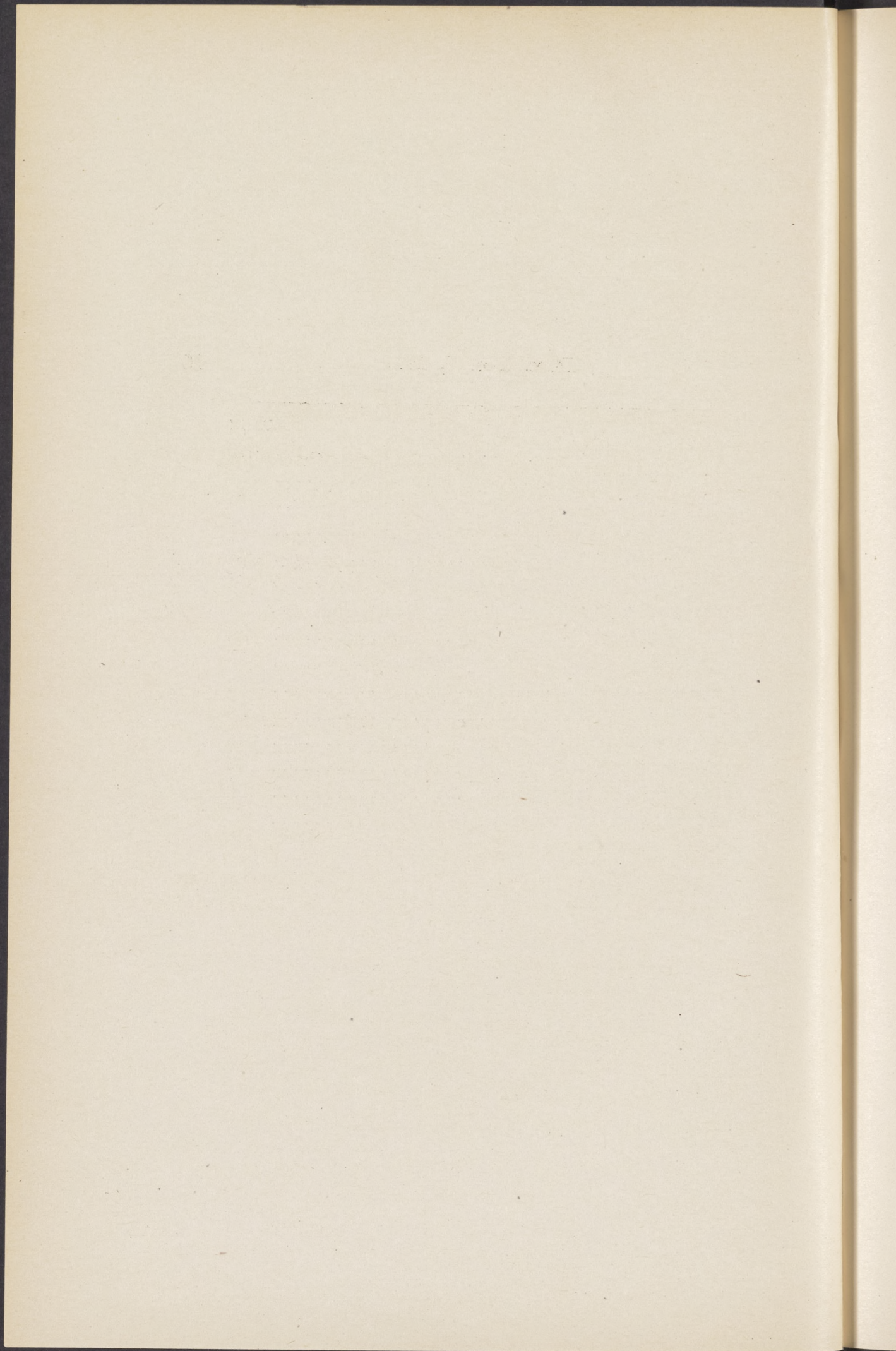


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(Filed Dec. 7, 1917.)

10

IN CHANCERY OF NEW JERSEY.

To His Honor, Edwin Robert Walker, Chancellor
of the State of New Jersey:

The complainants, Alfred J. Keppelmann, of
South Orange, New Jersey, and Edward M. Colie,
of East Orange, New Jersey, Trustees under the
last Will and Testament of Adolphus Keppelmann,
late of South Orange, New Jersey, respectfully
show that: 20

1. Said Adolphus Keppelmann died on February
4, 1913, having first made his last Will and Testa-
ment in due form of law under and by which he
appointed complainants executors and trustees of
his Estate. A true copy of said will is hereto an-
nexed and made part hereof marked Schedule 1.
That said Will was duly proved in the Essex
County Surrogate's Office February 15, 1913, and
letters testamentary granted thereon to complain- 30
ants who thereupon took upon themselves the ad-
ministration of said estate and the performance
of the trusts contained in said will.

2. That at the death of the testator his estate,
which was inventoried at \$2,711,001.85, consisted of
corporate bonds and corporate stocks with the ex-
ception of a small sum in bonds secured by mort-
gages, amounting to \$27,260.20, loans to four of his

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children amounting to \$14,076.51, personal property at homestead amounting to \$572.40 and cash on deposit amounting to \$32,818.04, all of which will more fully appear by the inventory on file in the Essex County Surrogate's office to which complainants beg leave to refer.

10 3. That of the seven children named in testator's said Will, Alfred J. Keppelmann and Erich P. Keppelmann are citizens and residents of the United States; that Pauline Adolphine Losch, Bertha von Borowsky, Louise Pauline Schulz and Amalie Caroline Lorenz are citizens and residents of the German Empire; and Caroline Emma Veessenmeyer is a citizen and resident of the Austrian Empire.

20 4. That the testator had been a careful investor in corporate stocks and bonds and had acquired the larger part of his fortune by reason of such investments; that complainants as trustees have, pursuant to the authority given to them by paragraph 2 of Section Sixth of said Will, to make a physical division, in whole or in part of said estate, and in the exercise of their best judgment have caused the stock certificates in their hands to be divided into blocks divisible by seven, in order to make such physical division and have sold most of the few excess shares of stock and few excess bonds after retain-
30 ing in their hands shares of stock and bonds divisible by seven, so far as said bonds were not distributed as hereinafter set forth. That in three instances where rights accrued on securities held by complainants as trustees, they have taken sufficient to make the number in hand divisible by seven and sold the remainder on the market, Schedule 2, annexed hereto and made a part hereof, sets forth the blocks of stock and the bonds in hand so divisi-
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ble by seven for the purpose of distribution in kind, pursuant to the authority given in said Will as aforesaid.

5. That the "Inheritance Accounts" referred to in Paragraph 1, of Section Sixth of said Will, including in addition to the "Inheritance Account" of Caroline Emma Veesebmeyer, the debt due from her husband Paul Veesebmeyer to testator, as written up on the testator's books to and including December 31, 1912, were as follows: 10

Lillie Lorenz	\$ 9,479.29	
Lena Veesebmeyer	\$43,788.66	
Paul Veesebmeyer Loan	6,250.00	50,038.66
		<hr/>
Bertha von Borowsky		30,858.29
Louise Schulz	24,767.13	20
Paula Losch	25,293.65	
Erich P. Keppelmann	15,244.42	
Alfred J. Keppelmann	11,556.75	

That the testator on the marriage of Carolina Emma Veesebmeyer, Bertha von Borowsky, Louise Schulz, and Pauline Adolphine Losch, paid to each of them as a dowry Thirty thousand marks and charged the same ultimately to their respective "Inheritance Accounts" as a dowry. That on the marriage of his sons, Alfred J. Keppelmann and Erich P. Keppelmann, and his daughter, Amalie Caroline Lorenz, he did not pay to them what he termed on his books "a dowry" but subsequently credited their respective "Inheritance Accounts" with Thirty thousand marks and also credited their respective "Inheritance Accounts" with interest calculated annually, of \$288. from the date of their respective marriages and said interest being 30

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calculated at the rate of 4% per annum. That no interest is charged on testator's books on the "Inheritance Accounts" therein of Alfred J. Keppelmann, Amalie Caroline Lorenz, Bertha von Borowsky, Louise Schulz and Erich P. Keppelmann. That the account of Caroline Emma Veesenmeyer is annually charged, for a period of seven years prior to testator's death, with \$602.86, being interest at 4% on 62,798.59 marks (\$15,057.49) included in her "Inheritance Accounts" and with annual interest on Paul Veesenmeyer loan of \$250.00 being interest at 4% on the aforesaid \$6,250. and is credited annually with \$20.50 interest, being interest at 4% on an account payment made by her on account of her "Inheritance Account." That the "Inheritance Account" of Pauline Adolphine Losch is charged annually with \$381.02 interest at 4% on \$9,525.45 included in her "Inheritance Account." That to these "Inheritance Accounts" are charged annual payments made by the testator to his respective children which payments made either monthly or quarterly, at the time of his death, as charged upon his books, were in the sum of \$2,400. per annum each of his children; that no interest was charged on the books on such annual payments made to the children respectively. The interest aforesaid is on the sums appearing in said "Inheritance Accounts" exclusive of said annual payments. That interest as aforesaid appears on testator's books in all cases written up to cover December 31, 1912. In all cases it is calculated at the rate of 4% per annum.

That by paragraph 1 of Section Sixth of said will the complainants as trustees were directed to deduct from the respective shares of testator's children the amounts due from them respectively

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on their "Inheritance Accounts" and also to deduct from the share of Caroline Emma Veese-meyer the amount due from her husband Professor Paul Veese-meyer, as the same appeared on the testator's books of account; that in order to adjust said "Inheritance Accounts" so that all would be made equal to the largest one, to wit, that of Caroline Emma Veese-meyer, including the aforesaid indebtedness of her husband Paul Veese-meyer, there would be required \$183,032.43 in cash, not including interest on said "Inheritance Accounts" calculated on the sums above referred to since December 31, 1912. 10

6. That the testator in his lifetime had made annual allowances to his children and that it was important to some of his children that they should be in receipt of an income to supply the place of the allowances which ceased upon the death of their father. Thereupon, under the discretion given to complainants as trustees under paragraph 5 of Section Sixth of said Will to make advances to said children from time to time out of either principal or accumulated income, which income by the said paragraph was made principal for the purpose of division, complainants have from time to time made distributions of the estate, partly in securities and partly in cash to the testator's children as follows: 20 30

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	1913.		
	April 1,	Cash	\$ 1,200.00
	May 8,	Bonds, included in inven- tory at inventory value, plus interest to Feb. 4-13	110,830.92
	May 19,	Cash	8,670.44
10	1914.		
	Feb. 18,	"	7,000.00
	May 22,	"	5,000.00
	1915.		
	Mch. 8,	"	10,000.00
	" "	Bonds, Hercules Powder Co. market value	297.00
	1917.		
	Feb. 14,	Cash	7,500.00
20		To each	<hr/> \$150,498.36

That the sums distributable to Amalie Caroline Lorenz and Caroline Emma Vcesenmeyer are held by the complainants as trustees under the special trusts set forth in Paragraphs 3 and 4 of Section Sixth of said Will.

