertaken until now in the introduction of the Joosten process in the U. S. A., and we are convinced that you will be successful with your work corresponding thereto.

"We now want to make the suggestion that you continue as until now to get interested parties for the Joosten process in order to obtain orders for the practical applications under your direction as our representative. Inasmuch as the income which we could expect from the U. S., particularly in the beginning, would not be sufficient to secure for you a commensurate annual income, you would in our opinion carry on your representation as a sideline as until now, so that you would remain in your position with the City of Chicago.

"We have been negotiating with the Philadelphia Quartz Co. concerning the delivery of the special Waterglas according to which Philquartz would sell this Waterglas with a premium for us amounting to 30¢ per hundred pounds wherever it is used for our method. We are willing to give you from this income and also from such income that we may receive through license agreements obtained through your efforts, continually one-third as a compensation for your efforts and expenses, and we suggest to keep this agreement for the time being for the years 1940-1942, inclusive; provided, however, that the German Devisenstelle (Currency Control Office) approves this agreement, of which approval we have no doubt in accordance with our experience. We are awaiting your reaction and decision concerning our suggestion."

Then on April 10, 1940 Cheverab again wrote to Riedel indicating intervening correspondence with Riedel and saying in part:

"We have happily and gratefully acknowledged that, for the time being until 1942 inclusive, you are willing to take over our representation in accordance with the conditions briefly sketched in our letter of December 28, 1939.

"Inasmuch as you write that you need an official acknowledgment concerning this arrangement so that you can present yourself as authorized representative of Cheverab, you intend to send us a corresponding draft of an agreement. We imagine the mutual relationship to be about as follows:

"As until now you promote the use of the Joosten-process in the U.S.A., with the exception of the territory already ceded to the Fruin-Colnon Contracting Co., St. Louis. This, in the east, takes in the territory east of the Mississippi River, in the west, the territory west of the Mississippi River, in the south, up to the middle of the State of Louisiana, in the north, up to the northern boundary of the State of Iowa, as entered in the map attached to the agreement with the Fruin-Colnon Co.

"All costs which arise directly or indirectly in connection with your promotion or with the execution of tests and practical application will be carried by you. In return therefor we will pay you, so far as we are in a position to do so in view of war conditions and currency regulations:

"a) $50, constituting the balance of our credit with the firm of Edeleanu Co., formerly of New York;

b) $150, constituting the first installment of the minimum compensation for 1939/40, which Fruin-Colnon Co. owes us;

c) ⅓ of our revenues resulting from license agreements from royalties derived from practical applications, obtained through your negotiations.

"The Philadelphia Quartz Co., as you will observe from the enclosed copy of a letter dated December 28, 1939 is not inclined to undertake any obligations with respect to direct payments to us as an additional amount charged with the chemicals delivered by Philquartz. We have therefore been forced to abandon handling this matter in this manner. Under these circumstances you will, in our opinion, have to try to get in touch with firms which will be willing to enter into a direct license agreement with us, as was done by Fruin-Colnon Co., or to obtain, on an individual basis, orders (like the one for the city of Chicago) from parties ready to pay royalty.

"You are entitled to ⅓ of these royalties, including the minimum amount payable to us by licensees secured by you.

* * * * * * *

"We particularly direct attention to the fact that we are not in a position to assume any obligation arising from the introduction and practical use of the Joosten-process in the U.S.A. All work, which you as our representative should take over independently or should have executed, therefore, is at your own risk. Included herein are any orders for chemicals, equipment, etc., so that no one can ever make us liable for payments, compensations, damages or the like, which are connected directly or indirectly with this work.

"As soon as an agency agreement with you will have been made, we will try to forward to you written instructions with drawings and photos, a so-called 'cook book' as we call it."

Consideration of these basic statements by Cheverab of the relationship between it and the claimant permit but one conclusion, Riedel was not to be a licensee of the patents. He was to promote the use of the Joosten

processes, arrange for licenses from Cheverab to others, and supervise as Cheverab's representative the practical application of the process. He was to receive as compensation one-third of the amounts to become payable to Cheverab as a result of his efforts. The arrangement did not contemplate the payment of a royalty by Riedel to Cheverab but for the payment of royalties by licensees to Cheverab and the payment of a commission by Cheverab to Riedel.

In view of the unequivocal meaning of these two letters as to the status which Cheverab intended Riedel to have, it is unnecessary to discuss the other circumstantial facts appearing in the record, which the Committee has considered and found to be consistent with the pattern outlined in the two letters.

Although Cheverab in a letter to Riedel, dated November 26, 1940, said,

"* * * * * * *

Agency Agreement: We also see no possibility for you to send us an Agency Agreement. Since we are not allowed to send telegrams to the United States we could discuss the draft of an agreement only by way of a letter. We do not think that it is imperative to make a written agreement during the War since we have absolute confidence in you that you will represent our interests during this time very well even though no contract has been signed by both parties."

nevertheless, Riedel testified that he did send a draft of a proposed agreement to Cheverab. The contents of this draft are immaterial because there is no evidence that Cheverab executed or in any way assented to its terms. We may parenthetically state, however, that the draft does not, in the opinion of the Committee, constitute Riedel a licensee of the patents.

The testimony of Riedel is not inconsistent with the conclusion of the Committee as to the incidents of his relationship with Cheverab. He testified frankly and fully as to the details. The conclusion is inconsistent merely with the legal effect which Riedel, not versed in the law, attached to these details.

In view of the documentary evidence and of Riedel's testimony as to the facts, it is necessary to find that he did not acquire prior to vesting an "interest, right or title" in the vested property within Section 9 (a) of the Trading with the enemy Act, as amended.

The Committee has considered Public Law 322—adding Section 32 to the Trading with the enemy Act, as amended, and approved on March 8, 1946—in relation to these claims and concludes that it does not affect the conclusion set forth in this determination.

Accordingly, Claims Nos. 130, 815 as supplemented, and 1332 are hereby disallowed.

April 10, 1946.

In the Matter of

THEODORE RINGS

Docket No. 22 Claim No. 820

Statement of the Case

This proceeding was initiated by Notice of Claim No. 820 (dated June 29, 1943) filed by Theodore Rings pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290) and amended December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 1457, dated May 13, 1943, (8 Fed. Reg. 7789) and amended August 19, 1943 (8 Fed. Reg. 11853), vested (1) a parcel of improved real estate located in New York City, (2) certain fire insurance policies, and (3) certain savings accounts in New York banks. The Vesting Order recited, among other things, a finding that the property was owned by Elsie Rings, a national of a designated enemy country (Germany).

The Notice of Claim alleges in substance that the claimant, Theodore Rings, was the owner of the property at the time of vesting.

The Order for and Notice of Hearing was published on March 31, 1944 (9 Fed. Reg. 3469) and a copy was served upon the person designated in Section 2 of the Notice of Claim.

The claim was noticed for hearing on April 18, 1944. On that date, pursuant to motion of the claimant and General Counsel, the taking of oral testimony by the Committee was waived, and substituted therefor was a transcript of the testimony given under oath by the claimant, in the presence of his counsel, while being examined by a member of the Custodian's staff on January 21, 1944.

The claimant was represented by John C. Delaney. A. Matt. Werner, General Counsel, Office of Alien Property Custodian, was represented by James W. Fallon.

The claimant submitted a brief dated May 6, 1944. General Counsel submitted a proposed determination and supporting brief on May 18, 1944. Supplemental memoranda were submitted on May 22, June 3, and June 14, 1944. A tentative determination disallowing the claim was issued on July 7, 1944. No proposals to modify the tentative determination having been submitted to the Committee, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in this proceeding.

Determination

The claimant, Theodore Rings, was born in Germany in 1875, entered the United States in 1893, and became a citizen of the United States in 1900. Since his entry into the United States he has resided in New York City and has worked chiefly as a mechanic and welder. In September of 1924 he married one Elsie Skaza who had been born in Germany in 1895, and had entered the United States in 1922. She visited Germany in 1926, 1931, and 1934. In 1936 she again went to Germany and has since that date resided there. It does not appear from the record that she at any time became a citizen of the United States.[1]

In October of 1924—within a month after the marriage—the claimant negotiated the purchase of the real estate [2] claimed in this proceeding. He paid the purchase price [3] but caused the record title to be placed in his wife where it remained until vesting.

To the extent that Elsie Rings was the owner of the real estate, it was properly vested because, since she was at the time of vesting a citizen and resident of Germany, she is an "enemy" under Section 2 of the Trading with the enemy Act of October 6, 1917, a "foreign national"

[1] She did not become a citizen of the United States by reason of her marriage in 1924 to a citizen. 42 Stat. 1021 (1922), 8 U.S.C., Sec. 368.

[2] The real estate consists of a one family house and lot located at 3762 Olinville Avenue, Bronx County, New York.

[3] $900 of the purchase price of $4,600 was paid in cash and the balance was paid by the discharge of a $3,700 debt owed by the vendor to the claimant. The property was subject to two mortgages which were subsequently discharged by the claimant.

under Section 5 (b) of that statute as amended by Title III of the First War Powers Act, 1941, and a "national of a designated enemy country" under Executive Order 9095, as amended.

The claimant contends, in substance, that he was the owner of the real estate and that his wife, the title holder of record, was a nominee for him. General Counsel contends that the claimant did not at the time of vesting have any interest in the property because he had, in legal effect, given the property to his wife.

The sole issue in this proceeding, therefore, is whether the claimant had at the time of vesting a legal or equitable interest in the property. The claimant has the burden of proof.[4]

Although it appears that the entire purchase price of the real estate was paid by the claimant, there is no instrument, formal or informal, in evidence—and the claimant testified that none existed—by which the grantee, Elsie Rings, agreed to hold the property for the claimant. Furthermore, the claimant is not the beneficiary of a resulting trust under common law principles. Although at common law a resulting trust arises in favor of a payor when the grantee is someone other than the payor, this presumption is rebutted by the countervailing presumption of a gift when, as in the instant case, the payor is the husband of the grantee. In the case at hand the inference of a gift is drawn not only from the fact of marital relationship, but also from the proximity of the conveyance to the date of the marriage, for the conveyance was made shortly after the marriage took place. And the claimant's own testimony tends to support rather than to rebut the inference of a gift.[5]

Application of the New York law to the facts of this proceeding does not change the common law result. While Section 94 of the New York Real Property Law ended the common law rule that where a conveyance is made to one person for a consideration paid by another a trust results by force merely of the payment, that section has no effect on trusts constructively imposed as a consequence of payment of the purchase price in conjunction with other circumstances. Those other circumstances necessary to invoke a constructive trust under the New York law are defined in *Foreman* v. *Foreman,* 251 N. Y. 237, 167 N.E. 428 (1929). The *Foreman* case apparently requires the claimant to establish, among other things, not only the payment of the purchase price and the existence of a confidential relationship between the payor and the grantee—factors which admittedly exist in the case at hand—but also a promise by the grantee,

[4] *Draeger* v. *Crowley,* —— Fed. (2d) ——, (Civil No. 19–385, D. C. So. Dist. of N. Y. May 29, 1944).

[5] The claimant testified with reference to his state of mind and his statements to his wife at the time of the conveyance as follows:

"Q. Did you have any discussion with your wife at the time you took title to the property and put it in your wife's name?

"A. Well, I said to her you are so much younger than I am and if anything should happen to me, well, you have the house, you have no bother, you can do with it as you please.

"Q. At the time you purchased the house and took it in her name, the reason for it was because she was so much younger than you?

"A. Yes, that was the main reason.

"Q. No other reason?

"A. Well, I said if anything should happen, if I became involved in a law suit or something, it would be safer to have it in your name than in my own.

* * * * * * *

"Q. Having taken the property in her name so soon after you were married, was it your intention to make a gift of it to her?

"A. Well, it was, and I thought in case I should need the money, I could always call on her and she would return it to me; that if I needed money she would take up a mortgage on it.

* * * * * * *

"Q. Was there any reason that you put the title to the property in her name other than the fact that you wanted to protect your business connections or anything of that sort?

"A. Well, I guess it was a sentimental reason. I wanted to show her that I cared for her."

express or implied, to hold the property in trust for the payor.[6] There is no evidence tending to show an *express* agreement by Elsie Rings to hold the property in trust for the claimant, and, in the opinion of the Committee, the facts do not *imply* such an agreement. Evidence that a husband-payor paid taxes, insurance, costs of repairs and improvements, and that he used rents as his own may provide a satisfactory basis for an inference of dominion over the property by him and, if the dominion was assented to by the wife-grantee, a further inference that the wife had agreed to hold the property in trust for the husband. The record in this case, however, does not in the opinion of the Committee contain satisfactory evidence of this nature. Moreover, the testimony of the claimant seems to indicate that, if such payments were in fact made by him, they were additional gifts to his wife.[7] Furthermore, Elsie Rings in 1939 apparently had under consideration the exchange of the house and lot in New York for similar property in Breslau, Germany. This fact and some of the language of the letter written by her to the claimant [8] in reference to the proposed exchange seems to be more reasonably referable to ownership of the property by her than to dominion over the property by him.

The Vesting Order, as amended, and the Notice of Claim involved in this proceeding included not only the real estate considered above, but also certain insurance policies and bank deposits—in the sum of approximately $2,000—described with particularity in the Vesting Order, as amended. No evidence was offered bearing independently on the insurance policies and the Committee concludes that the claim to the insurance policies must, therefore, be disallowed for failure of proof. The several bank accounts were opened by the claimant in the name of his wife. Deposits were made by him in these accounts from time to time and until approximately 1933 withdrawals from such accounts were made by her. The claimant testified that after approximately 1933 he made withdrawals under a power of attorney from her. He further testified that he had other bank accounts in his own name and joint bank accounts with his several business associates. The Committee concludes in reference to the vested bank accounts, that the evidence is not sufficient to support a finding of title in the claimant. The circumstances which indicate a gift to Elsie Rings of the real estate in question likewise seem to indicate a gift to her of the various sums deposited by the claimant in such savings accounts.

Following a consideration of the entire record, the Committee concludes that the claimant has not sustained his burden of establishing a

[6] An earlier decision of the New York Court of Appeals, *Weigert* v. *Schlesinger*, 150 A. D. 765, 135 N.Y.S. 335 (1912), affirmed, 210 N. Y. 573, 104 N. E. 1143 (1912), is apparently even less favorable to the claimant's contentions than the *Foreman* case. In the *Weigert* case the following facts were held to be insufficient to establish an enforceable trust: The husband paid the purchase price, all operating expenses, mortgage interest, assessments, insurance premiums, and costs of repairs; the grantee-wife had referred to the house and lot as her husband's and, when approached by a prospective buyer, said it belonged to the husband. The *Foreman* case has been followed in *Bartos* v. *Bartos*, 138 Misc. 117, 244 N.Y.S. 713 (Broome County, 1930); *Frick* v. *Cone*, 160 Misc. 450, 290 N.Y.S. 592 (Genesee County, 1936); *In re Weschler's Estate*, 171 Misc. 738, 13 N.Y.S. (2d) 940 (N. Y. County, 1939).

[7] See Footnote 5.

[8] "* * * In reference to the house at Breslau I wish to inform you that the proprietor became impatient because it took too long before I received your answer and so he was forced to dispose of it elsewhere. I looked it over; it was not bad. However, I did not want to act without your consent. As you did not react upon my letters the man did not care to wait any longer. He had the visa already for the U. S. A.

"The consent to an exchange is only given when one does not leave any relatives remain behind in the U. S. and does also not leave any cash remain in the U. S. A. Perhaps I'll try with an advertisement once again.

"I had stated the value of our house to be $15,000 or the equivalent of 63000 Marks.

"For the return Wanderer Marks one gets very little at present. I think, it is best to exchange house for house. * * *."

legal or equitable interest in the property vested by Vesting Order No. 1457, as amended.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Theodore Rings, was not at the time of vesting the owner of the claimed property.

Accordingly, Claim No. 820 is hereby disallowed.

SEPTEMBER 13, 1944.

IN THE MATTER OF

W. SAXTON SEWARD

Claim No. 1600 Docket No. 76

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 1600 (dated January 14, 1944) filed by W. Saxton Seward, pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 677, dated January 18, 1943 (8 Fed. Reg. 7029), vested, among other things, United States Patents Nos.

2,096,106 — 2,159,891 — 2,247,051

as the property of A. Guerbilsky, a national of a foreign country (France).

The Notice of Claim alleges in substance that Guerbilsky assigned the patents to the claimant in November 1941 in order to insure the realization of an income therefrom and thus to facilitate the payment of Guerbilsky's pre-existing indebtedness to the claimant and to his firm for legal services in the sum of approximately $5,000.

The Order for and Notice of Hearing was served upon the person designated in Section 2 of the Notice of Claim. The hearing was held before the Vested Property Claims Committee, Office of Alien Property Custodian, 120 Broadway, New York, N. Y., on April 20, 1945. The claimant appeared personally, and John Ernest Roe, General Counsel, and George B. Searls, by Edward M. Murphy, appeared on behalf of the Custodian. A brief was filed by General Counsel on July 5, 1945. A tentative determination disallowing the claim was issued on September 21, 1945. No proposals for modification of the tentative determination having been received, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in the matter.

