ESCHER, ANCILLARY ADMINISTRATOR, ET AL. *v.* WOODS, TREASURER OF THE UNITED STATES, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 365. Argued April 17, 1930.—Decided April 28, 1930.

Upon recovery by citizens of a neutral country of the value of property mistakenly seized during the late war as belonging to an alien enemy, the Alien Property Custodian is not entitled to a deduction for administration expenses not shown to have been incurred in respect of the particular property or fund. P. 383.

33 F. (2d) 556, reversed.

CERTIORARI, 280 U. S. 544, to review a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of the District in a suit against the Alien Property Custodian.

Mr. Spier Whitaker, with whom *Messrs. Lawrence A. Baker, Lyttleton Fox, Henry Escher,* and *Henry Ravenel* were on the brief, for petitioners.

The Alien Property Custodian was not given, and constitutionally could not be given, the right to appropriate from the money of petitioners as so-called administrative expenses the sum of $55,909.83, or any part of it, and therefore the judgment of the Court of Appeals should be reversed and the decree of the Supreme Court of the District of Columbia affirmed because:

A. The provisions of the Trading with the Enemy Act expressly limit the deductions for expenses to the amounts actually and necessarily incurred on account of the particular money and property from which the deduction is sought to be made; and

B. Even if this would include any part of the salaries and other general expenses of operating the Custodian's office—which we deny—the provisions of the Fifth

Amendment do not permit the Custodian to appropriate under the guise of expenses any percentage of petitioners' money and property, much less a percentage arbitrarily fixed by him without notice to the owner; and

C. The bringing of petitioners' suit under § 9 of the Trading with the Enemy Act necessarily restricted the right and power of the Treasurer and the Custodian over the money and property sued for to the mere holding of it until termination of the suit; and, any provision of the statute to the contrary notwithstanding, the utmost that the Custodian can charge against petitioners upon accounting under the decree in their favor is the actual amount, if any, necessarily expended for protecting and taking care of their money and property; and

D. The respondents having deducted the full amount of all expenses directly attributable to the money and property of petitioners and having admitted that it is impossible to determine the actual amount of the Custodian's general expenses which were incurred in respect of petitioners' money and property, the Custodian has no right to deduct and withhold any additional amount whatsoever on account of his so-called "administrative expenses."

Assistant Attorney General Rugg, with whom *Attorney General Mitchell*, *Messrs. Claude R. Branch* and *Thomas E. Rhodes* and *Mary G. Connor*, Special Assistants to the Attorney General, and *Mr. J. Frank Staley* were on the brief, for respondents.

I. The Act of March 4, 1923, specifically provided that the Custodian might pay the necessary expenses incurred by him in securing the possession, collection, or control of money or other property seized by him or in protecting or administering the same, out of funds seized by the Custodian. This Court has held that the Custodian was authorized to seize property supposed to belong to an enemy even before an adjudication that it was enemy

property, and has recognized that all property seized by the Custodian should be administered by him.

The Act of March 28, 1918, vests the Custodian with all the powers of a common law trustee in respect of all property seized by him. Congress intended that the entire cost of administering the office should be borne by the trust funds administered by him. The practice of deducting for administrative expenses a fixed percentage of the trust funds upon their return to the owners had been in force for several years before the passage of the Act of March 4, 1923, and that Act operated as a confirmation of the existing practice.

Moreover, it is universally recognized that a trustee has the right to be reimbursed for the expenses incurred in the administration of the trust estate. This Court has said that proper charges and expenses may be deducted even from property wrongfully seized.

II. The deduction of a flat rate charge of two per cent. has been determined by the Custodian to be the lowest amount necessary to cover the expenses incurred by him in collecting, protecting, and administering the seized property.

The principal of the trust estate of the petitioners amounted to over $3,000,000, and the estate was administered by the Custodian for over ten years. The amount deducted is about two per cent. of the principal sum returned, and is about five per cent. of the total income.

The petitioners admit that the Custodian could deduct exact amounts expended in the administration of their property, but contend that they should not be charged "one cent more than the actual expense of protecting or administering such property" or anything on account of the general expenses of the Custodian's office. If deductions can not be made for this purpose, it is obvious that the authority given to the Custodian to pay

expenses from trust funds will be largely ineffective. It was unavoidable that the Custodian should make mistakes and seize the property of non-enemies.

The action of the Custodian in determining this method and amount is presumed to be reasonable and proper.

III. The deduction by the Custodian of a fixed percentage to cover administrative costs or expenses did not deprive the petitioners of their property without due process of law. The Trading with the Enemy Act was passed under Art. I, § 8, Cl. 11 of the Constitution empowering Congress to declare war and make rules concerning captures on land and water. The power vested in the President to make rules and regulations with respect to the administration of property seized by the Custodian included the power to regulate the administrative expenses to be deducted from seized property.