30 7. That the distributions to Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz were made to Messrs. Schulz & Ruckgaber, composed of the partners, Carl Gopel, Max Ruckgaber, Jr., and Paul Ruckgaber, bankers of New York City, pursuant to Powers of Attorney executed by the said Bertha von Borowsky, dated July 16, 1913, by said Pauline Adolphine Losch, dated August 28, 1913, and by said Louise Pauline Schulz dated August 5, 1913, all prior to the existing state of war between the United States and the German Empire, a true copy of one of which (all being in like language) omitting the

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dates, signatures and certificates of execution is annexed hereto and made a part hereof as Schedule 3.

8. That complainants as trustees have filed in the Surrogate's office of Essex County their Account as of October 1, 1917, showing in hand the securities divisible by seven, set forth in Schedule 2, hereto annexed, and showing cash in hand amounting to \$326,575.60, subject to Surrogate's fees on the aforesaid account and commissions, to be allowed by the Orphans' Court of Essex County, which account is pending for allowance by said Court. 10

9. That in addition to said securities so divisible by seven, at the time of filing said account, complainants as trustees had in hand the securities shown on Schedule 4 hereto annexed and made a part hereof, which together with the aforesaid securities and aforesaid cash, and together with the homestead of the testator at South Orange (of relatively small value) constitute the entire estate of the testator undistributed by complainants as trustees. 20

10. That complainants as trustees on the accounting in the Orphans' Court of Essex County, desire to distribute in kind, pursuant to the terms of the trust created in and by said will, the securities shown on Schedule 2 and also to adjust the "Inheritance Accounts" by means of the cash in hand and distribute the same. 30

11. That complainants as trustees have sold, since October 1, 1917, a portion of the securities in Schedule 4 and are endeavoring to sell the remaining securities therein named, and also the homestead of testator all for the best price that can be obtained, and thereupon the entire estate in the 40

hands of complainants as trustees will be distributed.

10 12. That as executors complainants performed their last act in that capacity on December 14, 1914, by the distribution of the furniture in the homestead of testator at South Orange, in accordance with the bequest thereof in said will. That they filed their account as executors at the same time that they filed their account as trustees as aforesaid and the same is pending before the Orphans' Court of Essex County for allowance.

20 13. That in August, 1914, the European War broke out and that in April, 1917, a state of war was declared to exist between the United States of America and the German Empire; that by reason of both events the stock market has been greatly depressed as to most of the securities held by the estate and it is greatly to the advantage of all parties interest that they should receive their shares in the securities held by the complainants as trustees in order to enable them to avoid the loss incurred by a sale in a depressed market; that in accordance with the directions given to the complainants as trustees, and in accordance with their judgment they have held and propose to make a physical division of the securities hereinafter set forth in Schedule 2.

30 14. That Messrs. Schulz & Ruckgaber have given notice in writing to complainants that they claim the right to receive, by virtue of the aforesaid Powers of Attorney, the shares of Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz under the distribution which complainants as trustees are about to make; that the President of the United States has appointed A. Mitchell Palmer, Custodian of Alien Property and

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said A. Mitchell Palmer also claims the right to receive the shares of Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz under the distribution which complainants as trustees are about to make. That complainants do not know whether they should make distribution of the shares of Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz to the said Schulz & Ruckgaber, under such powers of attorney, or to said A. Mitchell Palmer, Custodian of Alien property, and whether such distribution would be a full and complete discharge of complainants on said distribution. Complainants are entitled to the determination of that question by this Court and the instructions of this Court to them in that regard. 10

15. Complainants are uncertain whether the facts set forth in Paragraph 5 above take the amounts of the "Inheritance Accounts" which are to be deducted from the shares of the respective beneficiaries out of the ordinary rule in relation to charging interest on such payments, and whether under said facts interest is chargeable and to be credited on said "Inheritance Accounts" since December 31, 1912, and if so, what interest, on what amounts, and to what date. 20

16. That it is necessary that the following matters should be determined by this Court and complainants be directed in relation thereto; 30

(1) Whether on the distribution which complainants as trustees are about to make in securities and cash, the "Inheritance Accounts" can be adjusted from the cash in hand, and whether interest is chargeable and to be credited on said "Inheritance Accounts" in accordance with the practice of the testator in his life time. 40

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10 (2) Whether on the distribution which complainants are about to make, said Schulz and Ruckgaber are entitled to receive the shares of Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz by virtue of their respective Powers of Attorney, or whether the said A. Mitchell Palmer is entitled to receive from the complainants as trustees the shares of Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz, and whether a receipt of either of them can be a full and complete discharge of complainants on such distribution.

20 That the aforesaid matters must be determined in order that complainants as trustees may know the amount to be distributed to each of the parties entitled to share in the distribution under the terms of said will and in order to enable complainants as trustees to distribute said shares to the parties properly entitled to receive the same to the end that complainants may be fully discharged as to such distribution upon making the same.

17. Complainants are advised that they cannot act with safety in the premises without the determination by this Court of the aforesaid matters and instructions by this Court as to their duties in said matters.

30 18. That the only child of Amalie Caroline Lorenz is Hilgrade Lorenz, of full age, living with her mother; that Caroline Emma Veesenmeyer has no children.

Complainants are without adequate remedy in the Courts of law and therefore pray;

(1). That Erich P. Keppelmann, Pauline Adolphine Losch, Bertha von Borowsky, Louise Pauline Schulz, Amalie Caroline Lorenz, Caroline Emma Veesenmeyer, Hildagarde Lorenz, Paul Vee-

senmeyer, Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, partners constituting the firm of Schulz and Ruckgaber; and A. Mitchell Palmer, Alien Property Custodian, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

(2). That this Court may determine whether on the distribution which complainants as trustees are about to make in securities and cash, the "Inheritance Accounts" can be adjusted from the cash in hand, and whether interest is chargeable and to be credited on said "Inheritance Accounts" in accordance with the practice of the testator in his life time and if so what interest, on what amounts and from what date to what date. 10

(3). That this Court may determine as to the parties who are entitled to receive from Complainants as trustees on the aforesaid distribution, the shares of the said Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz. 20

(4). That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

EDWARD M. AND RUNYON COLIE.
Solicitor and Counsel with Complainants. 30

Schedule 1.

In The Name of God Amen.

I, Adolphus Keppelmann, at present residing at Number 212 Irvington Avenue, South Orange, New Jersey, being of sound mind, memory and under-

standing, and hereby revoking all former wills by me heretofore made, do now make, publish and declare this to be my last Will and Testament.

10 SECTION FIRST. I direct all my just debts and obligations, funeral expenses and the expenses of the administration of my estate to be promptly paid and discharged.

SECTION SECOND. I hereby give and bequeath unto the following named corporations, associations or bodies respectively the sums of money set opposite their several names and I direct that my executors pay over the same promptly to them accordingly:

1. To the German Society of the City of New York, two hundred and fifty (250) dollars.

20 2. To the American Sunday School Union, Southern District (specially for the mountainous region of North Carolina) the Superintendent now or formerly being Reverend J. M. McCullagh, Henderson, Kentucky, one hundred (100) dollars.

3. To the Deutsches Lutherisches Emigrantenhause, located at Number 4 State Street, in the City of New York, one hundred (100) dollars.

4. To the Board of Foreign Missions of the Presbyterian Church in the United States of America, two hundred and fifty (250) dollars.

30 5. To the First Presbyterian Church South Orange, New Jersey, two hundred and fifty (250) dollars.

6. To the Heidenmissions Kasse, with which Reverend H. Grahn, D. D., is now connected, two hundred and fifty (250) dollars.

7. To the Evangelical Lutheran Ministerium of New York and adjacent territory to be applied to the Ministerial Relief fund of the said Society two hundred and fifty (250) dollars.

SECTION THIRD. I hereby give and bequeath to my friend and former employe Eugene Thumm, if he be living at my decease, the sum of Five Thousand (5000) dollars, in recognition of his kindness and courtesy to me during the many years of our acquaintance.

2. I hereby give and bequeath to Mrs. Sarah Burkhard, now residing at Number 132 Stevens Avenue, Jersey City, New Jersey, if she be living at my decease, the sum of one hundred (100) dollars. 10

SECTION FOURTH. I hereby give and bequeath to my daughter-in-law Luise von Zanthier Keppelmann, wife of my son Alfred J. Keppelmann, such of my pictures, household ornaments, rugs, bed and table linen, bedding and domestic utensils in and about my resident, 212 Irvington Avenue, South Orange, New Jersey, as she may in writing designate within three months after my decease. I hereby give the remainder of the articles in and about my said residence to my son, Alfred J. Keppelmann, directing that any that he does not wish to have he shall relinquish to my estate. 20

SECTION FIFTH. I hereby direct my executors to keep open and maintain my said present place of resident and to allow my son, Alfred J. Keppelmann to care for and occupy the same until the same is disposed of in the administration of my estate, such occupancy to be not only free of rent, but at the expense of my estate, and that said expense be paid by my executors accordingly. 30

SECTION SIXTH. All the rest, residue and remainder of my estate, real, personal and mixed of every kind whatsoever, and wheresoever the same may be situated, including any and all lapsed or void gifts and legacies, I give, devise and bequeath to my executors hereinafter named and to the sur- 40

vivor of them his or their successors or successor appointed by any court of competent jurisdiction, to have and to hold the same in trust, nevertheless, for the following uses and purposes, namely:

1. I direct my executors to deduct from the respective shares of my children in the residue of my estate, as the same are hereafter provided for, any and all amounts due from them respectively to me, as the same appear in the Inheritance Accounts against them respectively in my books of account, excepting as to the share of my daughter, Caroline Emma Veesenmeyer, from whose share is also to be deducted the amount due from her husband Professor Paul Veesenmeyer, to me, as the same appears in my books of account, in my Loan Account against him, and I direct my executors in their discretion both as to time and manner, having regard to the interests of my estate, to divide the said residue into as many shares or parts as I have children surviving me or children deceased leaving a child or children surviving them respectively at my death, taking into account in making such division as part of the same, the sums hereinbefore directed to be charged against my said children respectively and deducted from their respective shares. And I direct that my executors may make such division either by making a physical division in whole or in part of the property comprising my estate or by converting my estate in whole or in part into money and dividing the proceeds thereof.