The transcript of the testimony taken at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for the reasons hereinafter set forth.

DETERMINATION

This proceeding concerns United States Patents Nos. 2,096,106, 2,159,891 and 2,247,051, which were vested by Vesting Order No. 677 as the property of A. Guerbilsky, a resident of France. The claimant, W. Saxton Seward, in effect seeks payment of an indebtedness owing from Guerbilsky in the sum of approximately $5,000 for legal services. The services were rendered on behalf of Guerbilsky over a period of several years prior to the war in connection with the application, prosecution, and exploitation of the three patents in question.

There is no dispute as to the services having in fact been rendered, the reasonableness of the fee, or claimant's eligibility as to nationality—he being a native-born citizen of the United States and a member of the New Jersey bar. Likewise, there is no controversy in this proceeding about the findings of Vesting Order 677 whereby the three patents were vested as the property of Guerbilsky. It may be further noted that there were, and are, no royalty contracts in existence pertaining to the patents.

The debt claim aspect of the matter is not here considered, because the Office of Alien Property Custodian is not presently acting upon debt claims as such [1] and, we may add, because the patents in question have not produced any income out of which a debt claim could be paid. It follows that the sole issue in this proceeding is whether the claimant has established that he had at the time of vesting any "interest, right, or title" in the vested patents within the meaning of Section 9 (a) of the Trading with the enemy Act, as amended.

An extensive discussion relative to the claimed "interest, right, or title" is unnecessary, however, for the claimant in his testimony consistently and candidly disclaimed that the document of assignment which was received by him from Guerbilsky some time in November 1941 was intended as an instrument of conveyance of a legal or beneficial interest in the patents. Further, the correspondence exchanged between the parties prior to the transmittal of the document conclusively indicates that neither Guerbilsky nor the claimant intended an assignment of the legal or beneficial ownership of the patents. An assignment had not been requested by the claimant and the transaction was not, according to the testimony of the claimant, a satisfaction of the debt, nor was it a gift. It was the claimant's understanding that Guerbilsky was at the time without means to pay for the legal services that had been rendered, and under the circumstances the parties endeavored merely to work out an amicable arrangement whereby the patents could be exploited for Guerbilsky, the owner thereof—any money received to be applied in part upon the indebtedness until it should be satisfied; the arrangement did not purport, however, to repose in the claimant any proprietary interest in the patents or in the prospective royalties.

Inasmuch as the Committee is constrained to conclude that the claimant did not have at the time of vesting any "interest, right, or title" in the patents, it is unnecessary to consider the effect of the fact that the transmittal of the document of assignment in November 1941 was, apparently, unlicensed.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, W. Saxton Seward, did not have at the time of vesting a title or interest to the vested property sufficient in law to support a right of recovery.

Accordingly, Claim No. 1600 is hereby disallowed.

OCTOBER 22, 1945.

[1] See *Cabell* v. *Markham*, (Civ. Action No. 26–302, S.D.N.Y., January 3, 1945, reversed, No. 279, C.C.A. 2d, April 3, 1945. Petition for Certiorari to the U. S. Supreme Court, No. 1271, granted June 4, 1945).

IN THE MATTER OF
WALTER SOBERNHEIM (Y MAGNUS)
N. V. HANDEL-MAATSCHAPPIJ "WALDORF"
Docket No. 1 Claim No. 240

REPORT

Findings of fact, conclusions of law, and recommendations to the Alien Property Custodian.

This proceeding was instituted upon Notice of Claim (assigned serial number 240) filed on January 9, 1943 on Form APC 1 by Walter Sobernheim (Y Magnus) pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290).

The Order for and Notice of the Hearing was published on August 17, 1943 (8 Fed. Reg. 11398) and copies thereof were served by registered mail on the persons designated in Section 2 of the claim. A hearing on the claim was held before the Vested Property Claims Committee in Room 411, National Press Building, Washington, D. C., on September 2, 1943.

Abberly, Bryde, Kooiman, MacFall & Amon, Esqs., appeared by Edward D. Bryde, Esq. and Pieter J. Kooiman, Esq. on behalf of the claimant. The General Counsel, Office of Alien Property Custodian, by Irwin L. Langbein of the Claims Unit, appeared on behalf of the Custodian. Counsel for the claimant also appeared by leave of the Committee on behalf of N. V. Handel-Maatschappij "Waldorf" in support of the claim and, also by leave of the Committee, N. V. Handel-Maatschappij "Waldorf" intervened contingently in the event of the disallowance of the claim.

The claim asserts title to and right of possession of certain securities vested by Vesting Order Number 435 (Re: Certain securities of N. V. Handel-Maatschappij "Waldorf") executed on December 4, 1942 (7 Fed. Reg. 10403). The securities claimed are described in Exhibit "A" of said claim as follows:

$10,000.00 Associated Gas & Electric Corp. Deb. 3¾% 1978.
10,000.00 Cities Service Convertible Deb. 5% 1950.
10,000.00 Hudson & Manhattan R.R. Co. 1st. Ref. 4% 1960.
10,000.00 Third Avenue Ry. 1st Ref. 4% 1960.
100 Shares American Radiator and Standard Sanitary, Common.
200 Shares General Motors Corp., Common.
100 Shares H. L. Green Co., Common.
200 Shares North American Rayon, B. Common.
100 Shares Penn. R. R. Corp., Common.
50 Shares Union Pacific R. R. Co., Common.
300 Shares Transue and Williams Steel Forging Co., Common.

The hearing was stenographically reported and all exhibits admitted into evidence at the hearing are hereby incorporated by reference into this report. The following findings of fact, conclusions of law and recommendations to the Alien Property Custodian are based upon the evidence adduced at the hearing and upon the record in this proceeding.

The issues in this proceeding were narrowly circumscribed by several factors. Vesting order number 435 does not make a finding on the ownership of the subject property and, furthermore, it does not characterize the nationality of the claimant, Walter Sobernheim. In addition, the General Counsel of the Office of Alien Property Custodian did not

contend that the claimant was controlled by or acting for or on behalf of a designated enemy country or that the national interest required that the claimant be treated as a national of a designated enemy country. While the Committee believes that such factors may not in an appropriate case relieve a claimant from the burden of establishing either that he is not a foreign national within the broadest meaning of these terms as defined in Executive Order 8389 or that he is not a national of a designated enemy country within the broadest meaning of these terms as prescribed in section 10 (a) of Executive Order 9095 as amended, these broad issues were not in fact presented to the Committee in the present proceeding. It follows that, for the purpose of this proceeding, the claimant has the burden of establishing merely that he owned at all material times the property subject to the claim and that he is not a national of a designated enemy country as these terms are used in their limited sense in section 10 (a) of Executive Order 9095 as amended.

Findings of Fact

NATIONALITY OF THE CLAIMANT

The claimant's allegation of Spanish citizenship is confirmed by uncontroverted evidence establishing the following facts:

1. Walter Sobernheim (Y Magnus), hereafter referred to as "claimant", was born in Germany and resided there until 1933. From 1933 until the Spring of 1940 he resided either in Paris or in Southern France. From 1933 until his arrival in the United States in March 1941 he did not at any time reside in Germany or in territory occupied by Germany or by any country at War with the United States. Since March 1941 he has continuously resided in the United States.

2. By letter dated July 3, 1936, claimant was advised by the Under Secretary of State of the Spanish Government that he had been granted Spanish citizenship contingent upon (a) relinquishment of his foreign citizenship, (b) registration as a Spanish citizen with the Bureau of Vital Statistics, and (c) execution of the oath of allegiance to the constitution and obedience to the laws. A decree of the Spanish Government, in content substantially identical with the letter, signed by Manuel Azana, President, and countersigned by Juan Moles Ormella, Minister of Government, was published in the Gaceta de Madrid on July 5, 1936. On May 14, 1937, claimant applied, through the German Embassy at Paris, for a release of German nationality. By letter dated September 12, 1938, the President of Police at Berlin advised the claimant that his German nationality had been released. The release was delivered to the claimant, through the German Embassy in Paris, on October 28, 1938. Some time in July 1937 in Brussels, Belgium, on the occasion of receiving his first Spanish passport and his first certificate of Spanish nationality, the claimant satisfied the other conditions of the Spanish decree by registering as a Spanish citizen and by taking the required oath of loyalty to the Spanish Government. Annually since 1938, certificates of Spanish nationality were issued to the claimant and the Spanish Consul in New York City issued to the claimant on April 22, 1942, Certificate of Spanish Nationality No. 481. The claimant, in addition, testified that he was a citizen of Spain during all material times.

Ownership

The claimant's allegation of ownership is confirmed by evidence establishing the following facts:

3. N. V. Handel-Maatschappij "Waldorf" (hereinafter referred to as "Waldorf") is a corporation organized in 1925 by the claimant under the laws of the Netherlands. Its head office has at all times been in Amsterdam and from 1937 was located in the office of Pierson and Company where it remained during the transactions described in this report. Its articles of incorporation authorize it to deal in securities for the account of the corporation and for the account of third persons. All of the authorized and issued shares of "Waldorf" have been owned by the claimant during all material times. Furthermore, the claimant has been the sole managing director of "Waldorf" at all material times; a status authorized by its articles of incorporation and by the Netherlands law. "Waldorf" served as a personal holding company for the claimant.

4. One Adrianus Rühl, a citizen of the Netherlands, was, during all material times, the head of the bookkeeping and accounting department of Pierson and Company, Amsterdam. Commencing about 1937 and during all material times he maintained in Amsterdam the books and records of "Waldorf". These books and records, and any copies thereof formerly in the possession of the claimant in France, are not and have not been within the United States.

5. Claimant's allegation that he is the beneficial owner and "Waldorf" merely the nominee of the securities subject to this claim is substantiated by his direct testimony and by various exhibits admitted into evidence. The Committee places credence in the testimony of the claimant on the authenticity of these exhibits. His testimony was strongly corroborated by the testimony of Mr. A. A. Andriesse. Mr. Andriesse is a native of the Netherlands, and was a partner of Pierson and Company, Amsterdam, until November 1940. He established the relationship between Mr. Rühl and "Waldorf", and, in addition, convincingly identified Mr. Rühl's signature on the various exhibits. It is the affirmative judgment of the Committee that Mr. Andriesse is credible. The exhibits principally relied upon by the claimant to establish his beneficial ownership of the property subject to his claim are described in the following portions of this section.

The claimant received in France, either in November or December 1939, through the mails from Rühl in Amsterdam four documents attached together. The originals were inspected by the Committee and photostatic copies were admitted into evidence as claimant's Exhibits 6, 6-A, 6-B, and 6-C. Each is subscribed "N. V. Handel-Maatschappij 'Waldorf'" and each bears the signature of Rühl.

Claimant's Exhibit 6 is a balance sheet and profit and loss statement of "Waldorf" dated September 30, 1939. It describes a credit balance in favor of "Dr. W. Sobernheim" of 325,045.09 florins. The Exhibit does not refer to the securities claimed in this proceeding. It does describe as assets of "Waldorf" certain investments, securities, and balances to which the claimant does not in this proceeding assert title or right of possession. Exhibit 6 indicates that the records of "Waldorf" did not reflect ownership by "Waldorf" of the securities claimed in this proceeding.

Claimant's Exhibit 6-A, also dated September 30, 1939, lists various items, including the following:

Titres Dr. W. Sobernheim F 108,681.05

Exhibit 6-A indicates that "Waldorf" held securities of a value of 108,681.05 florin for the account of the claimant.

Claimant's Exhibit 6-B is entitled "Titres 30 Septembre 1939 N. H. Handelmij 'Waldorf' " and lists about 60 specifically described securities. The descriptions do not include any of the securities claimed in this proceeding, with the exception of 100 shares of General Motors described as "100 General Motors 55½ N.Y. F 10,406.25". With the exception of the reference to shares of General Motors (upon which additional findings are made in this report) the Committee finds that claimant's Exhibit 6-B indicates that the securities listed therein were held by "Waldorf" for its own account, and further indicates that the records of "Waldorf" did not reflect ownership by "Waldorf" of the securities claimed in this proceeding.

Claimant's Exhibit 6-C is entitled "Titres Dr. Walter Sobernheim Paris" and is dated September 30, 1939. It describes with particularity certain securities of a stated value of 108,681.05 florin and is a specification of the Sobernheim item in Exhibit 6-A. The securities listed in claimant's Exhibit 6-C include, with two exceptions, the securities claimed in this proceeding. Exhibit 6-C does not include the $10,000 Cities Service item claimed and it includes merely 100 shares of General Motors, while the claimant is asserting title and right to possession of 200 shares of General Motors. With the two exceptions noted above, claimant's Exhibit 6-C indicates that the records of "Waldorf" reflect ownership by the claimant of the securities claimed in this proceeding.

6. Further to support the claimant's allegation of beneficial ownership of these securities, it was established that the claimant received in Paris through the mail from Rühl in Amsterdam an instrument subscribed "N. V. Handel-Maatschappij 'Waldorf' " signed by Rühl, dated February 1, 1940, and entitled "Dr. W. Sobernheim Paris Kupons & Dividends 1. Oktober 1938-30. September 1939." A photostatic copy of this instrument was admitted into evidence as claimant's Exhibit 10. It lists dividends and interest received by "Waldorf" from November 11, 1938 until September 14, 1939 on approximately 36 securities described therein with particularity. This instrument refers to all of the securities claimed in this proceeding except (a) the shares of American Radiator and Standard Sanitary, (b) the shares in Transue and Williams Steel Forging Company, and (c) the $10,000 Cities Service bonds. No dividends, however, were paid upon either the stock of American Radiator and Standard Sanitary Corporation or of Transue and Williams Steel Forging Corporation during the period October 1, 1938 through September 30, 1939. The exhibit includes, furthermore, merely 100 shares of General Motors, whereas the claimant is asserting title and right to possession of 200 shares of General Motors. Claimant's Exhibit 10 indicates that the records of "Waldorf" reflect ownership by the claimant of the securities claimed in this proceeding with the exception stated above.

7. Further corroboration of the claimant's allegation of ownership is developed by the receipt by the claimant in Paris in June, July, and August of 1939 of six advices of credit. Each was addressed to Dr. Walter Sobernheim, Paris, subscribed "N. V. Handel-Maatschappij 'Waldorf' ", and signed by Rühl. The originals were admitted in evidence as claimant's Exhibits 8, 8-A, 8-B, 8-C, 8-D, and 8-F. Each advice of credit states that dividends or interest of a certain amount on certain securities is "held by us to your credit—". For example, the advice of credit dated June 10 admitted in evidence as claimant's Exhibit

8, reads translated as follows: "On account of dividends received on 20 AM Tobacco Company B held by us to your credit, we have credited you in the guilder account with —— Dutch Guilders 42.19 ——". Exhibits 8 to 8-F indicate that the securities referred to in the exhibits were held by "Waldorf" for the personal account of the claimant. The securities referred to in these exhibits are as follows:

20	The American Tobacco Co. common B, par $25.
100	General Motors Corp. common, par $10.
100	General Cigar Co., Inc. common, no par.
100	Anaconda Copper Mining Co., capital stock par $50.
$10,000	Third Avenue Railway Co. first, refunding gold 4's due 1960.
50	Union Pacific R. R. Co. common, par $100.
$10,000	Hudson & Manhattan R. R. Co. 1st Ref. lien & Refunding mortgage 5% due Feb. 1, 1957.
100	H. L. Green Co., Inc., common, par $1.

8. In addition to the foregoing, it was established that the claimant received through the mails in Nice, France, either late in December 1939 or early in January 1940 from Rühl in Amsterdam an instrument dated December 6, 1939 entitled "Bilanz der N. V. Handel-Maatschaapij 'Waldorf' Amsterdam" subscribed "N. V. Handel-Maatschappij 'Waldorf'" and signed by Rühl. A photostatic copy of this instrument was admitted into evidence as claimant's Exhibit 7. The instrument is a comparative balance sheet of "Waldorf" for September 30, 1938 and September 30, 1939. The securities claimed in this proceeding are not referred to on the balance sheet portion of the instrument. The instrument does contain, however, below the balance sheet items, the following statement:

	30.9.1938	*30.9.1939*
"Effekten Dr. Walter Sobernheim	f 143.036.86	108.681.05"

The absence of a reference in the balance sheet portion of the instrument to the claimed securities and the reference described above to securities of the claimant indicates that "Waldorf" was holding for the personal account of the claimant on September 30, 1939, securities of a value of 108.681.05 florin.

9. It is to be noted that the documents referred to in paragraphs 5 through 8 of this report were in the possession of the claimant during all material times.