Therefore, the method employed by the Executive Department of deducting a flat rate of two per cent. from the petitioners' seized property was the exercise of the discretionary power vested in the President, which is not reviewable. The power conferred by the Act to take enemy-owned property included the authority to seize property believed to belong to an enemy. This Act, and its amendments and the Executive Orders of the President, authorized the Custodian to make the deductions in question, as stated above. The Fifth Amendment does not prevent the exercise of war powers, and the Executive must have wide discretion as to the means to be employed in order to carry out the war successfully.

Moreover, it is not open to the petitioners to raise any constitutional question, as none was raised in the record in the courts below.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by citizens of Switzerland to recover property mistakenly seized during the late war as belonging

to an alien enemy. The plaintiffs recovered, but on a statement of account by the Alien Property Custodian he claimed a deduction of $55,909.83 for administrative expenses, "said sum having been paid by [him] into a fund maintained by him, out of which the expenses incurred in administering money and other property seized by the Alien Property Custodian, are paid." On a rule to show cause the claim was disallowed by the Supreme Court of the District of Columbia, but the decision was reversed by the Court of Appeals. 33 F. (2d) 556. A writ of certiorari was granted by this Court.

In the answer to the motion to show cause why the charge should not be stricken out it was not alleged and no evidence was offered to show that the expenses actually incurred in respect of the particular fund were equal to this sum, or what, if any, they were. It was said to be impracticable to prove them or to apportion the general expenses of the office. The amount was two per cent. of the assets handed over and it is said that without pleading or evidence the record shows this to be a reasonable charge.

To sustain the deduction the respondents rely upon the Trading with the Enemy Act of October 6, 1917, c. 106, § 12; 40 Stat. 411, 423, amended by Act of March 28, 1918, c. 28; 40 Stat. 459, 460, by which the Alien Property Custodian is "vested with all the powers of a common-law trustee" in respect of all property, "other than money," received by him under the Act and may exercise any powers appurtenant thereto "as though he were the absolute owner thereof." They also invoke Executive Order, February 26, 1918 (No. 2813) that the Custodian "may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property . . . and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event

recorded as a charge against, the estate to which such money or other property belongs." Also Order of July 16, 1918 (No. 2916), of which it is necessary to mention only the direction that the expenses "shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which" the expenses shall have arisen provided that if the property or assets of the business are insufficient, they may be satisfied out of other property "received from, or as the property of, the same enemy." Under these Acts and Orders the Custodian has adopted the course followed in this case and it is further urged that his conduct is tacitly ratified by the later Acts of March 4, 1923, c. 285, adding § 24 to the original Act, which embodies so much of the above orders as limits the liability to expenses incurred in respect of the same property, and to the property concerned or other property of the same person, 42 Stat. 1511, 1516; and May 16, 1928, c. 580; 45 Stat. 573, 574, that "all expenses of the office . . . including compensation of the Alien Property Custodian . . . shall be paid from interest and collections on trust funds and other properties under the control of such Custodian." It will be observed that the charge for the expenses of the office is upon interest and collections only; that is, a deduction from income for the cost of earning it, not as in the present case, a charge upon the corpus of the fund.

We do not perceive even in 1928 anything that clearly suggests treating the property in the hands of the Custodian as one great trust, to be called on to bear the expenses of administration, as one homogeneous whole. On the contrary the directions are explicit that the expenses charged to a given property are those incurred in getting or protecting it, or at least others similarly due from the same owner. But, and this is the main thing, all of these provisions naturally are interpreted to refer to property that the Custodian is entitled to hold. It

would be extraordinary if the charges incident to a seizure that the law did not intend the Custodian to make and a possession that the law requires him to surrender, were to be imposed upon the owner whose interests were sacrificed up to the moment of restitution. It seems to be going far enough to require him to bear the loss that he has suffered, without compelling him to pay the Government for its outlay in doing him harm. See *Hobbs* v. *McLean,* 117 U. S. 567, 582.

Decree reversed.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 389. Argued April 21, 22, 1930.—Decided May 5, 1930.

A telephone company, while under a standing written contract, made with the Secretary of the Treasury pursuant to the Act of June 17, 1910, to furnish telephone equipment and service to the War Department, installed in a building especially constructed for it by the Government, an unusually large and very expensive switch-board to meet the growing needs of the Department during the World War; and after the need was over and the switch-board had been removed, it sued under the Dent Act to recover the cost of installation less salvage. *Held,* upon the facts as found below:

1. That the switch-board was covered by the written contract, and that the conduct of the parties following installation was consistent with this view. P. 386.

2. That a contract for extra pay was not to be implied either (a) from claims addressed to officials of the Department having no authority to bind the Government and not assented to by them or known to their superiors; or (b) from the fact that the plans for the special building, showing the switch-board and equipment proposed, were submitted to the Secretary of War; or (c) from the fact that the Government had continued to use the switch-board after the claims were made. P. 388.

68 Ct. Cls. 273, affirmed.

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