2. And upon making such division or divisions to transfer and pay over one such share or part to my son, Alfred Julius Keppelmann; to transfer and pay over one such share or part to my daughter, Mrs. Bertha von Borowsky, now of Strassburg, Elsass, Germany; to transfer and pay over one such share or part to my daughter, Mrs. Louise Pauline

Schultz, now of Gehlsdorf, bie Rostock Mecklenberg, Schwerin, Germany; to transfer and pay over one such share or part to my son, Erich Paul Kappelmann, now of Murryville, Pennsylvania; and to transfer and pay over one such share or part to my daughter, Mrs. Pauline Adolphine Losch, now of Stuttgart, Germany. In the event that any of my children named as beneficiaries in this paragraph of my will should die in my lifetime, leaving a child or children them surviving respectively at my decease, then I give the share of the child so dying to his or her said surviving children respectively, share and share alike.

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3. And upon making such division or divisions to hold one such share or part in trust during the lifetime of my son-in-law, Dr. A. Lorenz, of Stuttgart, Germany, and to invest the same according to law in good and approved interest bearing securities and to pay the income thereof semi-annually to my daughter Amalie Caroline Lorenz, wife of the said Dr. A. Lorenz, for her sole and separate use, free and apart from the control of her husband, and without the power of anticipation or assignment; and in the event that the said Amalie Caroline Lorenz should die in the lifetime of her said husband leaving a child or children her surviving, to hold the income of the said share or part for the benefit of the said child or children equally, the issue of any deceased child to take the parent's share, and to pay out of the income thereof for the support, maintenance and education of the said child or children during their repective minorities, such sums and at such time as in the absolute discretion of my said executors and trustees shall seem proper, charging each child with the amount so expended on his or her behalf; and when the said child

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- or children shall respectively attain majority, to pay to them any accumulated income that may be due them respectively, and thereafter to pay the income of the said share or part semi-annually to them equally; and I direct that in all accountings the receipts for all moneys so paid to or expended for the
- 10 benefit of the said children of Amalie Caroline Lorenz, shall be a full and complete release, discharge and acquittance to my said executors and trustees therefor. In the event that the said Amalie Caroline Lorenz should die and her issue become extinct in the lifetime of the said Dr. A. Lorenz, then in such event to pay the said share or part, together with all increase and unpaid income accumulated thereon forthwith to those of my said children who may be then living and to the issue of any deceased
- 20 child, such issue to take per stirpes, as and for their respective property absolutely and forever. Upon the death of the said Dr. A. Lorenz either in my lifetime or after my decease, I direct that the said share or part together with any unpaid income accumulated thereon, shall go to and be paid to the said Amalie Caroline Lorenz absolutely if she be then living, or if she be not then living, to her child or children absolutely. Provided, always, however, that the share that would fall to my daughter, Mrs.
- 30 Caroline Emma Vessenmeyer under this provision of my will shall be held by my executor upon the same trusts and the same terms provided in paragraph 4 of this Section of my Will.
4. And upon making such division or divisions to hold one such share or part in trust during the lifetime of my son-in-law, Professor Paul Vessenmeyer, of Abbazia, Austria, and to invest the same according to law in good and approved interest bearing securities and to pay the income thereof
- 40 semi-annually to my daughter, Caroline Emma

Veesenmeyer, wife of the said Professor Paul Veesenmeyer, for her sole and separate use, free and apart from the control of her husband, and without the power of anticipation or assignment, and in the event that the said Caroline Emma Veesenmeyer should die in the lifetime of her said husband leaving a child or children her surviving, to hold the income of the said share or part for the benefit of the said child or children equally, the issue of any deceased child to take the parent's share, and to pay out of the said income thereof for the support, maintenance and education of such child or children during their respective minorities such sums and at such times as in the absolute discretion of my said executors and trustees shall seem proper, charging each child with the amount so expended in his or her behalf, and when such child or children shall respectively attain their majority to pay to them any accumulated income that may be due them respectively and thereafter to pay the income of the said share or part semi-annually to them equally, and I direct that in all accountings the receipts for all moneys so paid to or expended for the benefit of the said children of Caroline Emma Veesenmeyer shall be a full and complete release, discharge and acquittance to my said executors and trustees therefor. In the event that the said Caroline Emma Veesenmeyer should die without having had any child or children who shall survive her or her issue become extinct in the lifetime of her husband, the said Professor Paul Veesenmeyer, then in such event to pay one-quarter of the said share or part of the increase and unpaid income accumulated thereon forthwith to the said Professor Paul Veesenmeyer as and for his property absolutely and forever, and to pay the remainder of the said share or part and of the increase

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and unpaid income accumulated thereon forthwith to those of my said children who may be then living and to the issue of any deceased child, such issue to take per stirpes, as and for their respective property absolutely and forever. Upon the death of the said Professor Paul Veesenmeyer, either in my lifetime or after my decease, I direct that the said share or part, together with any unpaid income accumulated thereon shall go to and be paid to the said Caroline Emma Veesenmeyer absolutely if she be then living, or if she be not then living to her child or children absolutely. Provided always, however, that the share that would fall to my daughter, Mrs. Amalie Caroline Lorenz under this provision of my Will shall be held by my executors upon the same trusts and the same terms, provided in paragraph 3 of this Section of my Will.

5. I direct that all increase and income of my estate accruing after my death and before the division and transfer of my residuary estate herein provided for shall be considered as of the principal of the said residue for the purpose of such division and transfer; but advances of such income or principal may be made by my Executors from time to time in their discretion to the several beneficiaries, named in this Section of my Will, but as between the said beneficiaries such advances are to be as nearly equal as possible.

SECTION SEVENTH. I hereby nominate, constitute and appoint my son Alfred Julius Keppelmann and Edward M. Colie, Counsellor-at-law of New Jersey, Executors and Trustees of this my said Last Will and Testament, and I confer upon them full power and authority to hold, manage, invest, reinvest, convey, sell or dispose of all my estate

or any part thereof and to give good and sufficient deeds, receipts and acquaintances therefor, for the purpose of carrying out the provisions of this my Will; and I direct that no bond or other security shall be required of them or of either of them for the faithful performance of their duties as such Executors and Trustees either in the State of New Jersey or in any other State in which it may be either necessary or convenient to make proof hereof. 10

In Witness Whereof, I, Adolphus Keppelmann, the aforesaid testator have hereunto set my hand and affixed my seal this thirteenth day of April, in the year of Our Lord one thousand nine hundred and eleven.

Adolphus Keppelmann (L. S.) Adolphus Keppelmann, the above named testator, signed the foregoing instrument, and sealed, published and declared the same to be his Last Will and Testament all in the presence of us, and in the presence of each of us, all being present at the same time, who thereupon, at his request, and in his presence and in the presence of each other, all being present at the same time, have hereunto subscribed our names as witnesses; the said instrument having been read over to him, in the presence of all of us, all being present at the same time before the same was signed, sealed, published, declared and witnessed as aforesaid. 20 30

Dated, April thirteenth, nineteen hundred and eleven.

William C. Bitzer, 81 Stuyvesant Ave., Newark,
N. J.

Ralph W. Skinner, 116 North 16th Street, East
Orange, N. J.

Laura M. Wilson, 12 Burnett Street, East Orange, 40
N. J.

Schedule 2.

BONDS :

\$21,000 Missouri, Pacific, Gen 4's, 1975.

STOCKS :

	98	American Smelting & Refining Co.
10	490	American Telephone & Telegraph Co.
	497	Atchison, Topeka & Santa Fe.
	595	Baltimore & Ohio.
	329	Chicago, Great Western pfd.
	4424	Chicago, Milwaukee & St. Paul, Com.
	994	Chicago, Milwaukee & St. Paul, pfd.
	49	Chicago, Rock Island and Pacific Com.
	14	Chicago, Rock Island and Pacific, pfd.
	700	Denver & Rio Grande, pfd.
	7	Eastman Kodak Co.
20	126	General Electric.
	1106	Great Northern Ry.
	595	Illinois Central Com.
	1288	International Nickel.
	595	Louisville & Nashville Com.
	98	Mackay Companies.
	350	Minneapolis, St. Paul & Saulte Ste. Marie Com.
	126	Minneapolis, St. Paul & Sault Ste. Marie pfd.
30	511	Missouri Pacific Com.
	35	Missouri Pacific 5% Cum. pfd.
	196	National Biscuit.
	196	New York Central.
	497	Northern Pacific.
	210	Ottawa Light Heat & Power Co.
	1316	Pennsylvania R. R.
	\$49,000	Railroad Securities Certs.
	217	Republic Iron & Steel.
	413	Southern Pacific Com.

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266	United Fruit.	
4	Pennsylvania R. R.	
\$1,000	Railroad Securities Certs.	
2	Republic Iron & Steel.	
2	Southern Pacific Com.	
10	Wabash R. R. Pfd. A.	
12	Wabash R. R. Pfd. B.	10
10	Wabash R. R. Com.	

Schedule 3.

KNOW ALL MEN BY THESE PRESENTS that I, Bertha von Borowsky of Schweighauser Str. 31 P. Strassburg, Germany, have made and constituted and by these presents do make and constitute Messrs. Schulz & Ruckgaber, Bankers of New York City, my true and lawful attorney for me and in my name, place and stead to receive and receipt for such securities and such sums of money as may be distributed to me from time to time by Alfred J. Keppelmann and Edward M. Colie, executors of the last will and testament of Adolphus Keppelmann, deceased, probated before the Surrogate of the County of Essex in the State of New Jersey, and to deliver for me refunding bonds duly executed by me for such securities and such sums of money distributable to me under the last will and testament of Adolphus Keppelmann, and to collect for me all income upon such securities and to do all other things on my behalf in relation to such securities or the receipt of such moneys; with full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully

to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that said Messrs. Schulz & Ruckgaber shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set
 10 my hand and seal this.....day of.....
 in the year one thousand nine hundred and thirteen.

Signed and sealed in the
 presence of

Schedule 4.

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BONDS:

\$1,000	Chicago, Rock Island and Pacific Ry. Gen. 4's.
1,000	Cleveland, Cincinnati, Chicago & St. Louis.
1,000	Denver & Rio Grande.
4,000	Missouri, Kansas & Texas.
4,000	Rio Grande & Western.
5,000	St. Louis & San Francisco Ry., prior lien, Series A.
5,000	Southern Pacific Railroad.
30 4,000	Southern Railway.
1,000	U. S. Steel.

STOCKS:

2	American Smelting & Refining Co.
3	Atchison, Topeka and Santa Fe.
5	Baltimore & Ohio.
1	Chicago, Great Western, pfd.
1	Chicago, Milwaukee & St. Paul, com.

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Schedules.