10. Further clarification of the relationship between the claimant and the securities claimed in this proceeding is found in the following facts. From time to time the claimant purchased or caused the purchase of securities in the name of "Waldorf". From time to time the claimant intended securities so purchased to be held by "Waldorf" either for "Waldorf's" own account or for the personal account of the claimant. If securities were purchased in the name of "Waldorf" for the claimant's account the cost of the purchase was charged against the claimant's credit balance. The securities claimed in this proceeding were purchased in the name of "Waldorf" and held by the Chase National Bank in a custody account for "Waldorf".

11. It will be noted that the securities described in Exhibit A of claim 240 are not identical with the securities referred to in claimant's exhibit 6-C (see paragraph 5 of this report). This apparent discrepancy

is unreal because during the period from February 27, 1940 through November 1, 1940 "Waldorf" sold the following securities:

$2,000	Baltimore & Ohio R. R., Ref. & Gen'l Mtge. Series "A" 5% due 12/1/95.
20	American Tobacco Co. common B, par $25.
100	Anaconda Copper Mining Co. of capital stock, par $50.
200	Columbia Gas & Electric Corp., common, no par.
100	General Cigar Co., Inc., common, no par.
100	Republic Steel Corp., common, no par.

These securities were sold by the Chase National Bank pursuant to the direction of one Otto Heineman who had been instructed by the claimant as sole managing director of "Waldorf" to buy and sell in New York securities for "Waldorf". The Cities Service bonds described in Exhibit A of the claim were purchased out of the proceeds of the securities so sold.

12. At the time of the purchase by "Waldorf" of the 100 shares of General Motors stock which are listed on the claimant's Exhibit 6-B as an asset of "Waldorf", the claimant intended that such shares be purchased by "Waldorf" for the claimant's personal account. The claimant's testimony to this effect is consistent with his conduct. After his arrival in the United States in March 1941 he instructed Heineman to set up records for "Waldorf" corresponding in content with the pertinent exhibits admitted into evidence at the hearing. The instructions included specifically a request that the new "Waldorf" records reflect the personal ownership by the claimant not only of the 100 shares of General Motors stock but also of the Cities Service bonds. The Committee therefore finds that the 100 shares of General Motors stock were listed as an asset of "Waldorf" (as indicated in claimant's Exhibit 6-B) by error and that the transfer of the item on the new records of "Waldorf" into the claimant's personal account was merely a correction of that error. It is well to note that the above finding is based upon the Committee's belief that the claimant's testimony as to the instructions and mistaken action described above is credible and that he had no motive to falsify at the time of the events referred to.

13. The Committee does not attach weight to the erroneous description in Exhibit A of Vesting Order 435 and Exhibit A of Claim 240 of certain bonds as "10,000 Hudson and Manhattan R. R. Co. 1st Ref. 4% 1960". This description is obviously erroneous because such securities do not exist. The exhibits necessarily refer to "Hudson and Manhattan R. R. Co. 1st Ref. Lien & Refunding Mortgage 5% due February 1, 1957" bonds and bonds corresponding to this designation were taken into the possession of the Alien Property Custodian in pursuance of the vesting order. References, therefore, to Hudson and Manhattan bonds in this report are to be read as referring to the Hudson and Manhattan bonds of 1957 which are in the possession of the Custodian.

Conclusions of Law

Based upon the above findings of fact, the Committee concludes that the claimant has established by clear and convincing evidence that:

1. The claimant was not on April 8, 1940 (the earliest effective date of Executive Order 8389), or on December 12, 1942 (the effective date of execution of Vesting Order 435), or on January 9, 1943 (the date

of filing claim 240), and is not now and has not been at any intervening time, a national of a designated enemy country as those terms are prescribed in section 10 (a) of Executive Order 9095 as amended and in Vesting Order 435.

2. On December 12, 1942 (the date of execution of Vesting Order 435) the claimant was the owner of all right, title, and interest in and to the property described in Exhibit A of claim 240.

3. It is in the interest of and for the benefit of the United States to quitclaim, transfer, assign, and deliver said property to the claimant.

RECOMMENDATION

Based upon the above findings of fact and conclusions of law, the Vested Property Claims Committee recommends that claim 240 be allowed.

NOVEMBER 4, 1943.

IN THE MATTER OF

MAURICE STERN (A. J. STERN & CIE.)

Claim No. 367 Docket No. 5

REPORT

Findings of fact, conclusions of law, and recommendations to the Alien Property Custodian.

This proceeding was commenced upon Notice of Claim dated February 13, 1943, alleging in substance that the claimant, Maurice Stern, was at all material times the sole owner of certain securities vested by the Alien Property Custodian.

The Vesting Order, No. 155, dated September 19, 1942 (7 Fed. Reg. 7764), vested the securities described in Exhibit "A" attached thereto. The Vesting Order recited, among other things, findings that the securities were then the subject of litigation in the New York courts and payable or deliverable to, or claimed by A. J. Stern & Cie, en liquidation, a French partnership which was determined to be a national of a designated enemy country (Germany).[1]

Pursuant to notice (8 Fed. Reg. 13690) a hearing was held before the Committee in New York, N. Y., on October 26, 1943. Auchincloss, Alley & Duncan, by James B. Alley and James Brodeur, appeared on behalf of the claimant. A. Matt. Werner, General Counsel, by Irwin L. Langbein and David Williford, appeared on behalf of the Custodian.

In accordance with claimant's election filed December 29, 1943, this proceeding is based upon the regulations issued by the Alien Property Custodian on March 25, 1942, (7 Fed. Reg. 2290) apart from the superseding amendments thereto of December 11, 1943 (8 Fed. Reg. 16709).

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of the findings of fact, conclusions of law and recommendation here made to the Custodian.

The claimant's proposed findings of fact and recommendation were received November 19, 1943. The General Counsel filed proposed findings, conclusions and a supporting brief on December 28, 1943. Replies were filed by the parties on February 2, March 15 and March 23, 1944.

[1] Section 2(f) of Executive Order No. 9193.

Pursuant to the procedures of the Committee, a tentative recommendation to allow the claim was issued on May 3, 1944. A proposal for modification of the tentative recommendation was received from the claimant on May 6, 1944. This report, recommending an allowance of the claim, is the final report to the Custodian.

Findings of Fact

The issue in this proceeding is whether the claimant, Maurice Stern, has established title to the vested securities.

The firm A. J. Stern & Cie., en liquidation, (hereinafter referred to as "the firm") is a French partnership with its principal offices in Paris and has been engaged since 1832 in banking and in dealing in securities. From its inception it has been managed and controlled by members of the Stern family, a prominent French family of Jewish descent.

The claimant became associated with the firm in 1912 and soon after became a partner. He served as a Captain in the French army in the first World War and from August 1939 until June 1940 in the present war. Before the complete occupation of France, he received an honorable discharge from the French army and on June 23, 1940, he abandoned his personal effects and fled through Spain to the United States with his wife and three children. He entered the United States in December 1940 and has since resided here.

In the course of its business the firm maintained cash and securities accounts with bankers in various foreign cities and in New York. It was the practice of the firm to buy, sell and hold securities for the personal accounts of customers and of the partners. All of the securities of the firm that were held by securities houses in New York—including securities purchased for customer accounts—were at all times carried by the securities houses in the name of the firm, A. J. Stern & Cie.

In 1938 the firm went into voluntary liquidation under the laws of France to avoid difficulties which arose because of the mental incapacity of one of the partners and to effect, for additional purposes, a reorganization of the firm. The claimant and two other partners, namely, Robert Singer and Jean Stern, became liquidators and, as liquidators, gave to one Rene Grolleau a general power of attorney to act in their stead. On March 11, 1938, a short time after its liquidation had been commenced, the firm sent to its customers and correspondents a list of the signatures of the three liquidators along with that of Grolleau with the statement that "* * * either jointly or severally, may validly bind the company, A. J. Stern and Co., in liquidation."

Prior to claimant's arrival in this country the securities involved in this proceeding were in New York in the custody of Kuhn, Loeb & Co., and carried, as above stated, in the name of A. J. Stern & Cie. Sometime thereafter the claimant endeavored to have the securities he claimed as owner transferred from the account of the firm to his personal account. This was not done and the claimant then caused the entire firm account to be transferred from Kuhn, Loeb & Co., to Hallgarten Co. This transfer was licensed by the Treasury Department on November 26, 1941. Claimant then filed suit against Hallgarten Co. to recover the securities to which he asserted individual ownership.[2] This suit occasioned the vesting by the Custodian of the securities in question.

The issue in this proceeding, as stated above, is whether the claimant

[2] *Stern* v. *Newton*, 39 N.Y.S. (2d) 393 (Sup. Ct. N. Y., 1943).

has established that he, as an individual, owned certain of the securities which were held by Hallgarten Co., in the name of the firm. The principal documentary evidence in support of his claim consists of two instruments received by the claimant after his arrival in the United States. These instruments purport to identify certain securities, including those vested, as being the property of the claimant although held in the name of the firm. One of the instruments, undated, is signed by Robert Singer, a partner and one of the liquidators, and the other instrument, dated January 25, 1940, is signed by Grolleau. The authenticity of the signatures of Singer and Grolleau was duly proved. These instruments were characterized by the claimant as the annual statements customarily issued by the firm to him and to other customers. Pursuant to advice given by the claimant before he left Europe, these instruments were transmitted by various employees of the firm to his mother who was then residing in Cannes, France. She caused them to be transmitted through Switzerland to the United States. The existence of the two substantially identical instruments signed by different persons is explained by the fact that, in anticipation of the risks of war, which seemed evident, the firm had, in 1939, taken measures to have all of its essential records kept in duplicate form and in two separate places, namely, Paris, the home office, and Bernay, a town about 80 miles west of Paris. The instrument signed by Grolleau is captioned as follows:

"Compte Titres de Monsieur Maurice STERN au 31 Déc'bre 1939
Compte "Pleine-Propriété"
Titres étrangers placés sous notre dossier á l'Etranger."

(Securities account of Mr. Maurice Stern as of December 31, 1939
"Full-ownership" account
Foreign securities on deposit in our dossier abroad).[4]

The caption of the instrument signed by Singer is identical with the caption set forth above. The contents of the instruments are substantially alike in describing the vested securities, among others, by number of shares, title of issuer, and location of certificates.[5]

We find that these instruments are what they purport to be; that is, that they are statements issued by the firm in the regular course of business to a customer identifying the quantity and kind of the shares [6] held in the name of the firm but owned by the customer as his property.

In support of the claim of ownership, the claimant testified that the securities in question were purchased by and through the firm for his personal account as a customer and that he individually owned them. The claimant as a partner and liquidator of the firm was in position to know these facts. A searching cross-examination failed to develop any material inconsistencies in his testimony or any admissions at variance with his claim of ownership. We believe his testimony.

If there were any evidence tending to show that other customers of

[4] This translation of the caption was more fully defined by claimant as follows: "Securities account of Mr. Maurice Stern, Full Property (Pleine-Propriete) which means that no one else has an interest * * *. That is a specification of the French Law."

[5] For example, the Grolleau instrument reads in part as follows: (Translated) "I.734 Act. General Aniline & Film Cy, Class A Kuhn Loeb, New York."

[6] Of these the following were vested and are claimed in this proceeding:
1,734 common shares of General Aniline & Film Corporation; 400 shares of General Electric Co.; 600 shares of Kennecott Copper Corp.; 400 common shares of Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.; 500 common shares of U. S. Steel Corp.; 500 shares of Pennsylvania Railroad Co.; 4,549 ordinary shares Canadian Pacific Railway Co.; 77 Common shares of International Nickel Co. of Canada, Ltd.; 2 shares of Standard Oil Co. of New Jersey; and 624 shares of Standard Oil Co. of California.

the firm had claims to these securities held in New York—in the name of the firm and of the same kind as those involved in this proceeding—and if there were evidence tending to show that there were not in New York, held in the name of the firm, sufficient securities of that kind to meet the demands of such other customers, or if there were any evidence indicating the possibility of insolvency of the firm, we might feel constrained [7] to recommend the deferment of any action on the instant claim until the end of the war should make it reasonable to require more formal proof of these matters. But, on the contrary, there was no evidence whatsoever either of conflicting claims or of insolvency; and, furthermore, the claimant, in whose credibility we have full confidence, testified positively to his ownership of the claimed securities, to the absence of conflicting claims, and to the solvency of the firm. In other words, the quantum of proof offered by the claimant is, in the opinion of the Committee, sufficient to establish the absence of any reasonable possibility that the firm is insolvent or that there are other customers whose rights conflict with his claim. The claimant was at the time of vesting a resident of the United States and a citizen of France. No question of "cloaking" or of "national interest" exists in this case. The claimant is a friendly foreign national residing in the United States whose rights under the circumstances are to be guarded as zealously as those of an American citizen. To withhold his property for an indeterminable time would subject him to unwarranted hardship.[8]

Although there are no other claims on file in respect to the property in question, the claimant, after restoration of the securities, may, of course, be exposed to such demands as were appropriate prior to vesting because the Custodian in this proceeding is determining merely the rights of this claimant to the vested securities as against the Custodian.

Conclusions of Law

Based upon the above findings of fact, the Committee concludes that the claimant has, for the purposes of this proceeding, established by convincing evidence that:

1. He was not, at any material time, a national of a designated enemy country as defined in Section 10 (a) of Executive Order 9095 as amended and in Vesting Order 155.

2. At the time of vesting, he was entitled to the property described in Exhibit "A" of Vesting Order 155.

3. That it is not in the national interest to retain the property.

Recommendation

Based upon the above findings of fact and conclusions of law, the Committee accordingly recommends that Claim 367 be allowed.

May 19, 1944.

[7] It seems that a custody customer does not have a property right *as against other customers* for the same issue, in the absence of tracing and sometimes even with tracing. *Duel* v. *Hollins,* 241 U. S. 523 (1916); *Gorman* v. *Littlefield,* 229 U. S. 19 (1918); *Asylum of St. Vincent de Paul* v. *McGuire,* 239 N. Y. 375, 146 N. E. 632 (1925). These cases represent the common law doctrine rather than the statutory rules even where applied in bankruptcy cases. Cf. the more stringent statutory rule of the 1938 amendment of Section 60 (e) of the Bankruptcy Act, 11 U.S.C. 96e.

[8] The decision in *Pilger* v. *Sutherland,* 57 F. (2d) 604 (App. D. C. 1932) is consistent with the allowance of this claim.

IN THE MATTER OF

EMANUEL TEITZ

Claim No. 858 Docket No. 67

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 858 (dated July 9, 1943) filed by Emanuel Teitz pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Alien Property Custodian by Vesting Order No. 141, dated September 8, 1942 (7 Fed. Reg. 8311), vested all right, title and interest in United States Patent No. 1,776,010 as the property of K. Schrader, a national of a foreign country (Germany).

Notice of Claim No. 858 alleges in substance that the ownership of the patent in question was acquired by the claimant from the German inventor, E. Schulze, and from the record owner, K. Schrader, "by virtue of existing agreements and certain payments."

The Order for and Notice of hearing was published on the 21st day of November, 1944 (9 Fed. Reg. 13870) and a copy was served upon the person designated in Section 2 of the Notice of Claim. Pursuant thereto a hearing was held before the Committee at the New York Office of Alien Property Custodian on December 5, 1944.

The claimant appeared at the hearing without counsel. John Ernest Roe, General Counsel, by George B. Searls and James M. Fallon, appeared on behalf of the Alien Property Custodian. A brief was filed by General Counsel on February 26, 1945; no brief was filed by the claimant. A tentative determination disallowing the claim was issued on May 19, 1945. No proposals for modification having been received, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in the matter.

The transcript of the testimony taken at the hearing and the exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby disallowed for reasons hereinafter set forth.

DETERMINATION

This proceeding concerns United States Patent No. 1,776,010 which was issued by the United States Patent Office on September 16, 1930, to the inventor, E. Schulze, and vested by Vesting Order No. 141. The record owner of the patent at the time of vesting was K. Schrader. Both Schulze and Schrader are residents and nationals of Germany. The patent deals with the "manufacture of injection or other liquids for dental, medicinal and other purposes, and particularly for liquid anesthesia, by means of which a permanent and sterile liquid is created." It appears that its use has been reduced substantially by the introduction of the sulpha and penicillin drugs.

The claimant is a citizen of the United States—by naturalization in 1920—and is without question an eligible claimant as to nationality. The only question in this proceeding is whether he has sustained his burden of proving ownership of the patent. *Sturchler* v. *Hicks,* 17 F. (2d) 321 (E.D.N.Y. 1926); *Stohr* v. *Wallace,* 269 Fed. 827, 840 (S.D.N.Y. 1920), affirmed sub nom, *Stoehr* v. *Wallace,* 255 U. S. 239 (1921); *Thorsch* v. *Miller,* 5 F. (2d) 118, 22, 23 (App. D. C. 1925),

appeal dismissed, 274 U. S. 763 (1927); *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); Paragraph IV, Rules on Practice and Procedure of the Vested Property Claims Committee.

It appears that while the claimant was in Europe in 1929 he conferred with Schulze and Schrader, of Germany, for the purpose of acquiring the patent. An option agreement was executed on December 5, 1929, under the terms of which it appears that the claimant obtained the right to acquire the patent upon payment of sixty thousand dollars on or before December 30, 1930. This option was later extended to May 31, 1931.

The claimant's brother, Maurice Teitz, a British subject and resident, was engaged in the chemical and drug business in London, and was interested in exploiting the patent with the claimant in England and the United States. On April 7, 1931, a new agreement was made between Schulze, Schrader, and Maurice Teitz, under the terms of which the patent was to be transferred to Maurice Teitz upon payment of $60,000, 10% or $6,000 payable on the date of execution of the agreement and a like sum to be paid each year thereafter until the entire purchase price was paid.

The contract further provided that ownership of the patent was to be in the vendors until the full purchase price was paid, and that Maurice Teitz was then "to have the sole and complete right to manufacture and for the exploitation * * * for the territories determined in this agreement." On April 20, 1931, $14,000 of the purchase price was paid to the vendors. Subsequently various changes were made as to the amount and the dates of payment of the purchase price and finally, on October 15, 1935, it was agreed that the sum of 600 English pounds be paid not later than March 1, 1936, as the final purchase price installment, upon the payment of which "all the rights mentioned shall automatically become the property of the buyer and the seller hereby obligates himself to perform all necessary formalities in connection therewith." The claimant contends that as a result of these agreements he is the owner of the patent in question.

The Committee has been constrained to disallow the claim for failure of proof of two items, each of which is essential. In order to recover it is necessary for the claimant to prove that the final installment of the purchase price was tendered to the vendors—admittedly it was not paid—and that as a result of the tender that the claimant was entitled to the patent. There is, however, no evidence in the record upon which the Committee may base a finding of tender. Although the claimant testified that he had been informed by his brother that the tender had been made and had been rejected by the vendors, a finding to that effect cannot be based solely upon such hearsay evidence. *Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 230 (1938). In other words, in the absence of satisfactory and convincing evidence that the tender had in fact been made within the terms of the contract, it is necessary to disallow the claim.

Furthermore, assuming adequate proof of the tender, the relationship of the claimant and his brother as to the claimed patent is so obscure in the record that a finding may not be made that the claimant was entitled to the patent. Although the initial option agreement of 1929 was executed by the claimant, the final agreement of March 1, 1936, was executed by Maurice Teitz. The claimant testified that this was done because the

credit for financing the purchase was available only in London through Maurice Teitz and that it was understood between the brothers that the rights under the United States patent were to be the exclusive property of the claimant. It appears, however, from the claimant's testimony that Maurice Teitz contributed $4,000 of the original payment of $14,000. These facts, coupled with the claimant's testimony that the final contract ran in the name of Maurice Teitz because of financing requirements, indicates that Maurice Teitz had some undefined interest in the patent. As a result, we are left in the record with a completely inadequate explanation of the business relationship between the brothers and, therefore, without evidence upon which the Committee may base a finding as to the extent, if any, of the claimant's proprietary interest in the patent.

It may be added that the Committee in arriving at its conclusion does not question the veracity of the claimant but bases its conclusion exclusively on the obvious inadequacy of proof.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that the claimant, Emanuel Teitz, did not have at the time of vesting a title or interest to the vested property sufficient to support a right of recovery.

Accordingly, Claim No. 858 is hereby disallowed.

JUNE 25, 1945.

IN THE MATTER OF

VICTOR CHEMICAL WORKS

Docket No. 11 Claim No. 34

STATEMENT OF THE CASE

This proceeding was commenced upon Notice of Claim filed on September 25, 1942, by Victor Chemical Works, pursuant to regulations issued by the Alien Property Custodian on March 25, 1942 (7 Fed. Reg. 2290), which were amended on December 11, 1943 (8 Fed. Reg. 16709).

On July 30, 1942, by Vesting Order No. 68, the Alien Property Custodian vested the several United States Patent applications listed in Exhibit "A" attached to the Vesting Order, including Application No. 276,020 which is the only application directly involved in this claim and is hereinafter referred to as "the application". The application is pending. The Vesting Order stated that the application was property in which one F. Bornemann, a German national, had an interest.

The Order for and Notice of the Hearing was published on January 14, 1944, and copies were served on the persons designated in Section 2 of the Notice of Claim.

A hearing was held in the National Press Building, Washington, D. C., before the Committee, on February 1, 1944.

Chritton, Wiles, Davies and Hirschl, by Charles J. Merriam, appeared on behalf of the claimant; A. Matt. Werner, General Counsel of the Office of Alien Property Custodian, by Elmer Cunningham, appeared on behalf of the Custodian. The claimant submitted a brief in support of the claim on February 19, 1944, and General Counsel filed a responsive brief on March 1, 1944. The Blockson Chemical Company, an Illinois corporation, by James J. Lenihan, Attorney (with W. Bartlett Jones, of Counsel) filed a brief in opposition to the claim on March 1, 1944,

pursuant to leave of the Committee. The claimant filed a reply brief March 6, 1944 and General Counsel replied both to claimant and to Blockson Chemical Company on March 6, 1944.

A tentative determination allowing the claim of a right to an exclusive license was issued on April 22, 1944. On May 9, 1944 Blockson filed a proposal for modification of the tentative determination and on May 25, 1944 Victor filed its objections to Blockson's proposal. General Counsel filed a reply on June 13, 1944.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The Committee, following a consideration of the entire record, hereby allows the claim for the reasons hereinafter set forth.

Determination

The issue to be determined is the right of the claimant to an exclusive license under any United States patent that may hereafter be granted as a result of United States Patent Application No. 276,020.

Chemische Werke Albert (hereinafter called "Albert"), being a German company of Weisbaden-Biebrich, which has long been engaged, among other things, in the development of various detergent compounds in Germany, had acquired by assignment from the inventors, Ferdinand Bornemann and Hans Huber, the exclusive American rights to the application [1] involved in this proceeding—the invention relating to the use of a water-softening agent known as "tripolyphosphate".

The claimant, Victor Chemical Works (hereinafter called "Victor") is an Illinois corporation engaged in the manufacture and sale of phosphates in general. On September 25, 1942, as above stated, Victor filed the claim here in issue, asserting at first a right of ownership of the application. The claim of ownership was later abandoned, however, by waiver and Victor then modified its claim to the assertion of a right to an exclusive license under any patent that eventually may be granted.

Prior to the summer of 1936, at which time August Kochs, president of Victor, visited the Albert Manufacturing plant at Weisbaden, Victor was not actively interested in tripolyphosphate because its officers did not believe that such a chemical existed. Its existence and probable value were later recognized, however, and the negotiations and agreements upon which this claim is based eventually followed.

After Koch's visit to the plant at Weisbaden, and prior to January 1939, Victor because of its interest in the phosphate field, voluntarily assisted in a general way in Albert's attempt to obtain some suitable patent protection in the United States for the use of the latter's tripolyphosphate in this country.

Shortly before January 17, 1939, an unnamed American chemical manufacturing firm had written to Albert, offering to cooperate with the latter in the United States in the development of Albert's processes in the phosphate field. This letter read in part as follows:

"We do not wish to appear unduly persistent in our suggestion of an understanding with yourselves regarding a license under this pend-

[1] This application was originally filed in the United States Patent Office as No. 746,774, on October 4, 1934, and assigned by Bornemann and Huber to Chemische Werke Albert on September 20, 1934 (Liber Z–160, Page 587). Application No. 276,020 having later been substituted for No. 746,774, a confirming assignment of No. 276,020 was thereafter—on August 20, 1941—executed by Bornemann and Huber to Chemische Werke Albert.

ing application, but we think it may not be amiss to point out to you some of the conditions prevailing in this country at the present time which probably will have a material bearing on the value of your patent when it has issued. Since we first wrote you on September 13, 1938, we have become increasingly conscious that this whole question of polyphosphates is being studied by several of the phosphate producers in this country. Numerous patents have issued on methods of manufacture and methods of using poly phosphates, such for example, as the one referred to in our letter to you of December 1, 1938.

"It is our belief that a sound patent program covering tri phosphates will probably call for the obtaining of quite a number of auxiliary patents in order to be assured of the most complete protection possible in this field. We know from personal experience of both the difficulty and the expense of prosecuting an extensive patent program in a foreign country and the thought occurred to us that it might be possible to effect some arrangement with you whereby we could undertake to assume the prosecution of not only your pending application (and any interferences that may arise in connection with it) but any future applications in the field of tri phosphates that you might desire to file in the U. S. Patent Office. In return for this contribution on our part, you might be willing to grant us the right to acquire a license under these patents, the terms and conditions of this license to be mutually agreed upon.

"During a search of the U. S. Patent Office records, in connection with some other phosphate patent matters we recently came across the registration of the assignment of your pending application and note that your attorney is Dr. Alfred Muller, 52 Vanderbilt Avenue, New York City. If the above idea appeals to you as possessing some merit you might be willing to write Dr. Muller according him permission to discuss this suggestion with us and thereafter write you his opinion as to the practicability and desirability of our suggestions from your standpoint. We should indeed be pleased to be advised as to your opinion in the matter of the above suggestion.

"Our desire to ascertain at an early date if some understanding with you is possible, results from two underlying motives.

"1. Competitive manufacturers of phosphates are, to our knowledge, actively working in this field. We feel that the broadest possible program of patent coverage should be prosecuted with the utmost vigor, and that sales promotional efforts should be undertaken in order that these competitive organisations be prevented from obtaining the advantage of a prior position in the market.

"2. We wish to place ourselves in a position to explore the possibilities of manufacturing and selling tri phosphates but with the knowledge in hand that you have U. S. patent applications pending in this field, we do not feel that it would be good judgment on our part to spend time and money on such efforts. We feel that a satisfactory arrangement with you would be of advantage to you as well as ourselves. We would obtain the advantage of your knowledge and experience and favorable patent position. You would obtain the advantage of a skilled and experienced manufacturing and sales organisation in this country who could undertake the prompt exploitation of the tri phosphate in the U. S. markets. We feel that we could also assist effectively in carrying forward your patent program. We presume that it would be possible for us to

purchase from you sufficient tri phosphate to enable us to undertake such a market exploration and development.

"We probably do not need to point out to you the advantage a U. S. corporation would have as compared with a foreign corporation, in obtaining evidence of infringement, and in prosecuting any infringement suits that might prove necessary to defend the rights granted to you under your patents.

"We realize that you probably know very little about our organization either as to financial responsibility, reputation for fair dealing, ability as manufacturers and sellers of chemical products and so forth, but we suggest that it would not be at all difficult for either Dr. Muller or any other representative in this country in whom you have confidence to obtain such information and transmit it to you. We would be very pleased to render any of the above points."

On January 17, 1939, Albert wrote a letter to Victor enclosing the above excerpt—which letter, translated, read as follows:

"A well-known chemical manufacturing firm in the USA sometime ago and again recently has approached us in the matter of using our processes in the phosphate field, particularly those concerning the uses and manufacture of sodium tripolyphospate. In order to show you how this firm is considering cooperation with us, we are enclosing a copy of part of their last letter to us.

"Because of our hitherto friendly relations with you *we shall allow you the precedence,* and shall talk business with this firm *only if you are not interested* in cooperating with us in the polyphosphate field under the conditions they have offered us in the accompanying letter copy.

"Accordingly, we would like to have your telegraphic reply as soon as possible."[2]

Obviously we here have a proposal made by Albert which, had it been approved by Victor, would have defined the mutual intentions of the parties with a reasonable degree of certainty. However, Victor did not approve the suggestion but replied with a cablegram which merely advised Albert that "collaboration * * * under suggested conditions desirable * * * writing." This cablegram was immediately followed by a letter dated February 2, 1939—which repeated the last mentioned cablegram. The letter was vague as to the general intention or desire of Victor, in the premises, except that it offered a degree of cooperation as to the one application with which we are here particularly concerned, in the following words:

"* * * We have consulted our attorney regarding your situation. He thinks that as your 1934 application, which is the important application, chances are somewhat precarious of getting a patent allowed which is of value. However, in his opinion there is a bare chance, and, under the circumstances, we are willing to undertake further prosecution of *this application,* without charge to you, on the understanding that it is the intention to negotiate some arrangement for the proper exploitation of such patent by us, when granted. * * *"

[2] Emphasis is supplied in all quotations unless otherwise indicated.

To this latter letter Albert replied on February 27, 1939.[3]

In the opinion of the Committee the third paragraph of this letter, considered in the light of the previous negotiations, constituted an offer to Victor. This offer required (1) the "prosecution without cost to us * * * " of United States applications No. 746,774 and No. 118,024, and (2) the "filing without cost to us * * *" of 23 German patent applications enumerated in the letter.

Victor did not accept this offer as it was made, but on the contrary, replied by cablegram as follows:

"Proposal accepted for pending applications also new applications[4] *which we consider valuable.* Please advise promptly of our participation

[3] "We wish to acknowledge the receipt of your cable and your letter of February 2, 1939, from which we infer that you have no patent applications in the polyphosphate field and are particularly interested in the granting of patents to us and in acquiring a license for your company. We see in your statements the basis for a loyal cooperation.

"You have been informed by our New York attorney, the late Dr. Alfred Muller, of the state of affairs before the U. S. Patent Office. In order not to let the patents lapse, in the last petitions we have raised objections to the final rejection; we hold, however, that it is proper to make a continuation in part, as you yourselves have already suggested. Because of the necessary haste, in the last petition, on the suggestion of our Berlin patent attorney, we had to give power of attorney to a new attorney, Mr. A. M. Hahn.

"For the further following up of the matter, which would now be a field of mutual interest, we would make the following suggestion. The further working and eventually the renewal (continuation in part) of pending patent applications and such that are still to be made to the U. S. Patent Office, you will carry on at your cost, if you wish, also through an attorney appointed by you. As to the practical handling we are figuring to send all papers and the necessary explanations with possibly complete detail direct to you in German, while leaving to you or, respectively, the patent attorney, the translating and drafting in the form legally required and most suitable for the obtaining of patents. *As soon as a patent is granted you are entitled to the economic exploitation* and 2 weeks after the granting of the patent you would advise us in a binding form whether you wish to make use of the license. For all manufacturing rights, etc., granted to you we receive a royalty of 2.5% of the value of your sales of polyphosphate. To the handling of our polyphosphate patents in the United States belong:

(1) the prosecution without cost to us of the pending polyphosphate applications serial No. 746774 and No. 118024.

(2) the filing without cost to us of the following German applications relative to the manufacture and use of polyphosphates:

C. 49 235 re. Phosphate therapy.
C. 49 290 re. Treating metal surfaces.
C. 49 524 re. Treating metal surfaces.
C. 49 291 re. Textile agents.
C. 49 317 re. Manufacture of polyphosphate.
C. 49 821 re. Manufacture of polyphosphate.
C. 50 062 re. Manufacture of polyphosphate.
C. 52 066 re. Manufacture of polyphosphate.
C. 53 519 re. Manufacture of polyphosphate.
C. 53 531 re. Manufacture of polyphosphate.
C. 49 506 re. Baking agent.
C. 49 508 re. Fireproofing.
C. 50 173 re. Fireproofing.
C. 50 215 re. Fireproofing.
C. 53 353 re. Fireproofing.
C. 50 061 re. Gloss starch.
C. 50 169 re. Tanning agent.
C. 54 747 re. Tanning agent.
C. 54 748 re. Tanning agent.
C. 50 206 re. Improving soap.
C. 50 364 re. Preparation of detergents and wetting agents.
C. 50 931 re. Pest control agents.
C. 51 727 re. Pest control agents.

"The priority time for these applications has expired; however, the filing of applications in the U. S. A. is still possible, since the respective applications in Germany partly have not been made public yet and partly have not been granted or printed. We do not know of any literature damaging to the novelty, but in individual cases further researching would have to be made.

"With claim to the Austrian priority of May 14, 1938, the following Austrian application is to be filed yet in U. S. A.:

A 4579–38 re. Use of Sodium Ammonium tripolyphosphate and like substances. We, of course, are very willing to follow your experience and advice in regard to the work undertaken by you on our patent applications in U. S. A. and on our part are ready to assist you from the experience we have gained in the manufacture of $Na_5P_3O_{10}$, etc.

"We believe that our above suggestions show the way to a satisfactory arrangement and in the interests of furthering the matter request you to advise us by return mail.

"Henkel & Cie., with whom we maintain friendly relations, have been amply informed about our efforts in the polyphosphate field, but have shown no interest in this field in the United States. For this reason we believe that a discussion with Mr. Jost Henkel on the occasion of his visit with you is superfluous."

[4] The pending applications were No. 746,774 and No. 118,024. The new applications were those 23 German applications listed in footnote 3.

in Hahn, we also request you to return promptly to (Hahn) the documents sent you."