6	Chicago, Milwaukee & St. Paul, pfd.	
2	Chicago, Rock Island and Pacific, com.	
6	Chicago, Rock Island and Pacific, pfd. A. 7%.	
3	Eastman Kodak Co.	
4	General Electric.	
5	Illinois Central, com.	10
4	International Nickel.	
5	Louisville & Nashville, com.	
2	Mackay Companies.	
6	Minneapolis, St. Paul & Sault Ste. Marie, com.	
2	Minneapolis, St. Paul & Sault Ste. Marie, pfd.	
1	Missouri Pacific, com.	
5	Missouri Pacific, 5% cum., pfd.	
4	National Biscuit.	20
4	New York Central.	
3	Northern Pacific.	

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Answer of Alien Property Custodian.

pursuant to the Trading with the Enemy Act he did determine, prior to the filing of the bill of complaint, that said three beneficiaries were enemies, and did require payment from the complainants to him of all money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of said enemies, and that by reason thereof, he is entitled to receive from the complainants the interests of said enemy beneficiaries in said estate. The defendant denies that there is any question as to his right to receive the shares of said enemy beneficiaries upon distribution, or that it is necessary for the protection of the complainant that an order should be made by this Court directing to whom payment should be made on distribution; and he prays the benefit of the objection heretofore made by notice to the complainants, to this portion of the bill of complaint, upon the ground that under the law and the statutes in such case made and provided, said shares, upon distribution, are payable only to this defendant. 10 20

This defendant joins in the prayer of the complainants for a determination, if the proofs when taken support the allegations of the bill, whether the "Inheritance Accounts" can be adjusted from cash in hand, and whether interest is chargeable and to be credited on said "Inheritance Accounts" as prayed for in the bill of complaint; and also prays that the shares which may be found to be due upon distribution to the defendants Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz may be paid to this defendant. 30

CARRICK & WORTENDYKE,
Solicitors and of Counsel with
A. Mitchell Palmer,
Alien Property Custodian. 40

(Filed March 8, 1918.)

10	Between ALFRED J. KEPPELMANN, et al., Trustees, &c., <div style="text-align: right; padding-right: 20px;">Complainants,</div> <div style="text-align: center; padding: 5px 0 5px 20px;">and</div> ERICH P. KEPPELMANN, et als., <div style="text-align: right; padding-right: 20px;">Defendants.</div>	On Bill, &c. Answer of Carl Goepel, Max Ruckgaber, Jr., and Paul Ruck- gaber, co-part- ners, trading as Messrs. Schulz and Ruckgaber.
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20 The defendants Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, copartners, constituting the firm of Schulz and Ruckgaber, answering the bill of complaint, say:

1. They admit the averments contained in paragraphs 1, 2 and 3 of the bill of complaint.

2. The defendants have no knowledge or information sufficient to form a belief as to the averments contained in paragraphs 4, 5 and 6 of the bill of complaint, except as to the averment contained in paragraph 4 relating to "dividing into blocks divisible by seven" the stocks and bonds of the said estate. This averment is admitted.

30 3. Defendants admit that the distributions referred to in paragraph 7 of the bill of complaint made by the complainants to Bertha von Borowsky, Pauline Losch and Louise Pauline Schulz were made to these defendant copartners trading as Messrs. Schulz and Ruckgaber pursuant to and in accordance with the terms of powers of attorney executed by the said distributees on the dates set forth in the said paragraph 7.

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Defendants further aver that the said powers of attorney and all of them wherein and whereby these defendants were created attorneys-in-fact for the said distributees were made, executed and delivered prior to the declaration of war between the Government of the United States and the Government of the Empire of Germany, and also prior to the declaration of war between the Government of the United States and the Empire of Austria-Hungary. 10

Defendants further aver that prior to a state of war existing between the said Government of the United States and of the Government of the Empire of Germany and of the Government of the Empire of Austria-Hungary, respectively, as attorneys-in-fact under said powers of attorney, they had represented the said distributees in various reorganizations of corporations whose securities were held by the said distributees. 20

Defendants further aver that since the declaration of war between the Government of the United States and the said above named Governments these defendants have represented the said distributees in the collection of coupons on bonds and dividends on stock belonging to and standing in the names of the said distributees, and in said capacity as attorneys-in-fact for the said distributees, have made all returns and accounted to the Hon. A. Mitchell Palmer, Alien Property Custodian, which in law under the Trading with the Enemy Act of Congress, approved October 6, 1917, they are required to make. 30

4. Defendants admit the averments contained in paragraphs 8 and 9 of the bill of complaint.

5. Defendants have no knowledge or information sufficient to form a belief as to the averments contained in paragraphs 10, 11 and 12 of the bill of complaint. 40

6. Defendants admit the averments contained in paragraph 13 of the bill of complaint.

10 7. Defendants admit that they gave notice in writing to the complainants that they claim the right to receive, under and by virtue of the said powers of attorney, the shares of the distributees, Bertha von Borowsky, Pauline Losch and Louise Pauline Schulz, and aver they were in duty bound and by law compelled, in the performance of the trust imposed by the said powers of attorney, to give the said notice and assert the right to receive the said distributive shares as set forth in the said 14th paragraph of the bill of complaint.

20 8. Defendants have no knowledge or information sufficient to form a belief as to averments contained in paragraphs 15, 16, 17 and 18 of the bill of complaint.

30 9. Defendants are advised by counsel, believe and suggest to the Court that the aforesaid powers of attorney executed by the said distributees prior to the declaration of war between the Government of the United States and the Government of the Empire of Germany and the Government of the Empire of Austria-Hungary are at the present time, and notwithstanding the said declaration of war, valid and enforceable; and that neither the subsequent state of war between the said Governments nor the enactment by the United States Government of the Trading with the Enemy Act of Congress, approved October 6, 1917, revoked or annulled the said powers of attorney.

40 10. Defendants, however, admit and suggest to the Court that under and by virtue of the provisions of the said Trading with the Enemy Act, as attorneys-in-fact under the said powers of attorney, upon receipt by them of the said several distribu-

tive shares, they are compelled to account to the said Alien Property Custodian for all moneys and securities and property so received by them for and on account of the said alien belligerent distributees.

11. These defendants further aver and suggest to the Court that under the provisions of the said Trading with the Enemy Act the Alien Property Custodian is without warrant or authority to claim or to receive from complainants the shares of the said alien belligerent distributees, but on the contrary aver the said shares of such distributees should be paid and delivered to the defendants. 10

12. These defendants join in the prayer of the complainants and also pray that the shares which may be found to be due upon distribution to the defendants, Bertha von Borowsky, Pauline Losch and Louise Pauline Schulz may be paid to these defendants as their respective attorneys-in-fact under the said powers of attorney duly executed by them. 20

MARTIN V. BERGEN,
RUBY R. VALE,

Solicitors for Carl Goepel, Max Ruckgaber,
Jr., and Paul Ruckgaber, copartners,
trading as Messrs. Schulz and Ruckgaber.

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Answer of Erich P. Keppelmann.

6. Defendant has no knowledge or information sufficient to form a belief as to the averments contained in paragraphs 10, 11 and 12 of the bill of complaint.

7. Defendant admits the averments contained in paragraphs 13 and 14 of the bill of complaint.

8. Defendant has no knowledge or information sufficient to form a belief as to averments contained in paragraphs 15, 16, 17 and 18 of the bill of complaint. 10

9. This defendant joins in the prayer of the complainants and for the determination of the several matters as prayed for in the bill of complainant.

MARTIN V. BERGEN,
RUBY R. VALE, 20
Solicitors for Erich P. Keppelmann,
Defendant.

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Stipulation as to Facts.

(Filed February 15, 1919.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

	Between	
10	ALFRED J. KEPPELMANN, et als., Trustees, &c.,	} Stipulation as to Facts. On Appeal from Court of Chancery.
	Complainants, Respondents,	
	and	
	ERICH P. KEPPELMANN, et als.,	
	Defendants, Respondents,	
	and	
20	A. MITCHELL PALMER, as Alien Property Custodian,	
	Defendant, Appellant.	

30 The stenographer's transcript of the testimony taken upon the final hearing in the Court of Chancery, in the above entitled cause on July 11, 1918, not being accessible, it is stipulated that the following facts in addition to those established by the formal pleadings, pertinent to the pending appeal, were established by the evidence then and there produced.

40 1. That distributions to Bertha von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz, were made to Messrs. Schulz & Ruckgaber, composed of the partners, Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, bankers of New York City, pursuant to powers of attorney executed by said Bertha von Borowsky, dated July 16, 1913, by said Pauline Adolphine Losch, dated August 28, 1913, and by said Louise Pauline Schulz, dated August 5, 1913, all prior to the ex-

isting state of war between the United States and the Empire of Germany, a true copy of one of which powers of attorney, all being in like language, omitting the dates, signatures and certificates of execution, is annexed to the bill of complaint as Schedule 3.

2. The said powers of attorney, and all of them, wherein and whereby the defendant Schulz & Ruckgaber were created attorneys in fact for the distributees, were made, executed and delivered prior to the declaration of war between the Government of the United States, and the Government of the Empire of Germany, and also prior to the declaration of war between the Government of the United States and the Government of the Empire of Austria-Hungary. Prior to a state of war existing between the Government of the United States and the Government of the Empire of Germany and the Government of the Empire of Austria-Hungary, respectively, Schulz & Ruckgaber, as attorneys in fact under said powers of attorney, had represented the distributees in various reorganizations of corporations whose securities were held by said distributees. Since the declaration of war between the Government of the United States and the above named Governments Schulz & Ruckgaber have represented the distributees in the collection of coupons on bonds and dividends of stock, belonging to and standing in the names of the said distributees, and in such capacity, as attorneys in fact for the said distributees, have made all returns and have accounted to the Honorable A. Mitchell Palmer, Alien Property Custodian, as the Trading with the Enemy Act, approved October 6, 1917, requires.

3. The Honorable A. Mitchell Palmer, Alien Property Custodian, refused to execute refunding bonds as provided by the statutes of the State of

Stipulation as to Facts.

New Jersey, as a condition to taking or receiving or holding any share of the Estate devised or bequeathed to the persons whom he has, after investigation, determined to be enemies or allies of enemies within the meaning of the Trading with the Enemy Act.

10 4. Messrs. Schulz & Ruckgaber, attorneys in fact, are willing and are prepared to execute and deliver such refunding bonds upon an award to them of the respective shares of the alien belligerents (or enemies or allies of enemies) in the Estate of Adolphus Keppelmann, deceased.

20 5. All the partners of the firm of Schulz & Ruckgaber, attorneys in fact, were, at the time of the execution and delivery of the powers of attorney, and now are, citizens of the United States of America, and were, in the lifetime of the testator his brokers and private bankers, and were known to be such to the alien belligerent distributees who executed and delivered the said powers of attorneys. Their only interest in the subject matter of the respective powers of attorney is as expressed in those instruments.

6. The Trustees have taken on every distribution of principal or income, refunding bonds from the distributees.

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EDWARD M. & RUNYON COLIE,
Solicitors of Complainants.