Albert acknowledged this cable by letter on March 17th, stating therein that:

"* * * After the receipt of your confirmation in writing we will send you the specifications and claims for the new patent applications that are to be filed by you in our name. * * *"

Victor had in the meantime, under date of March 17, 1939, written a letter which quoted and confirmed their last cablegram, and contained the following statements:

"* * * We accept your proposition and we are willing, therefore to prosecute the two applications, serial Nos. 467774" (admitted typographical error, should read 746,774) "and 118024, before the Patent Office, to a final conclusion and to assume further costs necessary for this purpose for our own account.

"In reference to the 23 new applications which have been made in Germany, you will kindly send us copies and, if for our understanding explanations are necessary, you will let us have these by letter.

*"We obligate ourselves to represent only such new applications at our expense before the Patent Office, which in our opinion have prospects of becoming of industrial value. New applications which do not appear to us to be of value, would go back to you. * * *"*

On April 6, 1939, Albert replied to this last letter from Victor—stating in part as follows:

"In this connection we further consent to send copies of all of our German and also one Austrian polyphosphate applications, which if necessary could serve as bases for new applications in the U. S. A. Moreover, there is attached to each application an explanation contributing to the understanding of the present patent situation. We have not made a critical choice of the materials. None of the applications sent over have gone as far as issuance in Germany, so that nothing would prevent a new American application. *However, we believe that you can best judge which of the applications have a chance of industrial application in the U. S. A.,* and that you understand that *you are to return to us those applications which you do not regard as valuable."*

From all of the foregoing it appears to the Committee that there can be no question but that definite mutual contractual obligations were incurred by this time—April 6, 1939. The correspondence clearly discloses that it had then become the duty of Victor to proceed to prosecute the designated United States patent applications—No. 276,020 (which then had been substituted for No. 746,774) and No. 118,024; also, to file and prosecute such of the German applications submitted to Victor for the latter's consideration as should be determined by Victor to be of commercial value; and to return to Albert all such applications as Victor should consider undesirable from the standpoint of commercial exploitation in the United States.

To the contention raised by the intervenor that Victor assumed an obligation to *file* in the United States Patent Office all of the German applications, we cannot subscribe. It is amply demonstrated from the correspondence exchanged between the parties that all Victor agreed to do was to file and prosecute only those German applications which were

of commercial value. Victor had the exclusive right to determine their commercial value. The German applications determined by Victor not to be of commercial value were to be returned to Albert. It appears highly improbable that Victor would undertake to file at its own expense what it should consider to be a valueless application—or that Albert would want Victor to undertake what Victor should consider to be a futile burden of expense and work.

This leaves the question of exclusivity as the sole remaining issue; that is, whether Victor became entitled under the contract to the right to exclusive licenses as to all such applications as it should prosecute before the United States Patent Office.

We have no doubt but that the unnamed firm that offered its services and its trade position to Albert was offering them in exchange for exclusive license rights. The tenor of the letter (quoted on page 3, supra) clearly indicates that an exclusive license was contemplated else the phrases "favorable patent position" and "the prompt exploitation of the product" would have had no reasonable meaning. Also, we have no doubt but that Albert so understood the proposal of the unnamed firm, and that upon receipt of a copy of it Victor also understood that an exclusive license was in the minds both of the unnamed firm and of Albert.

The understanding of Albert and Victor in this respect is clearly disclosed in the following excerpts from their correspondence hereinbefore quoted. Thus Victor in its letter to Albert dated February 2, 1939, stated:

"* * * our company * * * is definitely interested in obtaining *the rights* to a valid patent, if this can be secured * * *" and "* * * we are willing to undertake further prosecution of this application, without charge to you, on the understanding that it is the intention to negotiate some arrangement for *the proper exploitation of such patent by us,* when granted * * *."

And Albert's reply to this letter included the following:

"We wish to acknowledge the receipt of your cable and your letter of February 2nd, 1939, * * *. As soon as a patent is granted you are entitled to *the economic exploitation* * * *."

As found above, the contract between Albert and Victor obligated Victor to prosecute, in addition to the application in question, another pending U. S. application—No. 118,024 which was also based upon the use of polyphosphates. This latter application was granted in September 1939 and the formal patent issued on October 3, 1939. It is significant that as to this patent Victor wrote to Albert on September 28, 1939 as follows:

"*Under our agreement with you,* we are to notify you within two weeks after the issue of the patent whether or not we desire to secure an *exclusive license* under this patent.

"In considering this phase, it occurs to us that it would not be fair to you to ask you at this time to enter into *an exclusive license* contract with us in connection with the patent about to issue. We are prompted in saying this by two considerations:

"1. That we would not expect to use the process described in the patent and that, therefore, no revenue in the form of royalty could accrue.

"2. Unless a patent is granted on the use of sodium tripolyphosphate as a water softener, U. S. Serial 276,020 (continuation in part of Serial 746,774) the above patent about to issue would seem to be of very little, if any, commercial value."

also;

"The creation of a situation which would be a *real protection to us* in this country, as producers of tripolyphosphate, would be a patent which covers the use of sodium tripolyphosphate as a water softener, as described in U. S. Serial 276,020. If such a patent is issued, then we would most certainly wish to arrange for *an exclusive license* under it. In that case, you would, of course, be entitled to receive royalty payments, as per stipulated terms, on whatever tripolyphosphate we sold."

There is nothing in the record as to exclusivity that indicates any different understanding of the nature of the general agreement between the parties than that last above disclosed.

It is noted that pursuant to the contract between Albert and Victor, Albert executed on December 31, 1940 a formal exclusive license for U. S. Patent No. 2,209,129. This patent grew out of German Application No. C-50,931 which was listed in Albert's letter of February 27, 1939. This conduct of the parties is consistent with a finding that the parties intended any license to be issued under the contract to be exclusive.

The Committee, therefore, concludes that both Victor and Albert at all material times intended that Victor should be entitled to an exclusive license as to any patent that should issue under the application in question, at Victor's option.

The Committee has carefully considered the arguments in opposition to the claim, advanced by the intervenor in its brief and proposals to modify the tentative determination. One argument of the intervenor is to the general effect that the announced policy of the Alien Property Custodian warrants a refusal to recognize a contract right as against an enemy owner of a United States patent unless "* * * unequivocably established and unless it be definite, certain and absolutely free from doubt." The Committee knows of no purpose on the part of the Custodian to invoke so harsh a doctrine; that is, no purpose to insist upon a more absolute degree of proof than is customary in the courts of this country as to property rights in general. The intervenor also makes a point of the time when Victor notified Albert that Victor elected to exercise its option to take a license. Victor made this election on July 10, 1941, by notifying Albert of its intention to take advantage of its option—without waiting until after the granting of a patent. The Committee considers the limitation of the option to "two weeks after the granting of the patent" as provided in the contract to be an extreme limitation of the option period; that is, we find it was the intention of both parties that Victor should have the right to exercise its option at any time after the right to the option was originally granted, providing that it did not delay beyond two weeks after the patent should issue. This construction in no way enlarges Victor's rights; and, obviously, the earlier Albert learned of Victor's decision in this respect the more definite and certain the former's position would be.

No question arises in this proceeding as to any violation of Executive Order 8389, because, on September 11, 1941, the Secretary of the

Treasury licensed Victor to exercise its rights under the letter of February 27, 1939.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that:

(1) The claim of Victor Chemical Works to title to the application, having been waived by claimant, is hereby denied.

(2) Victor Chemical Works is entitled to an exclusive license under any United States Patent that may issue under application No. 276,020.

Accordingly, the claim (No. 34, as amended) of Victor Chemical Works to the right to an exclusive license under any patent that may issue under Application Number 276,020 is hereby allowed.

JUNE 17, 1944.

IN THE MATTER OF

ARNOLD WEISSELBERG

Claim No. 870 Docket No. 55

Claim No. 1209 Docket No. 56

STATEMENT OF THE CASE

This proceeding was initiated by Notices of Claims Nos. 870 and 1209, dated respectively July 10 and September 30, 1943, filed on Form APC-1 by Arnold Weisselberg pursuant to regulations issued by the Alien Property Custodian (8 Fed. Reg. 16709).

The Alien Property Custodian by Vesting Order No. 27, dated June 18, 1942 (7 Fed. Reg. 4629), vested, among other things, all right, title and interest, including all accrued royalties, in United States Patent No. 1,747,942, registered in the United States Patent Office in the name of Karl Lanninger, and in United States Patent No. 2,278,512, registered in the United States Patent Office in the name of Langbein-Pfanhauser-Werke, A. G., as property of nationals of a foreign country (Germany) designated in Executive Order No. 8389, as amended.

Notice of Claim No. 870 concerning Patent No. 1,747,942 alleges in substance that the claimant and Lanninger had entered into an agreement whereby the claimant was to receive as compensation for engineering service performed for both the licensor (Lanninger) and the licensee, The California Corrugated Culvert Company, Berkeley, California, 25% of all royalty payments. Notice of Claim No. 1209 concerning Patent No. 2,278,512 alleges in substance that the claimant by 1937 had entered into an agreement with the licensor (Langbein-Pfanhauser-Werke, A. G.), whereby claimant was to receive as compensation for engineering services 20% of all royalties paid by the licensee, Standard Process Corporation of Chicago, Illinois.

The claims were consolidated for hearing. The Order for and Notice of Hearing was published on September 20, 1944 (9 Fed. Reg. 11580), and a copy was served upon the person designated in Section 2 of the Notices of Claims, and upon the licensees. Pursuant thereto a hearing was held on October 3, 1944 before the Committee in the Office of the Alien Property Custodian in New York City.

The claimant appeared at the hearing without counsel. John Ernest Roe, General Counsel, by George B. Searls and James M. Fallon, appeared on behalf of the Alien Property Custodian. General Counsel's brief was filed on November 17, 1944 and a memorandum in reply was filed by the claimant on December 20, 1944. A further memorandum

was filed by General Counsel on January 12, 1945. A Tentative Determination disallowing the claims as title claims was issued on February 3, 1945. Various memoranda, dated February 6, 14, 21 and 24, 1945, directed to the tentative determination were submitted by the parties and considered by the Committee.

The transcript of testimony taken at the hearing and all exhibits in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claims as title claims are hereby disallowed for reasons hereinafter set forth, without prejudice, however, to whatever rights the claimant may have in the premises as a creditor.

Determination

This proceeding concerns royalties payable by the California Corrugated Culvert Company pursuant to a license [1] under Patent No. 1,747,942 which was issued to one Karl Lanninger and was vested by Vesting Order No. 27, and royalties payable by the Standard Process Corporation pursuant to a license [2] under Patent No. 2,278,512 which was registered in the name of Langbein-Pfanhauser-Werke and was likewise vested by Vesting Order No. 27.

The question for determination is whether the claimant had acquired at the time of vesting a proprietary interest in the royalties as distinguished from a creditor's claim against the respective licensors. The Office of Alien Property Custodian is not presently considering creditor's claims. See *Cabell* v. *Markham,* (Civ. Action No. 26-302, S.D.N.Y., January 3, 1945, reversed, No. 279, C.C.A. 2nd, April 3, 1945).

The claimant contends in substance that under certain agreements made by him and the owners of the inventions, he had acquired prior to the vesting a proprietary interest in a portion of the royalties payable under certain licensing agreements. General Counsel takes the position that the claimant has failed to establish the existence of such a proprietary interest.

It appears that the claimant, Arnold Weisselberg, was born in Galati, Rumania, and was educated as an engineer at the University of Vienna. He has been a resident of the United States since 1923 and a naturalized citizen since 1929. It is not contended that he is not—as to nationality—an eligible claimant. Since about 1930 he has been engaged as a consulting engineer principally by foreign concerns. His advice was sought on such matters as patent licenses, selling processes, technical problems concerning patent office procedure, and specific technical information regarding proper utilization of inventions.

For reasons of convenience attention is first directed to Notice of Claim No. 870 concerning Patent No. 1,747,942. The claimant testified that this patent "dealt with the speed coupling, such as was used for setting up portable irrigation lines * * * this method of irrigation, which is now an accepted fact * * * has greatly contributed to increased output of agricultural products in recent years". It seems that the inventor, one Karl Lanninger, first learned of the claimant through a mutual friend in Germany, and began corresponding with the claimant in 1932. This correspondence resulted in the execution by Lanninger of an affidavit on April 7, 1932, which stated:

[1] Karl Lanninger's interest under this license agreement was vested by Vesting Order No. 4114, dated September 7, 1944 (9 Fed. Reg. 13813).

[2] The interest of Langbein-Pfanhauser-Werke under this license agreement was vested by Vesting Order No. 4113, dated September 7, 1944 (9 Fed. Rg. 13813).

"I * * * [Lanninger] * * * am the owner of the entire rights, title and interest in the U. S. letters patent #1,747,942 * * * and do by these present give Mr. Arnold Weisselberg, a resident of the United States of America, the sole right and power to negotiate and conditional to my approval close agreements in my name and for my use concerning the sale or license of the aforenamed patents."

The claimant and Lanninger continued to correspond. Lanninger wanted to sell the patent outright but the claimant testified that an outright sale was impossible because:

"* * * the patent was not known in this country and its value was not established, it was impossible to get any outright sale. * * *"; and he further testified that:

"Mr. Lanninger had this patent but could not do anything with it in the United States because it was not just a matter of disposing of a patent, but considerable engineering in it was required in order to commercialize it."

It appears that the claimant then performed some of the preliminary engineering services required to exploit the device in this country. To further the exploitation, the claimant went to Germany in 1936 to confer with Lanninger. It appears that this conference accomplished a two-fold purpose, (1) the making of an oral agreement whereby the claimant was to be the exclusive engineering counsel for Lanninger, and (2) the acquisition by the claimant of first-hand information on Lanninger's development of the invention. The claimant testified that equipped with this information he was able to negotiate with the Culvert Company the exclusive license which was executed by Lanninger on April 14, 1937. Claim No. 870 is directed to the royalties payable under this license.

The license agreement is between Lanninger as licensor and the Culvert Company as licensee and is silent as to the claimant. Lanninger, however, on May 27, 1937 wrote to the claimant as follows:

"Summarizing our various agreements up to the present time, I confirm to you herewith:

(1) —You shall receive from all amounts accruing as a result of the executed license agreement with the California Corrugated Culvert Company a share of 25%.

(2) —As per our understanding, your share is payable immediately after receipt of the payments in New York, in Dollars, and I am authorizing a bank in the U.S.A. to receive the payments and to pay from it your share of 25%. * * *".

The claimant characterized this letter as follows:

"This is all I have, and this is the incorporation of all the previous written and oral agreement."

The Culvert Company was directed by Lanninger, in a letter dated May 25, 1937, to make all payments under the license agreement to the Bank of The Manhattan Company, New York City, for the account of Lanninger, and to furnish a copy to Lanninger and to the claimant of each statement of royalty payment.

Then on June 10, 1937 Lanninger wrote the following letter to the Bank:

"Referring to discussions Mr. Arnold Weisselberg had with you on May 13, I am hereby instructing you as my agent to receive for my account certain royalty payments which will be made quarterly, payable to you for my account by the California Corrugated Culvert Company of Berkeley, California. Upon receipt of these payments you are herewith directed to pay out to Mr. Arnold Weisselberg 25% of these payments and to transfer the balance, less your commissions as hereinafter stated, to me here in the form of your own check or of a draft.

"It is distinctly understood that you have no other obligations in connection with this account beyond crediting the payments received to my account and disbursing same as per above * * *."

In a letter to Lanninger dated June 14, 1937, the Bank stated:

"* * * We shall be glad to comply with your instructions and to act as your Agent in this matter, and as requested have noted our acceptance on the duplicate copy of your letter which we return herewith. It is our understanding that after paying 25% of the amounts received to Mr. Arnold Weisselberg we are to remit the balance to you, less the commissions stated in your letter."

It may be assumed that the claimant had suggested this arrangement whereby the royalty payments were to be made to the Bank because he testified that he then had in mind:

"* * * The possibility of a war, or some incidents which would prevent my receiving the payments for my principals, I made it a condition in my agreements with my principals that my payments are to be paid out here [United States], to be deducted from the gross sum received here, free of taxes, and only then should the balance go to the principals abroad * * *."

Periodically from 1937 to 1942 the Bank issued statements of account that were entitled "Karl L. Lanninger Agent" and which reflected receipts for royalty payments from the Culvert Company and disbursements pursuant to the Lanninger letter to the Bank of June 10, 1937. The Karl Lanninger Agency account at the Bank was "blocked" by action of the Foreign Funds Control Division, Treasury Department, and the 1942 statement of account indicates that a payment to the claimant out of the blocked account was made pursuant to Treasury license No. NY 441453M.

The foregoing material evidentiary facts, although not in dispute, are recited in detail because if the claimant acquired a proprietary interest in the royalties, it must be inferred from these facts.

The document principally relied upon by the claimant to establish a proprietary interest in the royalties is the letter above quoted from Lanninger to the claimant, dated May 27, 1937. This letter interpreted in the light most favorable to the claimant appears to the Committee to be not an assignment but merely a promise by Lanninger to pay the claimant a portion of the royalties when received. It was not an assignment because it did not manifest an intention to effect presently a transfer to the claimant of Lanninger's rights against the licensee. Furthermore, an indispensable element of a valid assignment was omitted because Lanninger retained not only control over the licensee as to the disposition of the royalties but also over the Bank in the distribution by it of the royalty payments. *Christmas* v. *Russell,* 81 U. S. (14 Wall.) 69 (1871); *Farmers' Bank of Greenville* v. *Blount,* 8 F. (2d) 443, (C.C.A., 4th,

1925); *East Side Packing Co.* v. *Fahy Market,* 24 F. (2d) 644, (C.C.A., 2d, 1928); *Farmers' Bank* v. *Hayes,* 58 F. (2d) 34, (C.C.A., 6th, 1932); *Williston on Contracts,* (Rev. Ed., 1936), Secs. 424-425. In other words, the fact that the license agreement called for payment by the licensee to Lanninger coupled with the correspondence between Lanninger and the Bank which indicates that the Bank was merely the collection agent for Lanninger, clearly establishes that both the licensee and the Bank were, in the disposition of the royalties, subject at all times to the control and direction of Lanninger.

Having concluded that there was not an assignment, the question remains whether Lanninger's promise to pay to the claimant 25% of the royalties received by Lanninger or by his agent, the Bank, created in the claimant any other equitable interest in the royalties. It is not disputed that if any equitable interest had been created in the claimant prior to the time of vesting, it would entitle the claimant to relief as one having an "interest, right and title" within the meaning of Section 9 (a) of the Trading with the enemy Act. *Pilger* v. *Sutherland,* 57 F. (2d) 604 (App. D. C. 1932).

The pertinent decisions impel the Committee to answer this question negatively. *Jamison Coal & Coke Co.* v. *Goltra,* 143 F. (2d) 889, (C.C.A., 8th, 1944); *Lone Star Cement Corporation* v. *Swartwout,* 93 F. (2d) 767, (C.C.A., 4th, 1938); *B. Kuppheimer & Co.* v. *Mornin, et al.,* 78 F. (2d) 261, (C.C.A., 8th, 1935); *Williston on Contracts,* (Rev. Ed. 1936) Secs. 424-429. These cases establish that a promise by a creditor (Lanninger) to pay a third party (the claimant) all or a part of a claim (Lanninger against the licensee) when collected does not—as distinguished from the effect of a partial or total assignment of a claim—create in the third party an equitable interest in the claim.

We are satisfied that the apparent exception to this rule, as illustrated by *Ingersoll* v. *Coram,* 211 U. S. 335 (1908), and by *Barnes* v. *Alexander,* 232 U. S. 117 (1914), is not applicable to the facts of this proceeding. In *B. Kuppheimer* v. *Mornin, supra,* the court commented upon the apparent exception to this rule as follows:

"* * * Fairly good reasons for putting aside the strict requirements of the doctrine of equitable assignments can be found in the cases of an asserted lien by a lawyer for his fee, on the money recovered as a result of litigation, for the efforts of the lawyer bring the fund into existence. In such case it may be said, arguendo, that the lawyer asserting the lien is, in a manner of speaking, a joint adventurer, and such cases scarcely belong in the category of equitable assignments. In the case of collateral pledged to secure a debt, possession usually follows, and so notice sufficient to induce inquiry is given to the world. * * *."

We also note that the apparent exception to the rule is seemingly limited to the situation in which an attorney is authorized to liquidate a claim, procure possession of the proceeds, and compensate himself out of the proceeds;—a situation not similar to the facts presented in this proceeding. It follows, therefore, that Claim No. 870, as a title claim, must be disallowed.

We now consider Claim No. 1209, which is a claim to 20% of the royalties payable by the Standard Process Corporation pursuant to its license under Patent No. 2,278,512. This patent was registered, at the time of vesting, in the name of Langbein-Pfanhauser-Werke, A. G., a German corporation (hereinafter referred to as Langbein). It appears that the

subject of the patent is an improved process and equipment to produce dense and finished copper shells on rotogravure cylinders.

The facts in this claim are very similar to those considered in connection with Claim No. 870. The claimant performed engineering services for Langbein since about 1931. He was paid for some of the services on a per diem basis and, in other cases, he was paid a percentage of the "money received". In 1936 it was agreed that Weisselberg was to represent Langbein in the United States "within the scope of the activities heretofore exercised by him for all their products", and that Weisselberg was to receive "on each business transaction a compensation to be agreed upon in writing in each instance".

Then on November 29, 1937 Langbein in a letter to the claimant stated, among other things,

"We take this opportunity to confirm for record purposes in the following the individual arrangements within the frame of our general agreement and ask you to inform us whether these are in agreement with your records.

(6) *Cylinder Polishing:* 20% license participation. * * *."

Claimant characterized this letter as a summation by Langbein of the "various projects on which I was working for them, showing the amount of compensation agreed upon in each instance" and further testified that "in connection with the patent in question and bearing on the claim in question, this letter showed that 20% was the amount that I should receive from any moneys received".

Then it appears that in September 1938 Langbein issued to the Standard Process Corporation, Chicago, Illinois, an exclusive license under the patent application which later became United States Patent No. 2,278,512. The license agreement provided, among other things, that the royalty payments were to be made to the licensor, and the agreement was silent as to the claimant. Later Langbein in a letter to Standard Process, dated May 31, 1939, stated:

"In reply to your letter dated May 12th we confirm that it will be in order that you make all payments under our agreement pertaining to the Roller Burnishing Process to Mr. Weisselberg on our behalf."

It appears therefore that the claimant was authorized to receive payment of the Standard Process royalties on behalf of Langbein; it is in this respect only that we find a variance between the question presented by Claim No. 870 and the present claim, for in reference to Claim No. 870 it will be recalled that the royalty payments were made to an agency bank on behalf of the licensor and not to the claimant.

It is apparent that the letter of May 31, 1939 did not purport to transfer presently to the claimant an interest in the royalties. It was merely an instruction to the licensee to pay the royalties to Weisselberg on behalf of licensor. The royalty payments remained under the unfettered dominion of Langbein and the direction to pay the royalties to the claimant was subject to change at any time by Langbein. *Christmas* v. *Russell, supra,* and the other cases cited relative to Claim No. 870, compel a finding that the claimant has not established an assignment to him of the Standard Process royalties. To the extent that the evidence shows a promise by Langbein to compensate the claimant out of the royalties, the claim must likewise be disallowed upon the authorities and for the reasons stated in reference to Claim No. 870.

The Standard Process royalties having been paid—prior to vesting—to the claimant by the direction of the licensor, and the claimant having been authorized by the licensor to retain as compensation 20% of the royalties, it may be noted that the claimant did not thereby have a "power coupled with an interest". Assuming, arguendo, that a claimant who had acquired such a power prior to vesting has an "interest, right or title" within the meaning of Section 9 (a) of the Act, to establish such a power it is necessary that the interest be in the property itself and not in the proceeds. *Hunt* v. *Rousmanier's Administrators,* 21 U. S. (8 Wheat.) 174 (1823). Authorization to an agent to receive a fund and to deduct a portion thereof for his services does not create such a power. *Taylor* v. *Burns,* 203 U. S. 120 (1906).

It will be noted that this determination is limited in its scope to Claims Nos. 870 and 1209 and does not pass upon whatever other questions may arise in reference to the two licenses referred to herein.

THEREFORE, for the purposes of this proceeding, it is the determination of the Committee that Arnold Weisselberg did not have, at the time of vesting, a title or interest to the vested property sufficient in law to support a right to recovery.

Accordingly, Claims Nos. 870 and 1209 are hereby disallowed, without prejudice, however, to whatever rights the claimant may have in the premises as a creditor.

APRIL 13, 1945.

IN THE MATTER OF

GEORGE YAMAOKA

Claim No. 573 Docket No. 75

STATEMENT OF THE CASE

This proceeding was initiated by Notice of Claim No. 573, dated April 13, 1943, filed by George Yamaoka, pursuant to amended regulations issued by the Alien Property Custodian on December 11, 1943 (8 Fed. Reg. 16709).

The Custodian by Vesting Order No. 176, dated September 28, 1942 (7 Fed. Reg. 8835) vested 390 shares (97.5% of all the outstanding shares) of the $100 par value common stock of Meito China Corporation, a New York corporation, as the property of specified nationals of a designated enemy country (Japan). One of the shares so vested was registered in the name of the claimant, George Yamaoka, a resident of Long Island, New York, and the vesting order recited that the national interest required that he be treated as a national of a designated enemy country (Japan).

A hearing was held before the Committee at the New York Office of the Alien Property Custodian on April 20, 1945. The claimant appeared on his own behalf, and John Ernest Roe, General Counsel, and George B. Searls, by Edward M. Murphy, appeared on behalf of the Alien Property Custodian. A brief was filed by General Counsel on June 21, 1945 and the claimant's reply brief was filed on July 5, 1945. A tentative determination allowing the claim was issued on September 21, 1945. No proposals to modify the tentative determination having been received, the tentative determination as hereinafter set forth is hereby adopted and issued as the final determination in the matter.

The transcript of testimony at the hearing and all exhibits received in evidence are hereby incorporated by reference into and constitute the basis of this determination.

The claim is hereby allowed for the reasons hereinafter set forth.

Determination

By Vesting Order No. 176 the Custodian vested one share of stock of Meito China Corporation, a New York corporation, which was registered in the name of the claimant, George Yamaoka, together with 389 shares which were registered in the names of residents of Japan. The claimant contends in this proceeding that he was at the time of vesting the owner of the share and that he was not and is not a "national of a designated enemy country" as determined in the vesting order. General Counsel takes the position that the claimant has failed to carry his burden of proving ownership of the share at the time of vesting.

The claimant is a native-born citizen of the United States who is and has been for some time a member of the law firm of Hunt, Hill & Betts, of New York City, and has continuously resided in New York.

In 1940 his law firm was counsel for Nagoya Sieto Kaisha, Ltd., a Japanese company which had a branch office in New York City for the purpose of importing and selling chinaware. Early in 1940 Nagoya caused the organization of Meito China Corporation and transferred its American business to that corporation in exchange for 400 shares of Meito and an additional sum of approximately $10,000 in cash. It appears that thereafter Nagoya caused the shares of stock of Meito to be transferred to various officers and employees of Nagoya who were residents of Japan—the vesting of these shares is not in issue in this proceeding. The share in question in this proceeding was transferred to the claimant as part of the same transaction and continued to be registered in his name on the books of the corporation up to the time of vesting.

The firm of Hunt, Hill & Betts handled the legal details of the incorporation of Meito, and the claimant became a member of its initial Board of Directors and later became an Assistant Secretary of the corporation. The Articles of Incorporation and the By-Laws of Meito provided that directors need not be stockholders. This provision in the Articles and the By-Laws makes it unnecessary, under the New York Corporate Law, to issue qualifying shares to directors.

The claimant testified at the hearing that the share was a gift to him from Nagoya, that no other person had any interest directly or indirectly in it, and that it was not subject to any limitation as to alienation, vote, or any other right that he might have as a shareholder. It further appears that in March 1941 the claimant received a dividend of $25 on the share, deposited the dividend in his personal account, and included it as income in his personal tax return for that year.

The Committee is of the opinion that the evidence satisfactorily and convincingly sustains the claimant's contention that he was at the time of vesting the owner of the legal and beneficial interest in the share. Since the Articles and By-Laws of Meito provided that directors need not be stockholders, the share obviously was not issued to the claimant merely to qualify him as a director. Furthermore, the payment to him of a dividend tends to negative any inference that the share was beneficially owned by Nagoya. As to cloaking, it appears to the Committee to be wholly unreasonable to assume that Nagoya intended to cloak the ownership of a single share of Meito's stock;—389 shares being registered on

Meito's books in the names of residents of Japan. In short, we find no reason to disbelieve the claimant's testimony as to his absolute ownership of the share registered in his name.

Finding, as we do, that the claimant was the owner of the entire legal and beneficial interest in the share at all material times, the question remains whether his "nationality" is such as to bar recovery.

The first category of persons who are ineligible as claimants is "enemies" as defined in Section 2 of the Trading with the enemy Act, as amended.[1] Section 9 (a) of the Act—which is the matrix of this proceeding—is the "sole relief and remedy" available to a claimant (Section 7 (c) of the Act) and the remedy of a Section 9 (a) reclamation suit is, by the terms of Section 9 (a), not open to "enemies" as defined in Section 2.

There is no suggestion, however, that the claimant is an "enemy." "Enemy" status may be acquired by a citizen of the United States—regardless of his loyalty—by reason of residence in enemy or enemy-occupied territory, but the claimant has been a resident of the United States at all material times.

The second category of persons who are not presently[2] eligible claimants is "foreign nationals" as defined in Section 5E of Executive Order 8389, as amended.[3] The claimant, as a citizen of the United States, is, of course, not a "foreign national" within the ordinary meaning of these terms; his political allegiance is to the United States. But, as a citizen of the United States may be an "enemy" under Section 2 of the Act, he may likewise be a "foreign national" as defined in Section 5E of Executive Order 8389, as amended. The only phrase in Section 5E which might conceivably apply to the claimant is Section 5E (iii), which extends the definition of foreign national to:

"Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country."

[1] Section 2 provides in part:
"The word 'enemy', as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.
"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'"

[2] Decisions indicate that the Section 9 (a) reclamation suit remedy is not only not available to "enemies" but also not available to "foreign nationals." *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944); *Josephberg et al.* v. *Markham,* Civ. Action No. 31–395 (S.D.N.Y. July 18, 1945). See "Determination by the Alien Property Custodian upon Application for Review" of Claim No. 1377, September 7, 1945.

[3] Section 5E reads in part:
"The term 'national' shall include,
"(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,
"(ii) Any partnership, association, corporation, or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,
"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country * * *."

This phrase seems to be primarily descriptive of a principal-agent, trustee-beneficiary, or some similar relationship and is, in this sense, a counterpart of Section 7 (c) of the Trading with the enemy Act, as amended, which provides in part:

"If the President shall so require any * * * property * * * belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy * * * which the President after investigation shall determine * * * so belongs or is so held, shall be conveyed * * * to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian * * *."

Since, as we have found, the claimant was the owner of the entire interest in the share and was not an agent, trustee, cloak, dummy, or nominee, in respect thereof, it follows that he was not "acting on behalf of" anyone other than himself in reference to the claimed share within this primary meaning of Section 5E (iii). In short, his proof of ownership precludes such a finding.[4]

There is another aspect of Section 5E (iii) of "8389" which requires comment. Meito China Corporation, although a domestic corporation, was a "foreign national" because it was controlled by foreign nationals;—substantially all of its shares were owned by residents of Japan. The claimant served as an officer and director of Meito after the effective date of "8389", and we must assume that he complied with his duties as a fiduciary. He therefore may be said to have acted in a broad sense "for and on behalf of" a foreign national; but such activity did not rest upon his ownership of the claimed share. Furthermore, a consideration of the scheme and of the context of "8389" clearly discloses that the Executive Order did not encompass such innocuous activity. The scheme of the Order is to control foreign interests in domestic property by prohibiting certain transactions in reference to the property unless licensed;[5] that is, *all* activity on behalf of foreign nationals is not prohibited by "8389." And the Committee has been unable to find, either in the Executive Order or in the regulations, general rulings, general licenses, public circulars, or public interpretations, issued pursuant to the Executive Order, any indication that the claimant, a citizen and resident of the United States, was prohibited from serving as a director and officer of Meito China Corporation, a domestic corporation. In brief, the national interest as manifested in the Executive Order and pertinent related documents did not require the claimant upon the effective date of the Executive Order either to vacate his corporate offices or, in the alternative, to procure a license authorizing him to continue in office.

The third category of persons who are not eligible as claimants is nationals of "designated enemy countries" as defined in Section 10 (a) of

[4] This is not to say that a citizen of the United States—or any other person—who employs his own property, or permits his own property to be employed, for the purpose of clogging the vesting process, or of concealing foreign owned property, or of protecting during the war an enemy's economic advantage so as to facilitate a post-war restoration of his pre-war economic position in this country, is not within a broader meaning of Section 5E (iii). See *Draeger* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. May 29, 1944). It suffices to say that such questions are not presented by the facts of this proceeding.

[5] *United States* v. *Leiner,* 143 F. (2d) 298 (C.C.A. 2d, 1944); *Aldrich* v. *Franco-Wyoming Securities Corp.,* 31 Atl. (2d) 246 (Del. Ch. 1943). Compare *Alexewicz* v. *General Aniline & Film Corp.,* 43 N.Y.S. (2d) 713 (Broome Co. 1943).

Executive Order 9095, as amended.[6] Since, however, this category is in substance merely a sub-classification of "foreign national" as defined in Section 5E of "8389", and since the claimant is not a national of any foreign country, he is not, of course, a national of any of the foreign countries designated as enemy countries in Executive Order 9095, as amended. The vesting order did determine that the national interest required that the claimant be treated as a national of a designated enemy country (see 10 (a) (iii) of Executive Order 9095, as amended). It now appearing, however, that the claimant is the owner of the share of stock in question and that he is a citizen and resident of the United States whose activity as an officer and a director of a domestic corporation was entirely innocuous and not in violation of any ordinance of the sovereign, we now find that the national interest does not require that he be treated as a national of a designated enemy country and further find that a retention of his property would not serve the purposes of the Trading with the enemy Act, as amended, or its related Executive Orders.