MARTIN V. BERGEN,
by Ruby R. Vale,

Solicitor of Erich P. Keppelman,
Carl Goepel and others, partners,
trading as Schulz & Ruckgaber,
Defendants.

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CARRICK & WORTENDYKE,
Solicitors of Defendant A.
Mitchell Palmer, as Alien
Property Custodian.

September 24th, 1918.

IN CHANCERY OF NEW JERSEY.

Between ALFRED J. KEPPELMANN, et al., Trustees, &c., Complainants, and ERICH P. KEPPELMANN, et al., Defendants.	}	On Bill, &c. Opinion.	10
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Mr. EDWARD M. & RUNYON COLIE for the Executors and Trustees. 20

Mr. MARTIN V. BERGEN and Mr. RUBY R. VALE (of the Philadelphia Bar) for Schulz & Ruckgaber, holders of the Powers of Attorney.

Mr. CHARLES L. CARRICK and Mr. MANSFIELD FERRY, for the Alien Property Custodian.

LANE, V. C.:

Testator, after disposing of a portion of his estate, gave all the rest and residue to his executors in trust. The trustees were directed to divide the estate into parts. Upon making the division, the trustees were directed to pay over certain shares to those who are now alien enemies. The duty of the trustees with respect to the shares of the alien enemies is merely to pay over. The executors are prepared to make the payments. They were authorized to pay over in kind, and propose to do so. 30 40

10 The shares are demanded by Schulz & Ruckgaber, citizens of this country, resident here, by virtue of powers of attorney executed by the alien enemy beneficiaries prior to the war (which powers of attorney give the holders full power to represent the alien enemy principals, to receive the shares and to execute and deliver proper refunding bonds), and by A. Mitchell Palmer, Alien Property Custodian, by virtue of authority conferred upon him by the act "An act to define, regulate, and punish trading with the enemy, and for other purposes," October 6th, 1917, and by proclamations and orders made by the President in pursuance of such act. He states that he has no authority to execute refunding bonds, and, in any event, he declines to give them. I will say here that I will not pass upon the question as to whether, in fact, the Alien Property Custodian can execute and deliver refunding bonds because of the attitude which he has taken, that, under no circumstances, will he give them. Schulz & Ruckgaber have the authority (if the powers of attorney be valid and exercisable) and are prepared to execute and deliver the refunding bonds. They admit that, if the shares are turned over to them, they hold them subject to the direction of the Alien Property Custodian and must account to him for them.

30 May the shares be turned over either to Schulz & Ruckgaber or the Alien Property Custodian without the execution and delivery of refunding bonds?

By Section 78 of the Orphans Court Act, 3 C. S. of N. J., page 3837, as amended by the laws of 1912, chapter 180, every executor or administrator, on the payment of any legacy or distributive share to the person entitled to the same, is directed to

take a refunding bond. The bond is for the benefit of any creditor who may sue thereon to recover the proportionate burden which the moneys paid to the distributee ought to bear to pay the debt notwithstanding that the creditor may have been barred by a decree of limitation. If the share is paid, in the first instance, to a trustee, the executors are required to take from the trustee a refunding bond. The purpose of the amendment of 1912 was to permit a trustee, to whom an initial payment had been made by the original executor to escape responsibility upon a refunding bond given by him by taking from the ultimate distributee a refunding bond running to the original executor. So, in the instant case, before the executors could turn over to themselves as trustees they must have given to themselves, as executors, refunding bonds executed by them as trustees. If they did not do so, they are liable as executors. To escape this responsibility, the statute permits them to take refunding bonds executed by the ultimate distributees to themselves as executors. It seems to me to be clear that the executors must exact, in order to protect themselves, refunding bonds before the shares can be paid over.

The Alien Property Custodian insists that the statute is inapplicable as to him. He takes the position that the trading with the Enemy Act is a war measure; that the President acts under it as Commander in Chief of the Army; that the President's determination that property is enemy property is final and conclusive, and that any property in which the President has determined that there is an enemy interest must be forthwith paid over to the Alien Property Custodian; that the executors, in the instant case, are required to pay over the

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shares to him without exacting refunding bonds. Without assuming to intimate an opinion as to the constitutionality of any legislation which would bear the construction contended for by the Alien Property Custodian I think a consideration of the act and the proclamations and orders issued under it will demonstrate that no such construction is possible. The act does not purport to require the turning over of property in which there is an enemy interest. Section 7c provides "that any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of any enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the alien property custodian." The Executive order of February 26th, 1918, provides, inter alia: "Sec. 2 (a) A demand for the conveyance transfer, assignment, delivery, and payment of the money or other property, unless expressly qualified or limited, shall be deemed to include every right, title, interest and estate of the enemy in and to the money or other property demanded, as well as every power and authority of the enemy thereover."

The act deals with property of alien enemies and the interest of alien enemies *in* property, *not* with property *in which* alien enemies have an interest and the authority of the Alien Property Custodian is over the property of, and interests of alien enemies *in* property, not in property *in which* alien enemies have an interest. In the case at bar, the right of the alien enemies in the shares in question is to receive those shares from the trustees upon

the performance by them of a condition, to wit, the giving of refunding bonds. The alien enemies have beneficial but not legal rights in the shares. To those beneficial interests the Alien Property Custodian succeeds, but he cannot convert the beneficial interests into legal estates and reduce the shares to his possession until the conditions, which the alien enemies must have performed, are performed, and until the trustees and the creditors of the estate are fully protected. The provisions of sec. 7, subdivision e, of the Trading with the Enemy Act, does not protect the trustees or the creditors of the estate. The right of the trustees is not in the property so that upon turning over the property they may resort to the remedies provided for in section 9. It is a right to have created a personal liability of the distributees, upon which creditors may sue. No acquittance or discharge by the Alien Property Custodian could acquit or discharge them of their duty toward creditors. Its uttermost effect would be to acquit and discharge as against those who had rights in the property itself. Assuming that the acquittance of the Alien Property Custodian would operate to release the executors from all liability so that suit might not be brought against them by creditors of the estate, then the rights of creditors of the estate would be taken away, without compensation, and no substitute would be provided. I had always supposed that the constitutional interdiction against the taking of private property for public purposes without compensation or the providing of a method of compensation is as effective in time of war as in time of peace and that the government may not take private property for war purposes without compensation, or without providing a means by

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10 which compensation may be made as in cases of eminent domain. In considering the English practice it is wise to keep in mind that the power of the English parliament is unlimited whereas that of the American Congress is circumscribed by a written constitution. I had never supposed that the authority of the President as Commander in Chief of the Army "to commandeer" (if by that term is meant the taking of property without first having made compensation or providing a method of compensation) extended or could be extended by Congressional action or otherwise over the civilian population without the field of military operation.

20 I express no opinion, because not necessary, as to the power of Congress to deprive citizens of the United States of their ordinary legal remedies against alien property or with respect to their interests in alien property, or whether the provisions of section 9 give such an adequate remedy as to constitute due process of law. Whether certain property is or is not enemy property and the determination of rights and interests in property is usually a question to be determined by judicial authority; whether Congress can, because of a state of war, confer upon the President authority to determine as against the rights of citizens of this country what is and what is not enemy property without the declaration of martial law is a question upon which no opinion ought to be expressed until the point is squarely raised.

30 There is a very clear distinction between the power to determine what is or is not an essential war industry and what is or is not enemy property. That Congress assumed that it would be necessary to invoke the aid of the courts, in reaching enemy property and that the determination of

the question as to what is or is not alien property may be a matter to be settled by the judicial tribunals is, I think, indicated by the provisions of section 17 of the Act by which full power and authority is given to the Federal Courts to make such orders or decrees as may be necessary to enforce the provisions of the act.

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A different question would arise if the United States was the ultimate distributee, which would be the case if the government, as it might, have (treaty rights not being considered) had confiscated the property of alien enemies. Whether or not refunding bonds, in such instance, would be required is a question upon which I express no opinion. The government, however, has not confiscated the property. It has provided for the appointment of a custodian (making him a common law trustee) expressly reserving to itself the right to determine, at some future time, what shall ultimately be done with the property taken into his possession. It may be turned back to the alien enemies, in which event we would have a situation where the alien enemies would have received their distributive shares and, because of the existence of war, have been absolved of the necessity of giving the refunding bonds required by our statute to protect creditors.

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My construction of the provisions of the statute and the orders of the President applicable to the facts in the case at bar leads me to the conclusion that neither Congress or the President intended to confer upon the alien enemy custodian any higher power over the shares held by the trustees than the alien enemies themselves would have if a state of war did not exist.

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I am of the opinion that the shares cannot be turned over to the Alien Property Custodian without the execution and delivery of refunding bonds.

Are the powers held by the attorneys in fact valid and exercisable?

- 10 I think it must be considered as settled by judicial dicta that, under the common law powers of attorney for the collection of moneys executed prior to the existence of a state of war, continue to be valid notwithstanding the state of war and that they may be exercised. *United States vs. Grossmayer*, 9 Wall, 72, 19 L. Ed., 627; *Montgomery vs. United States*, 15 Wall., 395, 21 L. Ed., 97; *New York Life Insur. Co. vs. Davis*, 95 U. S., 425, 24 L. Ed., 453, *Williams vs. Paine*, 169 U. S., 55, 42 L. Ed., 659. If there is anything inconsistent to be
- 20 gathered from any language used in *Mutual Benefit Life Insurance Co. vs. Hillyard*, 37 N. J. L., 444, it must be considered to have been overruled by the later federal cases. The English Court of Appeals, in Chancery, has held in the case of *Tingley vs. Muller*, Vol. 2, Chancery 1917, page 144, that a power executed before the war authorizing an agent to sell lands remained valid and might be exercised after the outbreak of the war, although the principal became an alien enemy. In
- 30 that case, the power was made irrevocable, for a period of twelve months. It would seem clear, from a consideration of the cases above referred to, that there is no rule of public policy which is offended by recognizing the validity of such powers and the right of the attorneys in fact to act under them.

Are the powers rendered invalid by our Trading with the Enemy Act? The Supreme Court of the United States in the cases above referred to has

held that, notwithstanding the broad language of the non-intercourse act in effect during the civil war, powers authorizing the performance of acts of greater extent than authorized by those under discussion might properly be exercised during war. The Trading with the Enemy Act forbids, sec. 3, "Any person * * * to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of any person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade * * *." The words "To trade" are defined in the act, among other things, to include, "a. Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation." "d. Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property." Notwithstanding that the word "trade" has been defined to include the payment of a debt and the receipt of property, before the performance of the act becomes illegal, it must be on behalf of, or for the benefit of the alien enemy. The case in the English Court of Appeals, Chancery Division, therefore becomes a direct authority. That court held, four judges to one, that a payment to the holder of a power of a consideration and the conveyance of real property by the holder of a power in pursuance thereof, was not within the language of their Trading with the Enemy Act and royal proclamations, forbidding the payment of money to or for the benefit of an enemy. It may be argued with great force that our Trading with the Enemy Act was not intended to be any broader than the English Act.