We conclude, therefore, that the claimant, George Yamaoka, has, for the purposes of this proceeding, established by satisfactory and convincing evidence that:

(1) He was at the time of vesting the owner of the entire legal and beneficial interest in one share of stock of Meito China Corporation, a New York corporation, and (2) that he was not at any material time an "enemy" as defined in Section 2 of the Trading with the enemy Act, as amended, or a national of a foreign country as defined in Section 5E of Executive Order 8389, as amended, or a national of a designated enemy country as defined in Section 10 (a) of Executive Order 9095, as amended.

Accordingly, Claim No. 573 is hereby allowed.

DECEMBER 3, 1945.

[6] Section 10(a) of Executive Order 9095, as amended, provides:

"The term 'designated enemy country' shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term 'national' shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines:

"(i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended."

APPENDIX

A

List of Claims Allowed Under Summary Procedure as Provided in Paragraph (h) of the Claims Regulation

Name	*Divesting order number*	*Date*
Cisatlantic Corporation and Cisoceanic Corp.	1	April 19, 1943.
L. Gabrilovitch	2	April 27, 1943.
American Lumber and Treating Co.	3	April 30, 1943.
Welding Research, Inc.	4	June 3, 1943.
Lucien Charles Sturbelle	5	June 21, 1943.
Bernhard Spur	6	August 6, 1943.
Edward G. Budd Mfg. Co.	7	August 18, 1943.
William Kroll	8	August 19, 1943.
Walter Haendal	9	August 19, 1943.
Joseph Blumenfeld	10	August 19, 1943.
The National Cash Register Co.	11	August 19, 1943.
Leon Thiry	12	August 25, 1943.
Anaconda Wire & Cable Co.	13	September 6, 1943.
Byron Jackson Company	14	September 6, 1943.
Elton H. Rimington	15	September 6, 1943.
International Nickel Company	16	September 6, 1943.
Scophony Corporation of America	17	September 7, 1943.
General Electric Company	18	September 7, 1943.
Karl Ludwig Schiff	19	September 10, 1943
Paul E. Hawkinson Company	20	September 20, 1943.
Remington Rand Inc.	21	September 20, 1943.
Dewey and Almy Chemical Co.	22	September 20, 1943.
Bronislaw Goldman	23	September 20, 1943.
Bronislaw Goldman	24	September 20, 1943.
Allied Chemical and Dye Corporation	25	September 22, 1943.
The Anglo California National Bank of San Francisco	26	September 22, 1943.
Bagpak, Inc.	27	September 22, 1943.
Bagpak, Inc.	28	September 22, 1943.
W. F. and John Barnes Company	29	September 22, 1943.
Bendix Aviation Corp.	30	September 22, 1943.
Edward G. Budd Manufacturing Co.	31	September 22, 1943.
De Directie van de Staatsmijnen	32	September 22, 1943.
De Directie van de Staatsmijnen	33	September 22, 1943.
E. I. du Pont de Nemours & Company	34	September 22, 1943.
Bernard Erber	35	September 22, 1943.
Harold G. Henry	36	September 22, 1943.
Laboratory for Raw Materials of the Norwegian Government	37	September 22, 1943.
Montfort Investment Co.	38	September 22, 1943.
The National Cash Register Company	39	September 22, 1943.
The National Cash Register Company	40	September 22, 1943.
The National Cash Register Company	41	September 22, 1943.
David Sciaky	42	September 22, 1943.
Shell Development Company	43	September 22, 1943.
Wallace R. Turnbull	44	September 22, 1943.
Radio Corporation of America	45	September 30, 1943.
Eugene Mittelmann	46	September 30, 1943.
I. F. Laucks, Inc.	47	September 30, 1943.

Name	*Divesting order number*	*Date*
Western Precipitation Corporation	48	September 30, 1943.
The Anglo California National Bank of San Francisco	49	September 30, 1943.
U. S. Metal Powders, Inc.	50	September 30, 1943.
U. S. Metal Powders, Inc.	51	September 30, 1943.
U. S. Metal Powders, Inc.	52	September 30, 1943.
E. I. du Pont de Nemours & Co.	53	September 30, 1943.
Link-Belt Company	54	September 30, 1943.
Walter Wisbrun	55	September 30, 1943.
General Electric Company	56	September 30, 1943.
B.S.A. Tools Limited	57	September 30, 1943.
Davis & Company, Inc.	58	September 4, 1943.
The Fate-Root-Heath Co.	59	October 5, 1943.
Radio Corporation of America	60	October 5, 1943.
Imperial Knife Company, Inc.	61	October 5, 1943.
General Electric Company	62	October 9, 1943.
Budd Wheel Company	63	October 23, 1943.
Franz Puening	64	November 6, 1943.
Walter Sobernheim (y Magnus)	65	November 17, 1943.
Leon Thiry	66	February 17, 1944.
Abel Edgar Chernack	67	February 17, 1944.
David Bezborodko and Charles Zucker	68	February 17, 1944.
Leonard Elion	69	February 25, 1944.
Herbert Mellor Jameson	70	February 25, 1944.
Alfred Marshutz	71	February 25, 1944.
Aluminum Company of America	72	May 9, 1944.
American Diagrid Corporation	73	May 9, 1944.
American Rolling Mill Company	74	May 9, 1944.
Niels Breinholt Bach	75	May 9, 1944.
Leon M. DeKanski	76	May 9, 1944.
The Dorr Company, Inc.	77	May 9, 1944.
Josef Ehrlich	78	May 9, 1944.
Francis F. Foldes	79	May 9, 1944.
Wsevolode Grunberg	80	May 9, 1944.
The Hoover Company	81	May 9, 1944.
Lewis Larsen, Trustee	82	May 9, 1944.
Friedrich Nettel	83	May 9, 1944.
Reynolds Metals Company	84	May 9, 1944.
Willem L. J. Spoor	85	May 9, 1944.
U. S. Industrial Chemicals, Inc.	86	May 9, 1944.
United States Radium Corporation	87	May 9, 1944.
George De Becze	88	May 23, 1944.
Robert Honigsberg	89	May 23, 1944.
Leopold Lion	90	May 23, 1944.
Bessie E. Steeves	91	May 23, 1944.
George Szekely	92	May 23, 1944.
Leopold H. P. Klotz	93	June 6, 1944.
Maurice Stern	94	July 11, 1944.
Chemipulp Process, Inc.	95	October 31, 1944.
Coro, Inc.	96	October 31, 1944.
Firestone Tire and Rubber Co.	97	October 31, 1944.
Freydberg Bros.-Strauss Inc.	98	October 31, 1944.
Mechanite Metal Corp.	99	October 31, 1944.
Precise Products Corp.	100	October 31, 1944.
Rene Tampier	101	October 31, 1944.
Jules Dupuis	102	November 6, 1944.
Maurice Stern	103	November 14, 1944.
Eelco Nicolaas van Kleffens	104	December 23, 1944.
Mary A. Leppla	105	January 25, 1945.
Shigeo Oshima	106	February 13, 1945.

B

TITLE 8—ALIENS AND NATIONALITY

Chapter II—OFFICE OF ALIEN PROPERTY CUSTODIAN

PART 501

AMENDMENT OF REGULATIONS

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, determining that it is in the national interest, hereby amends Part 501 of the Regulations of the Office of Alien Property Custodian (7 Fed. Reg. 2290) to read as follows:

Sec. 501 *Claims.*

501.1 *Receipt and Disposition of Claims.*

(*a*) Any person asserting a right to relief from or against the Alien Property Custodian because of any vesting, supervisory or other order of the Alien Property Custodian shall file with the Office of Alien Property Custodian, Washington (25), D. C., a notice of claim. Such notices shall be filed on the following prescribed forms, in conformity with the instructions set forth therein:

Form APC-1—(for claims arising of vesting orders)

Form APC-6—(for claims arising out of supervisory orders)

Form APC-16—(alternative form for inventors of vested patents)

Form APC-17—(alternative form for assignees of vested patents),

provided that by consent of the Custodian, on a showing of inapplicability of the above prescribed forms, notices of claim may be filed by informal written recital. Claims shall be filed within one year after the order to which they relate; provided that the Custodian may extend the time for filing. The forms may be obtained from the Office of Alien Property Custodian, Washington (25), D. C.

(*b*) All claims shall be determined on behalf of the Custodian by a Committee to be known as the Vested Property Claims Committee, to be composed of three members designated by the Custodian. The Committee shall have a seal which shall be affixed to all exemplifications of its records and, in its discretion, to any documents issued by the Committee. Except as hereinafter provided, the Committee shall exercise all powers of the Custodian appropriate to the hearing, consideration and disposition of claims, including the power to subpoena witnesses, to compel the production of documents for use as evidence, to administer oaths to witnesses, and to promulgate rules of practice and procedure not inconsistent with these Regulations. The members of the Committee shall designate one of their number to be Chairman. Any two members of the Committee shall constitute a quorum for the purpose of any action on any claim, and any one member of the Committee or any other person designated by the Committee may act as a Hearing Officer for the purpose of administering oaths, taking testimony, ruling on objections to the admission of evidence and performing any other functions of the Committee other than that of final consideration and determination of claims.

(*c*) Any person appearing in any proceeding before the Committee may be represented by counsel or otherwise. The claimant and the General Counsel of the Office of Alien Property Custodian shall be deemed necessary parties to any hearing on a claim. Any other person who asserts that he will be affected by grant or denial of the claim shall, on appropriate application to the Committee, be designated by the Com-

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mittee as an additional party; provided that the Committee may in its discretion reject any such application which it deems frivolous.

(*d*) The Committee shall not determinine any claim (other than a claim which is the subject of a summary proceeding for allowance as provided in subparagraph (h) hereof) except after hearing on appropriate notice to all parties, but any party may waive hearing or notice of hearing, and on consent of all parties any claim may be submitted to the Committee on a stipulated record.

(*e*) The Committee shall keep a record of any hearing before it, including a transcript of any examination of witnesses. Upon consideration of the record, the Committee shall issue a determination of all issues of fact and law necessary to the disposition of the claim, and shall transmit to the parties copies thereof. Such determination shall first be issued in the form of a tentative determination, and thereafter, with any modifications the Committee may see fit to make, in the form of a final determination. Before issuing its tentative determination the Committee shall afford to the parties appropriate opportunity to submit proposed tentative determinations and briefs thereon; and before issuing its final determination the Committee shall further afford the parties appropriate opportunity to submit proposals for modification of the tentative determination and briefs and oral argument thereon.

(*f*) The final determination of the Committee will be effectuated by the Office of Alien Property Custodian unless the Custodian or the Deputy Custodian, in his discretion, undertakes personal review thereof. Application by any party for such review shall be made within twenty days after receipt by him of the final determination of the Committee or within such further time as may be allowed by the Committee or the Custodian or the Deputy Custodian. If the Custodian or the Deputy Custodian undertakes such review, he will afford all parties opportunity for submission of briefs to him and, in his discretion, for oral argument before him. Upon consideration of the record, the final determination of the Committee, and any such briefs and argument, he will make a personal determination adopting, modifying, reversing, remanding, or otherwise disposing of the Committee's determination and will cause his personal determination to be transmitted to the parties and to be effectuated.

(*g*) Each party, on submitting any paper under subparagraphs (e) or (f) hereof, shall transmit copies thereof to every other party. Oral argument shall be held only upon notice to all parties.

(*h*) The General Counsel of the Office of Alien Property Custodian may in his discretion initiate a summary proceeding for allowance of any claim which he deems so clearly entitled to allowance that the public interest does not require contest thereof nor hearing thereon, by submitting to the Committee a recommendation for allowance, stating the facts considered in making the recommendation. The Committee shall make the recommendation available for public inspection and shall file with the Division of the Federal Register a notice of the proceeding which shall specify an appropriate time within which any person asserting any objection to the allowance may file application for hearing. If no such application is timely filed the Committee shall thereupon make its own review of the claim and the recommendation, and shall cause to be made any further investigation which it may deem proper but need not issue any notice of hearing nor issue any tentative determination nor transmit to

the claimant any copy of any document. If the Committee concurs in the recommendation it shall issue a summary determination (which may be in the form of an approval of the recommendation) allowing the claim, and such determination will be effectuated by the Office of Alien Property Custodian. If the Committee does not concur in the recommendation, or if an application for hearing is timely filed, the Committee shall dismiss the summary proceeding and shall set the claim down for hearing in according with subparagraph (c) above, and neither the recommendation nor the dismissal of the summary proceeding shall be considered in the hearing.

(*i*) This amendment shall become effective immediately upon filing with the Division of the Federal Register; provided that by notification to the Committee within twenty days thereafter any party to a claim which on the effective date of this amendment has been heard by the Committee but not yet made the subject of findings and recommendations as provided by subsection (g) of the "Regulations Relating to Property Vested in the Alien Property Custodian" (7 Fed. Reg. 2290) may elect that such claim be transmitted to the Custodian for decision by the Custodian in accordance with subsection (h) thereof.

Executed at Washington, D. C. on November 30, 1943.

(Official seal)

(Signed) Leo T. Crowley
LEO T. CROWLEY
Alien Property Custodian.

[F. R. Doc. 43–19766; Filed, December 11, 1943; 10:24 a. m.]
[8 Fed. Reg. 16709 (December 14, 1943)]

C

RULES OF PRACTICE AND PROCEDURE

Pursuant to the authority delegated to the Vested Property Claims Committee by the regulations of the Office of Alien Property Custodian, as amended December 11, 1943 (8 Fed. Reg. 16709) the Committee hereby issues the following rules of practice and procedure which, as of December 15, 1943, supersede the statement of procedures issued July 31, 1943 under the original regulations of March 25, 1942 (7 Fed. Reg. 2290).

I. All claims are listed for disposition according to the date on which they were received for filing. In scheduling claims for hearing those claims which assert an erroneous determination by the Custodian, either of nationality or of ownership, will, however, be given general preference on the Committee's calendar. Two or more claims related to the same property or presenting a common question of law or fact may, upon notice to the parties, be consolidated by the Committee for hearing.

II. Hearings before the Committee shall be at the time and place ordered by the Committee and for cause may be adjourned from time to time. Notice of a hearing will be served on the claimant (or the person designated by him in his notice of claim, as the case may be) by registered letter, mailed at least ten days in advance of the date of the hearing, and filed for publication in the Federal Register. All hearings before the Committee shall be public, except as otherwise ordered in the national interest by the Committee.

III. Subpoenas will not be issued except on a showing that other means of producing evidence have been exhausted. Testimony at any hearing will be upon oath (or affirmation) and subject to cross-examination. The rules of evidence prevailing in courts of law and equity will not necessarily be controlling. For example, hearsay and secondary evidence may be admitted, but the Committee will give consideration to its nature in determining its weight and credibility. The Committee will, however, on its own motion or on objection, exclude evidence which it deems privileged by law from disclosure, or which it deems immaterial, irrelevant, unduly repetitious, or otherwise of no probative value. On objection to rulings made during the examination of witnesses, a brief statement of grounds of objection must be made, but an automatic exception will follow if the objection is overruled by the Committee.

IV. The claimant shall be the moving party and the burden of proof on the issues tendered by the claim shall be on him and he shall proceed first at the hearing. The Committee shall in each case determine the time and manner of filing and exchanging tentative determinations and briefs.

V. Any notice of claim, or other paper filed in a proceeding, may be corrected or amended, but any such correction or amendment taking place after a claim is noticed for hearing shall be by leave of the Committee. By leave of the Committee any party who has made profert of an original exhibit may withdraw it from the record of the proceeding by substitution of a certified photostatic copy on notice to all other parties.

VI. It is the policy of the Committee to arrange prehearing conferences for the purpose of clarifying the issues, agreeing on matters of exhibits, and taking other steps related to simplification of the hearing.

DECEMBER 15, 1943.

D

EXECUTIVE ORDER NO. 9095

Establishing The Office of Alien Property Custodian And Defining Its Functions And Duties

By virtue of the authority vested in me by the Constitution, by the Trading with the Enemy Act of October 6, 1917, as amended, by the First War Powers Act, 1941, and as President of the United States, it is hereby ordered as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. The Alien Property Custodian shall receive compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Order.