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For reasons hereafter noted it will be unnecessary for me at this time to determine whether, without a license from the President, the holders of the powers may receive the shares in question. It will be observed that, in the one case in the Supreme Court of the United States (*Williams vs. Paine*) in which powers (similar or broader than those at bar) have been held valid, the question arose after the war and the facts showed ratification by the principal of acts which resulted in an estoppel. The Court stated the rule, Mr. Justice Peckham, page 73: "Where it is obviously and plainly against the interests of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. And, on the other hand, where it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then the acts are just as valid and binding on the principal as if no war had intervened." In a case determined during the pendency of war, where intercourse with the principal is forbidden, the Court must go to the length of holding that the presumption referred to by the Supreme Court is irrebuttable. It may be that the Court would go to that length or rather would hold that, where it appears that the exercise of the power would be for the benefit of the alien enemy in a time of peace, he is stopped from asserting a revocation of the power because of an irrebuttable

presumption that, if he revokes, it is because of the war and for the purpose of doing a detriment to this country which will not be tolerated where property rights in this country are the means employed to do the detriment.

But it seems to me that it is plainly against the interests of the principals that the agency in the instant case, so far as giving refunding bonds is concerned, should continue. Its exercise would impose a new obligation or burden upon the principals. The exercise of the power requires the giving of refunding bonds. These bonds are personal obligations of the principals which may be sued upon in any jurisdiction. In return for the giving of these refunding bonds, for which in time of peace, the principals would receive shares, they now get nothing. The shares go to the Alien Property Custodian and what will finally be done with them is a matter for Congress to determine. Many contingencies may arise which would cause the alien enemies to elect, rather than to give the refunding bonds, to disclaim any interest in the shares.

I cannot, therefore, presume that the principals desire that the agency, so far as the power to give refunding bonds is concerned, should continue.

It is no answer to say that the alien enemies have been made parties to this suit and have been served by publication and by mailing under a license of the War Trade Bureau and that they have interposed no defense to this action. Neither the bill nor the notice of publication sent to the enemy aliens set forth the situation in sufficient detail to call upon them to express an election as to whether the powers should continue to be exercisable or not.

Nor is it certain that if the alien enemies had desired to express an election they would have been able to communicate their election owing to the exigency of war.

10 Under the Trading with the Enemy Act, it is expressly provided, section 7, subdivision b, that an alien enemy may defend by counsel any suit in equity or action at law which may be brought against him.

Steps should be at once taken by the holders of the power to ascertain the desire of the alien enemies as to whether or not the holders of the powers of attorney should execute refunding bonds on their behalf.

20 The foregoing disposes of the case at the present time. If it appears that the alien enemies desire that the powers of attorney should be executed, it will remain to be determined, whether, assuming that the receipt of the shares by the holders of the powers is not forbidden by the Trading with the Enemy Act (which is not decided) the Court will, in disregard of the desire of the Alien Property Custodian, direct the shares to be paid over to the holders of the powers. In this connection it must be kept in mind that the holders of the powers take the shares for the immediate benefit of the alien property custodian. He is entitled to them immediately upon receipt of them by the holders of the power. Ordinarily, the Court would not, against the express desire of the principal, direct property to be transmitted to an agent. There may be exceptions to this rule. If it appeared that, for the protection of the trustees, it was necessary that they should get rid of these shares and the responsibility for them, and that the person who was entitled to their immediate custody could not receive them directly, as I have already held he cannot, 30 40 but might receive them through the intermediary

of an agent, and that he refused to permit that agent to act, an interesting situation would arise.

My conclusion is that the shares cannot be paid over to the Alien Property Custodian nor, at the present time, to the holders of the powers, and I will advise a decree that the shares be held until there is a change in the situation. I will permit testimony to be taken to show the present desire of the alien enemies as to the present exercise of the powers. 10

So far as the powers authorize the holders to appear for the principals and represent the principals in the pending proceedings, they are valid and exercisable. It is clearly to the interests of the alien enemies that they be represented at the passing of these accounts and the distribution of the estate. The alien enemies are, therefore, in this cause, not only by virtue of being brought in by publication but by virtue of their representation by their attorneys in fact so far as to bind them as to proceedings on the accounting and distribution, as well as by their representation by the Alien Property Custodian. The intimation by the representative of the Alien Property Custodian (Mr. Ferry) that the holders of the powers by making demand for the property and appearing in court have subjected themselves to the penalties provided for by the act is, I think, wholly without merit. 20 30

The English Court of Appeals, in Chancery, in *Tingley vs. Muller*, supra, indicated that a proper way out of the difficulty, if a difficulty existed, in that case would be for the body equivalent to our War Trade Board to issue a license to the holders of the powers under which they might receive the moneys and upon receipt transmit them to the Alien Property Custodian. A similar course may be pursued in this case and all difficulty will disappear. 40

 IN CHANCERY OF NEW JERSEY.

10	Between ALFRED J. KEPPELMANN, et al., Trustees, &c., Complainants, and ERICH P. KEPPELMANN, et al., Defendants.	On Bill, &c. Supplemental Opinion.
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Mr. EDWARD M. & RUNYON COLIE for the executors and trustees.

20 Mr. MARTIN V. BERGEN and Mr. RUBY R. VALE (Of The Philadelphia Bar) for Schulz & Ruckgaber, holders of the Powers of Attorney.
 Mr. CHARLES L. CARRICK and Mr. MANSFIELD FERRY, for the Alien Property Custodian.

LANE, V. C.

30 It is suggested in the brief of counsel for the Alien Property Custodian that one of the purposes of the Trading with the Enemy Act, and the appointment of the Alien Property Custodian, was to create a fund which might be used for the benefit of the United States and that the effect of a decision, such as I have rendered, would be to defeat that purpose. In the instant case there can be no difficulty with respect to this. The trustees may be directed to convert the shares and invest the proceeds in such securities as under the act the Alien Property Custodian has power to direct their investment in. In other words, the trustees may

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Notice of Appeal.

be directed to do with the shares whatever the Alien Property Custodian can legally do with them. And the trustees will, of course, be so directed upon application of the Alien Property Custodian. Whatever moneys have been paid into Court have been directed by the order of the Court to be invested in Liberty Bonds.

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(Filed, Dec. 7, 1918.)

IN CHANCERY OF NEW JERSEY.

Between

ALFRED J. KEPPELMANN, et al.,
Trustees, &c.,

Complainants,

and

ERICH P. KEPPELMANN, et als.,
Defendants.

On Bill, &c.
Notice of
Appeal.

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The defendant, A. Mitchell Palmer, as Alien Property Custodian, hereby appeals from so much of the decree made in the above entitled cause on the 15th day of November, 1918, as adjudges that said defendant, as Alien Property Custodian, is not entitled to receive from the complainants the shares which in the proposed distribution or distributions of the assets of the estate in the hands of the complainants as trustees, would go to Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, under the last will and testament

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of Adolphus Keppelmann, deceased, except upon executing and delivering upon such distribution or distributions, the refunding bonds required by the statutes of this State, and that the complainants, as trustees, cannot pay over to him the shares to which the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, would be respectively entitled under the last will and testament of Adolphus Keppelmann, deceased, on a distribution or distributions of the estate in the hands of the trustees, without the execution and delivery by said defendant of such refunding bonds, to the Court of Errors and Appeals in the last resort in all causes.

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20 This defendant also appeals from so much of said decree as adjudges that the defendants Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, holders of powers of attorney from the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, upon receiving an authorization from their principals to execute and deliver refunding bonds, shall be entitled to have and receive the respective shares of their principals, to the Court of Errors and Appeals in the last resort in all causes.

30 This defendant also appeals from so much of said decree as appoints Alfred J. Keppelmann and Edward M. Colie trustees, to receive and hold until the further order or decree of said Court, such assets of the estate of Adolphus Keppelmann, which upon a distribution or distributions under the terms of said last will and testament of Adolphus Keppelmann would go to the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, and requiring that

Notice of Appeal.

they pay into said Court any money which on said distribution or distributions would go to the said beneficiaries respectively, and requiring them to deposit in said Court all income received by them as trustees on such security so deposited, as in said decree provided to the Court of Errors and Appeals in the last resort in all causes.

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Dated, December 4, 1918.

CARRICK & WORTENDYKE,
Solicitors of Defendant A. Mitchell Palmer,
as Alien Property Custodian.
CHARLES L. CARRICK,
Of Counsel.

I conceive there is good cause for appeal in the above stated cause.

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CHARLES L. CARRICK,
Of counsel with A. Mitchell Palmer,
as Alien Property Custodian.

A True Copy
ROBERT H. MCADAMS,
Clerk.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between ALFRED J. KEPPELMANN, et als., Trustees, &c.,	Complainants, Respondents,	}	Petition of Appeal. On Appeal From Court of Chancery.
	and			
	ERICH P. KEPPELMANN, et als.,	Defendants, Respondents,		
	and			
20	A. MITCHELL PALMER, as Alien Property Custodian,	Defendant, Appellant.		

To the Honorable the Court of Errors & Appeals
in the last resort in all causes :

30 The petitioner, A. Mitchell Palmer, as Alien
Property Custodian, the appellant in the above
stated cause, finds himself aggrieved by a final de-
cree made in the Court of Chancery by his Honor
Edwin Robert Walker, Chancellor of the State of
New Jersey, bearing date the 15th day of Novem-
ber, 1918, in a cause wherein the said Alfred J.
Keppelmann and Edward M. Colie, Trustees under
the last will and testament of Adolphus Keppel-
mann, deceased, were complainants, and Erich P.
Keppelmann, Pauline Adolphine Losch, Bertha

von Borowsky, Louise Pauline Schulz, Amalie Caroline Lorenz, Caroline Emma Veessenmeyer, Hildagarde Lorenz, Paul Veessenmeyer; Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, and A. Mitchell Palmer, as Alien Property Custodian, were defendants, in this respect: That the said decree adjudges that said defendant A. Mitchell Palmer, as Alien Property Custodian, is not entitled to receive from the complainants the shares which in the proposed distribution or distributions of the assets of the estate in the hands of the complainants as trustees, would go to Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, under the last will and testament of Adolphus Keppelmann, deceased, except upon executing and delivering upon such distribution or distributions, the refunding bonds required by the statutes of this State, and that the complainants, as trustees, cannot pay over to him the shares to which the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz would be respectively entitled under the last will and testament of Adolphus Keppelmann, deceased, on a distribution or distributions of the estate in the hands of the trustees, without the execution and delivery by said defendant A. Mitchell Palmer, as Alien Property Custodian, of such refunding bonds; and also from so much of said decree as adjudges that the defendants Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, holders of powers of attorney from the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, upon receiving an authorization from their principals to execute and deliver refunding

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Petition of Appeal.

bonds, shall be entitled to have and receive the respective shares of their principals; and also from so much of said decree as appoints Alfred J. Keppelmann and Edwin M. Colie, trustees, to receive and hold until the further order or decree of said court, such assets of the estate of Adolphus Keppelmann, which upon a distribution or distributions under the terms of said last will and testament of Adolphus Keppelmann would go to the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, and requiring that they pay into said court any money which on said distribution or distributions would go to the said beneficiaries, respectively, and requiring them to deposit in said court all income received by them as trustees on such security so deposited, as in said decree provided.