2. All power and authority conferred on the President by Sections 3 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by Sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941, except such powers and

authority as were delegated to the Secretary of the Treasury by Executive Orders issued prior to February 12, 1942, and to the Board of Governors of the Federal Reserve System by Executive Order No. 8843 of August 9, 1941 (which powers and authority shall continue to be vested in and exercised by the Secretary of the Treasury and the Board of Governors respectively), are hereby delegated to and vested in the Alien Property Custodian. The memorandum of February 12, 1942, delegating to the Secretary of the Treasury certain powers and authority under said sections, is hereby revoked and canceled. Any and all action heretofore taken by the Board of Governors of the Federal Reserve System after February 11, 1942, in pursuance of Executive Order No. 8843 of August 9, 1941, is hereby confirmed and ratified. In the exercise of the authority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

3. Any property, or interest therein, of any foreign country or a national thereof shall vest in the Alien Property Custodian whenever the Alien Property Custodian shall so direct; and, in the case of any property, or interest therein, subject to the control of the Secretary of the Treasury, when the Alien Property Custodian shall notify the Secretary of the Treasury in writing that he has so directed, the Secretary of the Treasury shall release all control of any such property, or interest therein, to the Alien Property Custodian.

4. Any outstanding order, proclamation, regulation, ruling, license, or instruction issued pursuant to, or relating to the administration of, any power or authority vested in the Alien Property Custodian by this Order shall remain in effect unless and until amended or revoked by the Alien Property Custodian.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
March 11, 1942.

(F. R. Doc. 42–2127; Filed, March 12, 1942; 10:47 a. m.)
(cited: 7 Fed. Reg. 1971)

E

EXECUTIVE ORDER NO. 9193

AMENDING EXECUTIVE ORDER NO. 9095 ESTABLISHING THE OFFICE OF ALIEN PROPERTY CUSTODIAN AND DEFINING ITS FUNCTIONS AND DUTIES AND RELATED MATTERS

By virtue of the authority vested in me by the Constitution, by the First War Powers Act, 1941, by the Trading with the enemy Act of October 6, 1917, as amended, and as President of the United States, it is hereby ordered as follows:

Executive Order No. 9095 of March 11, 1942, is amended to read as follows:

1. There is hereby established in the Office for Emergency Management of the Executive Office of the President the Office of Alien Property Custodian, at the head of which shall be an Alien Property Custodian appointed by the President. The Alien Property Custodian shall receive

compensation at such rate as the President shall approve and in addition shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties. Within the limitation of such funds as may be made available for that purpose, the Alien Property Custodian may appoint assistants and other personnel and delegate to them such functions as he may deem necessary to carry out the provisions of this Executive Order.

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) any business enterprise within the United States which is a national of a designated enemy country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(*b*) any other business enterprise within the United States which is a national of a foreign country and any property of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of or owing to or which is evidence of ownership or control of any such business enterprise, and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize, or sell, (iv) to direct the management in respect to operations, or (v) to vest;

(*c*) any other property within the United States owned or controlled by a designated enemy country or national thereof, not including in such other property, however, cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities except to the extent that the Alien Property Custodian determines that such cash, bullion, moneys, currencies, deposits, credits, credit instruments, foreign exchange and securities are necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting pursuant to section 2 hereof;

(*d*) any patent, patent application, design patent, design patent application, copyright, copyright application, trademark or trademark application or right related thereto in which any foreign country or national thereof has any interest and any property of any nature whatsoever (including, without limitation, royalties and license fees) payable or held with respect thereto, and any interest of any nature whatsoever held therein by any foreign country or national thereof;

(*e*) any ship or vessel or interest therein, in which any foreign country or national thereof has an interest; and

(*f*) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

When the Alien Property Custodian determines to exercise any power and 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.

3. Subject to the provisions of this Executive Order, all powers and authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended, are hereby delegated to the Secretary of the Treasury or any person, agency, or instrumentality designated by him; *provided, however,* that when any property or interest, not belonging to a foreign government or central bank, shall be vested by the Secretary of the Treasury, such property or interest shall be vested in, and dealt with by, the Alien Property Custodian upon the terms directed by the Secretary of the Treasury. Except as otherwise provided herein, this Executive Order shall not be deemed to modify or amend Executive Order No. 8389, as amended, or the President's Proclamation of July 17, 1941, or Executive Order No. 8839, as amended, or the regulations, rulings, licenses and other action taken thereunder, or in connection therewith.

4. Without limitation as to any other powers of authority of the Secretary of the Treasury or the Alien Property Custodian under any other provision of this Executive Order, the Secretary of the Treasury and the Alien Property Custodian are authorized and empowered, either jointly or severally, to prescribe from time to time, regulations, rulings, and instructions to carry out the purposes of this Executive Order. The Secretary of the Treasury and the Alien Property Custodian each shall make available to the other all information in his files to enable the other to discharge his functions, and shall keep each other currently informed as to investigations being conducted with respect to enemy ownership or control of business enterprises within the United States.

5. The Alien Property Custodian is authorized to issue appropriate regulations governing the service of process or notice upon any person within any designated enemy country or any enemy-occupied territory in connection with any court or administrative action or proceeding within the United States. The Alien Property Custodian also is authorized to take such other and further measures in connection with representing any such person in any such action or proceeding as in his judgment and discretion is or may be in the interest of the United States. If, as a result of any such action or proceeding, any such person obtains, or is determined to have, an interest in any property (including money judgments), such property, less an amount equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding, shall be subject to the provisions of Executive Order No. 8389, as amended, *provided, however,* that this shall not be deemed to limit the powers of the Alien Property Custodian under section 2 of this Order; and *provided further,* that the Alien Property Custodian may vest an amount of such property equal to the costs and expenses incurred by the Alien Property Custodian in such action or proceeding.

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5(b) of

the Trading with the enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 shall be administered by him in conformity with the provisions of this Executive Order.

7. In the exercise of the authority herein delegated, the Alien Property Custodian shall be subject to the provisions of Executive Order No. 8839 of July 30, 1941, and shall designate a representative to the Board of Economic Warfare in accordance with section 6 thereof.

8. All records and other property (including office equipment) of the Treasury Department which are used primarily in the administration of powers and duties to be exercised by the Alien Property Custodian, and such personnel as is used primarily in the administration of such powers and duties and which was hired by the Treasury Department after September 1, 1941 (including officers whose chief duties relate to the administration of such powers and duties), as the Secretary of the Treasury and the Alien Property Custodian shall jointly certify for transfer, shall be transferred to the Office of the Alien Property Custodian. In the event of disagreement concerning the transfer of any personnel, records, or property, the determination shall be made by the Director of the Bureau of the Budget, pursuant to the formula here prescribed. Any personnel transferred pursuant to this Executive Order shall be transferred without loss of such Civil Service status or eligibility therefor as they may have.

9. This Executive Order shall not be deemed to modify or amend Executive Order No. 8843 of August 9, 1941, and the regulations, rulings, licenses and other action taken thereunder. Any and all action heretofore taken by the Secretary of the Treasury or the Alien Property Custodian, or by any person, agency, or instrumentality designated by either of them, pursuant to sections 3(a) and 5(b) of the Trading with the enemy Act, as amended, or pursuant to prior Executive Orders, and any and all action heretofore taken by the Board of Governors of the Federal Reserve System pursuant to Executive Order No. 8843 of August 9, 1941, are hereby confirmed and ratified.

10. For the purpose of this Executive Order:

(*a*) The term "designated enemy country" shall mean any foreign country against which the United States has declared the existence of a state of war (Germany, Italy, Japan, Bulgaria, Hungary and Rumania) and any other country with which the United States is at war in the future. The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries (even though they may be within enemy-occupied countries or areas) shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy-occupied country or area; or (iii) that the national interest of the United States requires that such person be treated as a national of a designated enemy country. For the purpose of this Executive Order any determination by the Alien Property Custodian that any property or interest of any

foreign country or national thereof is the property or interest of a designated enemy country or national thereof shall be final and conclusive as to the power of the Alien Property Custodian to exercise any of the power or authority conferred upon me by section 5(b) of the Trading with the enemy Act, as amended.

(*b*) The term "business enterprise within the United States" shall mean any individual proprietorship, partnership, corporation or other organization primarily engaged in the conduct of a business within the United States, and any other individual proprietorship, partnership, corporation or other organization to the extent that it has an established office within the United States engaged in the conduct of business within the United States.

11. The Secretary of the Treasury or the Alien Property Custodian, as the case may be, shall, except as otherwise agreed to by the Secretary of State, consult with the Secretary of State before vesting any property or interest pursuant to this Executive Order, and the Secretary of the Treasury shall consult with the Secretary of State before issuing any Order adding any additional foreign countries to section 3 of Executive Order No. 8389, as amended.

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3(a) and 5(b) of the Trading with the enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3(a) and 5(b) of the Trading with the enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

13. Any regulations, rulings, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under sections 3(a) or 5(b) of the Trading with the enemy Act, as amended, shall be conclusively presumed to have been issued, made or taken after appropriate consultation as herein required and after appropriate certification in any case in which a certification is required pursuant to the provisions of this Executive Order.

(Signed) FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,
July 6, 1942.

[No. 9193]

[F. R. Doc. 42-6502; Filed, July 8, 1942; 12:06 p. m.]
[7 F. R. 5205 (Number 134, July 9, 1942)]

F

[PUBLIC LAW 322—79TH CONGRESS]

[CHAPTER 83—2D SESSION]

[H. R. 4571]

AN ACT

To amend the First War Powers Act, 1941.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the First War Powers Act, 1941 (55 Stat. 838) is hereby amended by adding at the end of title III thereof the following:

"SEC. 304. The Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, is hereby further amended by adding at the end thereof the following section:

" 'SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

" '(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

" '(2) that such owner, and legal representative or successor in interest, if any, are not—

" '(A) the government of a nation with which the United States has at any time since December 7, 1941, been at war; or

" '(B) a corporation or association organized under the laws of such nation: *Provided,* That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be returned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof) and if such ownership was by one or more citizens of the United States or by one or more corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further,* That such owner or owners shall succeed to those obligations, limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

" '(C) an individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the

United States or a diplomatic or consular officer of a nation with which the United States has not at any time since December 7, 1941, been at war; or

"'(D) an individual who was at any time after December 7, 1941, a citizen or subject of a nation with which the United States has at any time since December 7, 1941, been at war, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory; or

"'(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided,* That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section;

and

"'(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

"'(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89–96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

"'(5) that such return is in the interest of the United States.

"'(b) Notwithstanding the limitation prescribed in the Renegotiation Act upon the time within which petitions may be filed in The Tax Court of the United States, any person to whom any property or interest or proceeds are returned hereunder shall, for a period of ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) following return, have the right to file such a petition for a redetermination in respect of any final order of the War Contracts Price Adjustment Board determining excessive profits, made against the Alien Property Custodian, or of any determination, not embodied in an agreement, of excessive profits, so made by or on behalf of a Secretary.

"'(c) Any person to whom any invention, whether patented or unpatented, or any right or interest therein is returned hereunder shall be bound by any notice or order issued or agreement made pursuant to

the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. 89–96), in respect of such invention or right or interest, and such person to whom a licensor's interest is returned shall have all rights assertible by a licensor pursuant to section 2 of the said Act.

"'(d) Except as otherwise provided herein, and except to the extent that the President or such officer or agency as he may designate may otherwise determine, any person to whom return is made hereunder shall have all rights, privileges, and obligations in respect to the property or interest returned or the proceeds of which are returned which would have existed if the property or interest had not vested in the Alien Property Custodian, but no cause of action shall accrue to such person in respect of any deduction or retention of any part of the property or interest or proceeds by the Alien Property Custodian for the purpose of paying taxes, costs, or expenses in connection with such property or interest or proceeds: *Provided,* That except as provided in subsections (b) and (c) hereof, no person to whom a return is made pursuant to this section, nor the successor in interest of such person, shall acquire or have any claim or right of action against the United States or any department, establishment, or agency thereof, or corporation owned thereby, or against any person authorized or licensed by the United States, founded upon the retention, sale, or other disposition, or use, during the period it was vested in the Alien Property Custodian, of the returned property, interest, or proceeds. Any notice to the Alien Property Custodian in respect of any property or interest or proceeds shall constitute notice to the person to whom such property or interest or proceeds is returned and such person shall succeed to all burdens and obligations in respect of such property or interest or proceeds which accrued during the time of retention by the Alien Property Custodian, but the period during which the property or interest or proceeds returned were vested in the Alien Property Custodian shall not be included for the purpose of determining the application of any statute of limitations to the assertion of any rights by such person in respect of such property or interest or proceeds.

"'(e) No return hereunder shall bar the prosecution of any suit at law or in equity against a person to whom return has been made, to establish any right, title, or interest, which may exist or which may have existed at the time of vesting, in or to the property or interest returned, but no such suit may be prosecuted by any person ineligible to receive a return under subsection (a) (2) hereof. With respect to any such suit, the period during which the property or interest or proceeds returned were vested in the Alien Property Custodian shall not be included for the purpose of determining the application of any statute of limitations.

"'(f) At least thirty days before making any return to any person other than a resident of the United States or a corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such

notice of intention to return may be revoked by appropriate notice in the Federal Register. After publication of such notice of intention and prior to revocation thereof, the property or interest or proceeds specified shall be subject to attachment at the suit of any citizen or resident of the United States or any corporation organized under the laws of the United States, or any State, Territory, or possession thereof, or the District of Columbia, in the same manner as property of the person to whom return is to be made: *Provided,* That notice of any writ of attachment which may issue prior to return shall be served upon the Alien Property Custodian. Any such attachment proceeding shall be subject to the provisions of law relating to limitation of actions applicable to actions at law in the jurisdiction in which such proceeding is brought, but the period during which the property or interest or proceeds were vested in the Alien Property Custodian shall not be included for the purpose of determining the period of limitation. No officer of any court shall take actual possession, without the consent of the Alien Property Custodian, of any property or interest or proceeds so attached, and publication of a notice of revocation of intention to return shall invalidate any attachment with respect to the specified property or interest or proceeds, but if there is no such revocation, the President or such officer or agency as he may designate shall accord full effect to any such attachment in returning any such property or interest or proceeds.

"'(g) Without limitation by or upon any other existing provision of law with respect to the payment of expenses by the Alien Property Custodian, the Custodian may retain or recover from any property or interest or proceeds returned pursuant to this section or section 9 (a) of this Act an amount not exceeding that expended or incurred by him for the conservation, preservation, or maintenance of such property or interest or proceeds, or other property or interest or proceeds returned to the same person.'"

SEC. 2. Section 20 of the Trading With the Enemy Act is hereby amended to read as follows:

"SEC. 20. No property or interest or proceeds shall be returned under this Act, nor shall any payment be made or judgment awarded in respect of any property or interest vested in or transferred to the Alien Property Custodian unless a schedule of the fees to be paid to all agents, attorneys at law or in fact, or representatives, for services in connection with such return or payment or judgment, has been furnished to, and approved in accordance with this section by, the President or such officer or agency as he may designate, or the court, as the case may be. In the case of any return of, or the making of any payment in respect of, any such property or interest or proceeds (other than pursuant to an order of a court), the President or such officer or agency as he may designate may make such modifications, if any, as are appropriate, and shall approve such schedule only upon determining that the individual fees do not exceed fair compensation for the services rendered and that the aggregate of the fees does not exceed 10 per centum of the value of such property or interest or proceeds or of such payment. Any person aggrieved by the determination of the President or of such officer or agency as he may designate may petition the district court of the United States for the district in which he resides to review the determination, and shall name the person or agency making the determination a party defendant. The court hearing such petition for review, or a court award-

ing any judgment in respect of any such property or interest or proceeds, as the case may be, may make such modifications, if any, as are appropriate, and shall approve such schedule only upon determining that the individual fees do not exceed fair compensation for the services rendered, and shall approve an aggregate of fees in excess of 10 per centum of the value of such property or interest or proceeds only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess. Any person accepting any fee in excess of an amount approved hereunder, or retaining for more than thirty days any portion of a fee, accepted prior to approval hereunder, in excess of the fee as approved, shall be guilty of a violation of this Act."

Approved March 8, 1946.

G

Executive Order 9725

DESIGNATING THE ALIEN PROPERTY CUSTODIAN TO ADMINISTER THE POWERS AND AUTHORITY CONFERRED UPON THE PRESIDENT BY SECTIONS 20 AND 32 OF THE TRADING WITH THE ENEMY ACT, AS AMENDED

By virtue of the authority vested in me by Title III of the First War Powers Act, 1941 (50 U.S.C. App., Sup., 616 et seq.), as amended, by the Trading with the Enemy Act of October 6, 1917 (50 U.S.C. App., 1 et seq.), as amended, and as President of the United States, it is hereby ordered as follows:

The Alien Property Custodian is designated as the officer to administer the powers and authority conferred upon the President by section 20 of the Trading with the enemy Act, as amended by Public Law 322, 79th Congress, approved March 8, 1946, and by section 32 of the said act, as added by the said Public Law 322.

The Alien Property Custodian may delegate to officers and employees of the Office of Alien Property Custodian such functions as he may deem necessary to carry out the provisions of this order.

This order shall not be construed as revoking or limiting any power or authority heretofore delegated to the Alien Property Custodian.

HARRY S. TRUMAN.

THE WHITE HOUSE,
May 16, 1946.

☆ U. S. Government Printing Office : 1946—696512