And your petitioner humbly appeals from those portions of the decree of the Chancellor which adjudge as aforesaid, upon the ground that the same are erroneous, for that said decree should have adjudged that said defendant A. Mitchell Palmer as Alien Property Custodian was entitled to receive the shares aforesaid of the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, without requiring the execution and delivery of refunding bonds as aforesaid; and for that said decree should have adjudged that the defendants Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, were not entitled to receive the respective shares aforesaid of their principals; and for that also the said decree should not have appointed trustees to receive and hold the shares aforesaid of the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz,

Petition of Appeal.

respectively, nor should said decree have adjudged that said trustee pay into court any money which on distribution should go to the said beneficiaries respectively.

Your petitioner therefore prays that the said decree of the Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable court shall seem meet. 10

CARRICK & WORTENDYKE,
Solicitors for Appellant.
CHARLES L. CARRICK,
Of Counsel with Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Between ALFRED J. KEPPELMANN, et als., Trustees, &c.,	Complainants, Respondents,	}	Answer to Petition of Appeal. On Appeal From Court of Chancery.
	and			
	ERICH P. KEPPELMANN, et als.,	Defendants, Respondents,		
	and			
20	A. MITCHELL PALMER, as Alien Property Custodian,	Defendant, Appellant.		

30 The answer of the Respondents, Alfred J. Keppelmann and Edward M. Colie, Trustees under the last will and testament of Adolphus Keppelmann, deceased.

30 These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the fifteenth day of November last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto

Answers to Petition of Appeal.

when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

EDWARD M. & RUNYON COLIE,
Solicitors for and of counsel with
the respondents, Alfred J. Keppelmann and Edward M. Colie,
Trustees under the last will and
testament of Adolphus Keppelmann, deceased. 10

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between		20
ALFRED J. KEPPELMANN, et als., Trustees, &c.,		
	Complainants, Respondents,	
	and	
ERICH P. KEPPELMANN, et als.,	} Answer to Petition of Appeal.	30
Defendants, Respondents,		
	and	
A. MITCHELL PALMER, as Alien Property Custodian,		
	Defendant, Appellant.	

The answer of Erich P. Keppelmann and Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, partners trading as Schulz & Ruckgaber. 40

10 These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the fifteenth day of November last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

20 MARTIN V. BERGEN,
Solicitor and of counsel with
respondents, Erich P. Keppel-
mann, and Carl Goepel and
others, partners trading as
Schulz & Ruckgaber.

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(Filed Nov. 16, 1918.)

IN CHANCERY OF NEW JERSEY.

Between ALFRED J. KEPPELMANN et al., trustees &c., Complainants, and ERICH P. KEPPELMANN et als., Defendants.	}	On Bill, &c. DECREE.	10
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This cause coming on to be heard before the Court upon the Bill and the Answer of A. Mitchell Palmer, Alien Property Custodian, and the Answer of Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, holders of powers of attorney of the defendants, Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, and the Answer of Erich P. Keppelmann (the Bill having been heretofore taken as confessed against the defendants, Pauline Adolphine Losch, Bertha von Borowsky, Louise Pauline Schulz, Amalie Caroline Lorenz, Caroline Emma Veesenmeyer, Hildegarde Lorenz and Paul Veesenmeyer) in the presence of Edward M. & Runyon Colie, Solicitors for and of counsel with the complainants, and Martin V. Bergen, Solicitor for and of counsel with the said defendants, Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, and Erich P. Keppelmann, and Carrick & Wortendyke, Solicit-

10 ors for and of Counsel with A. Mitchell Palmer, Alien Property Custodian, and the pleadings and proofs having been read, and the arguments of counsel heard, and the Court having duly considered the same, and it appearing to the Court that the complainants are prepared to make and are about to make distribution, in whole or in large part, or the Estate in their hands as Trustees, partly in money and partly by making a physical division of the assets of the Estate in their hands pursuant to the power given them in and by the last will and testament of Adolphus Keppelmann, deceased, and that they are entitled to the aid and directions of this Court as to the matters and things hereinafter set forth;

20 And it appearing to the Court that the several "Inheritance Accounts" referred to in paragraph 1, of Section Sixth of the last will and testament of said Adolphus Keppelmann, deceased, should be charged and credited with interest, at the rate of 4% per annum, on the items in said "Inheritance Accounts" on which the testator, in his lifetime, so charged or credited such interest respectively, from the date to which the said testator had so charged and credited interest thereon in his lifetime, up to the 4th day of February, 1913, the date of the death of the testator; and that the amounts of the said respective "Inheritance Accounts" so determined, were on the 4th day of February, 1913, as follows:

30 Caroline Emma Veesenmeyer (including therein, as directed by paragraph 1 of Section Sixth of said last will and testament of Adolphus Keppelmann, deceased, the amount due from her husband, Professor Paul Veesenmeyer, to the testator, as the same appeared on the testator's books of ac-

count in the testator's Loan Account against him, on which said Loan Account on the testator's books was charged interest at the rate of 4% per annum) the sum of Fifty thousand one hundred and eighteen dollars and forty-seven cents (\$50,118.47)—Alfred Julius Keppelmann the sum of Eleven thousand five hundred and twenty-nine dollars and fourteen cents (\$11,529.14)—Bertha von Borowsky the sum of Thirty thousand eight hundred and fifty-eight dollars and twenty-nine cents (\$30,858.29)—Louise Pauline Schulz the sum of Twenty-four thousand seven hundred and eighty dollars and seventy-eight cents (\$24,780.78)—Erich Paul Keppelmann the sum of Fifteen thousand two hundred and sixteen dollars and eighty-one cents (\$15,216.81)—Pauline Adolphine Losch the sum of Twenty-five thousand three hundred and thirty dollars and eighteen cents (\$25,330.18) Amalie Caroline Lorenz the sum of Nine thousand four hundred and fifty-one dollars and sixty-eight cents (\$9,451.68), and that in all of the testator's dealings with his aforesaid children, in relation to their respective "Inheritance Accounts" on the items as to which interest was credited or charged the rate was at 4% per annum, and the Court being of the opinion that 4% per annum is a fair and equitable rate of interest to allow each of the aforesaid children of the testator, on the sum that the "Inheritance Account" of Caroline Emma Veesenmeyer, as aforesaid, exceeds their aforesaid respective "Inheritance Accounts;" and the Court being of the opinion that the aforesaid "Inheritance Accounts" should be adjusted, settled and deducted by paying out of the Estate, to each of said children, excepting said Caroline Emma Veesenmeyer (whose "Inheritance Account" is the

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largest) the difference between the "Inheritance Account" of the said Caroline Emma Veessenmeyer, as aforesaid, and the "Inheritance Accounts" of said other children respectively, as aforesaid, together with interest on said respective differences, at the rate of 4% per annum, from February 4, 1913, the date of testator's death, up to the date at which said adjustment, settlement, and deduction takes place in the course of the administration of said Estate, and that thereupon the interest of all of the aforesaid children of said testator will be equal in the remainder of said Estate;

10 And it appearing to the court that A. Mitchell Palmer, Alien Property Custodian, has been advised by counsel that he is without authority in law to execute and deliver the refunding bonds
20 required by the statutes of this State, and has declared his unwillingness to do so, upon his receipt of the assets of the Estate in the hands of the complainants as Trustees as aforesaid, which, upon the proposed distribution or distributions, would go to the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, alien enemies; and it appearing to the Court that Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the
30 firm of Schulz & Ruckgaber, holders of powers of attorney from the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, are willing to receive and hold the shares of said respective alien enemies, subject to the direction of A. Mitchell Palmer, Alien Property Custodian, and are willing to execute and deliver, upon such distribution or distributions, of the assets of the Estate in the hands of the complainants as Trustees, as afore-

said, the refunding bonds required by the statutes of this State; and the Court being of the opinion that the Trustees aforesaid cannot pay over and deliver to the said Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, the shares that would go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, under the powers of attorney held by them, upon the making of the proposed distribution or distributions, in view of the provisions of the statute of the United States, with respect to the ultimate disposition of the property of alien enemies, under which the said A. Mitchell Palmer, Alien Property Custodian, is appointed and is acting, but that it will be necessary for the said Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, holders of the powers of attorney aforesaid, to obtain from the said Pauline Adolphine Schulz, Bertha von Borowsky, and Louise Pauline Schulz, respectively, alien enemies, an authorization to execute and deliver said refunding bonds, on their behalf, respectively, and that until such authorization is obtained by Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, from said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, and the said Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz and Ruckgaber, have executed and delivered the refunding bonds required by the statutes of this State, the Trustees cannot pay over and deliver to the said Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber partners constituting the firm of Schulz & Ruck-

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10 gaber, the shares that would go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, upon the making of the proposed distribution or distributions and and that the Trustees cannot pay over and deliver to A. Mitchell Palmer, Alien Property Custodian, the shares that would go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, upon the making of the proposed distribution or distributions until he executes and delivers the refunding bonds required by the statutes of this State, and that the Bill should be retained to enable the said Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, to obtain the aforesaid authorization from 20 the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively.

And it appearing to the Court that upon the making of the proposed distribution or distributions of the assets in the hands of the complainants as Trustees, as aforesaid, among the several parties entitled thereto, the duties and powers of the Trustees under said last will and testament of Adolphus Keppelmann, deceased, are at an end as to the assets so distributable, and that a Trustee 30 or Trustees should be appointed by this Court, to take and hold the shares that are distributable to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, until the same can be paid over and delivered to Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, under an authorization to them, as aforesaid, by the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, 40

respectively, to execute and deliver the refunding bonds required by the statutes of this State. And the Court being of the opinion that by a decree of this Court, Alfred J. Keppelmann and Edward M. Colie, Trustees appointed in and by the last will and testament of said Adolphus Keppelmann, deceased, should be appointed trustees to receive and hold, until the further order or decree of this Court, such assets of the said Estate, which, upon such distribution or distributions under the terms of the said last will and testament of Adolphus Keppelmann, would go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively and that the said Alfred J. Keppelmann and Edward M. Colie, as such Trustees by appointment of this Court, should be directed to pay into this Court, any money that, on such distribution or distributions, would under the provisions of said last will and testament of Adolphus Keppelmann, deceased, go to the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, respectively, and to deposit into this Court any securities that, upon such distribution or distributions would, under the provisions of said last will and testament of Adolphus Keppelmann, deceased, go to the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz respectively, and to deposit into this Court all income received by said Trustees, on such securities so deposited, and that said money and said securities should remain in the custody of this Court pending the further order or decree in this cause, subject to the payment thereof of any and all sums properly chargeable against the same, upon an order of this Court, directing such payment.

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It is, thereupon, on this fifteenth day of November, in the year one thousand nine hundred and eighteen, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on motion of Edward M. & Runyon Colie of counsel with the Complainants, ORDERED, ADJUDGED AND DECREEED, and the said Chancellor by virtue of the power and authority of this Court doth hereby ORDER, ADJUDGE AND DECREE

First. That the "Inheritance Accounts" of the said Caroline Emma Veesenmeyer, Alfred Julius Keppelmann, Bertha von Borowsky, Louise Pauline Schulz, Erich Paul Keppelmann, Pauline Adolphine Losch, and Amalie Caroline Lorenz, should be deducted, adjusted and settled, by paying out of the money of the estate in the hands of the Trustees, to Alfred Julius Keppelmann, the sum of Thirty-eight thousand five hundred and eighty-nine dollars and thirty-three cents (\$38,589.33), with interest thereon at 4% per annum from February 4, 1913, the date of the testator's death, to the date at which said Trustees make such payment (said sum of Thirty-eight thousand five hundred and eighty-nine dollars and thirty-three cents (\$38,589.33), being the difference between the sum of Fifty thousand one hundred and eighteen dollars and forty-seven cents (\$50,118.47), the amount of the largest "Inheritance Account," to wit, that of Caroline Emma Veesenmeyer, including therein interest up to February 4, 1913, credited and charged on the items in her "Inheritance Account" according to the testator's books of account, at 4% per annum, the rate of interest shown thereby, and the amount of the "Inheritance Account" of said Alfred Julius Keppelmann as of February 4, 1913, ascertained in like manner), by paying to Bertha von Borow-

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sky the sum of Nineteen thousand two hundred and sixty dollars and eighteen cents (\$19,260.18), with interest thereon at 4% per annum from February 4, 1913, being the difference between her "Inheritance Account" ascertained in like manner as aforesaid and the "Inheritance Account" of Caroline Emma Veesenmeyer; by paying to Louise Pauline Schulz, the sum of Twenty-five thousand three hundred and thirty-seven dollars and sixty-nine cents (\$25,337.69) with interest thereon at 4% per annum from February 4, 1913, being the difference between her "Inheritance Account" ascertained in like manner as aforesaid and the "Inheritance Account" of Caroline Emma Veesenmeyer; by paying to Erich Paul Keppelmann, the sum of Thirty-four thousand nine hundred and one dollars and sixty-six cents (\$34,901.66) with interest thereon at 4% per annum from February 4, 1913, being the difference between his "Inheritance Account" ascertained in like manner as aforesaid, and the "Inheritance Account" of Caroline Emma Veesenmeyer; by paying to Pauline Adolphine Losch, the sum of Twenty-four thousand seven hundred and eighty-eight dollars and twenty-nine cents (\$24,788.29), with interest thereon at 4% per annum from February 4, 1913, being the difference between her "Inheritance Account" ascertained in like manner as aforesaid, and the "Inheritance Account" of Caroline Emma Veesenmeyer; and by paying to Amalie Caroline Lorenz, the sum of Forty thousand six hundred and sixty-six dollars and seventy-nine cents (\$40,666.79) with interest thereon at 4% per annum from February 4, 1913, being the difference between her "Inheritance Account" ascertained in like manner as aforesaid, and the "Inheritance Account" of Caroline Emma Veesenmeyer.

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Second. That A. Mitchell Palmer, Alien Property Custodian is not entitled to receive from the complainants, the shares which, on the proposed distribution or distributions of the assets of the Estate in the hands of the complainants as Trustees, would go to Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, under the last will and testament of Adolphus Keppelmann, deceased, except upon executing and delivering upon such distribution or distributions, the refunding bonds required by the statutes of this State, and that as A. Mitchell Palmer, Alien Property Custodian, is advised by counsel that he is without authority in law to execute and deliver such refunding bonds and declines to do so, the complainants as Trustees cannot pay over to him the shares to which the said Pauline Adolphine Losch, Bertha von Borowsky, and Louis Pauline Schulz, would be respectively entitled under the last will and testament of Adolphus Keppelmann, deceased, on a distribution or distributions of the estate in the hands of the Trustees.

Third. That Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, holders of powers of attorney from the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise ^{Pauline Schulz} ~~Adolphine Losch~~, respectively, authorizing them to receive their respective distributive shares of said Estate, because of the provisions of the statute of the United States, with respect to the ultimate disposition of the property of alien enemies, under which said A. Mitchell Palmer, Alien Property Custodian, is appointed and is acting, cannot execute and deliver, on their behalf respectively, the refunding bonds required by the statutes of this State, without ob-

taining from said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, an authorization to execute and deliver said refunding bonds, on their behalf, respectively, and that pending such authorization to the said Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, the Trustees cannot pay over to them the shares to which the said Pauline Adolphine Losch, Bertha von Borowsky and Louise Pauline Schulz, would be respectively entitled, under the last will and testament of Adolphus Keppelmann, deceased, on a distribution or distributions of the Estate in the hands of the Trustees and that the Bill of Complaint in this cause should be retained for the purpose of enabling the said Carl Goepel, Max Ruckgaber, Jr. and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, to obtain such authorization to execute and deliver said refunding bonds.

Fourth. That Alfred J. Keppelmann and Edward M. Colie, are hereby appointed Trustees by this Court, to receive and hold, until the further order of decree of this Court, such assets of the Estate of Adolphus Keppelmann, which upon a distribution or distributions, under the terms of the said last will and testament of Adolphus Keppelmann, would go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, and that they pay into this Court, any money that, on such distribution or distributions, would, under the provisions of the said last will and testament of Adolphus Keppelmann, deceased, go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, and that they deposit into this

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10 Court any securities which, upon a distribution or distributions, would, under the provisions of said last will and testament of Adolphus Keppelmann, deceased, go to the said Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, respectively, and deposit into this Court all income received by them as Trustees hereunder, on such securities so deposited, and that said money and said securities shall remain in the custody of this Court pending the further orders or decrees in this cause, subject to the payment thereof of any and all sums properly chargeable against the same, upon an order of this Court directing such payment.

20 Fifth. That there is reserved to the complainants, as Trustees, under the will of Adolphus Keppelmann and as Trustees, under this decree, leave, at the foot of this decree, to apply hereafter for further instruction, aid or relief and like leave is reserved to all other parties hereto to apply hereafter for further relief.

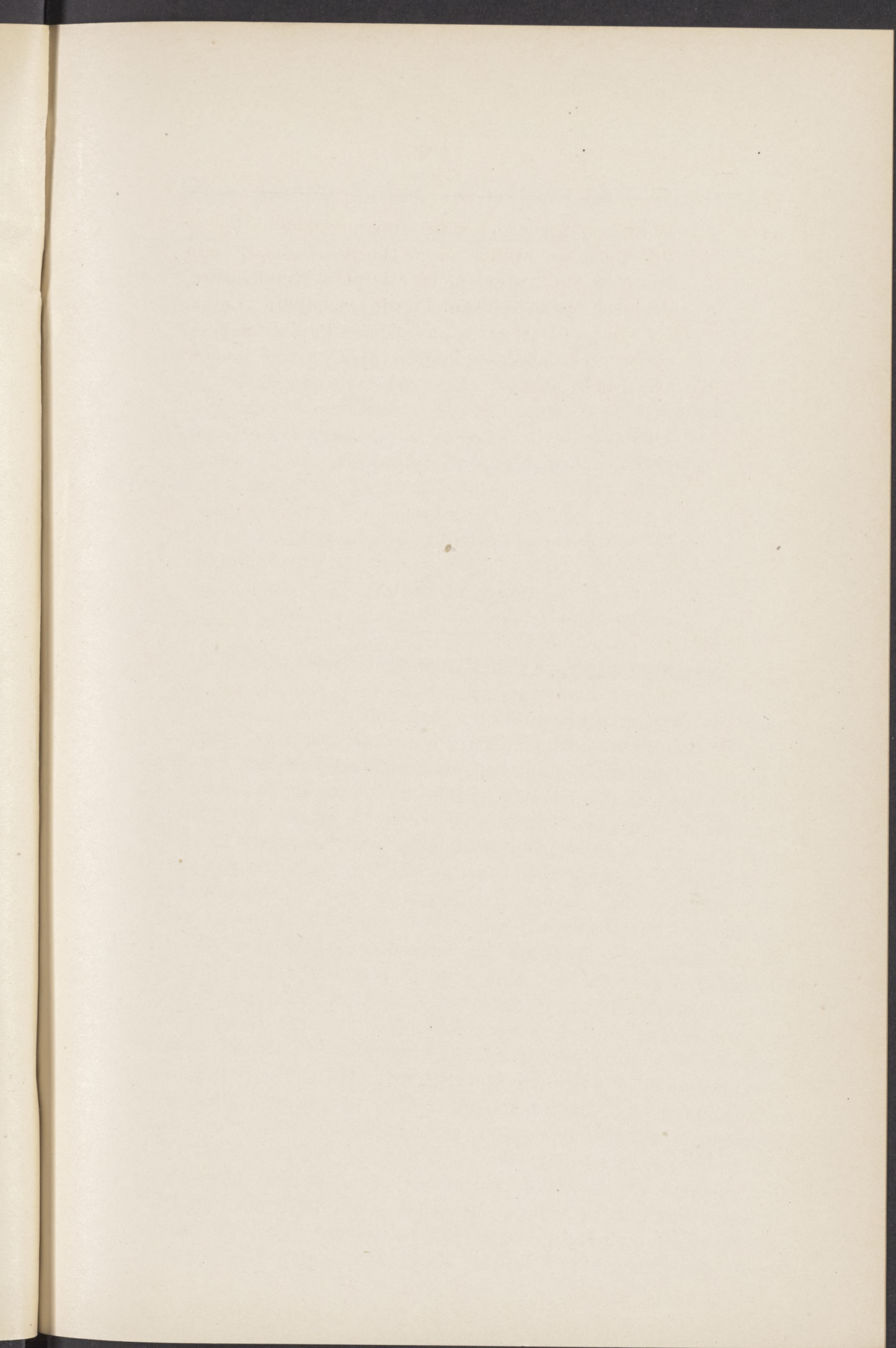
Sixth. Costs and counsel fees are reserved for the further order of this Court.

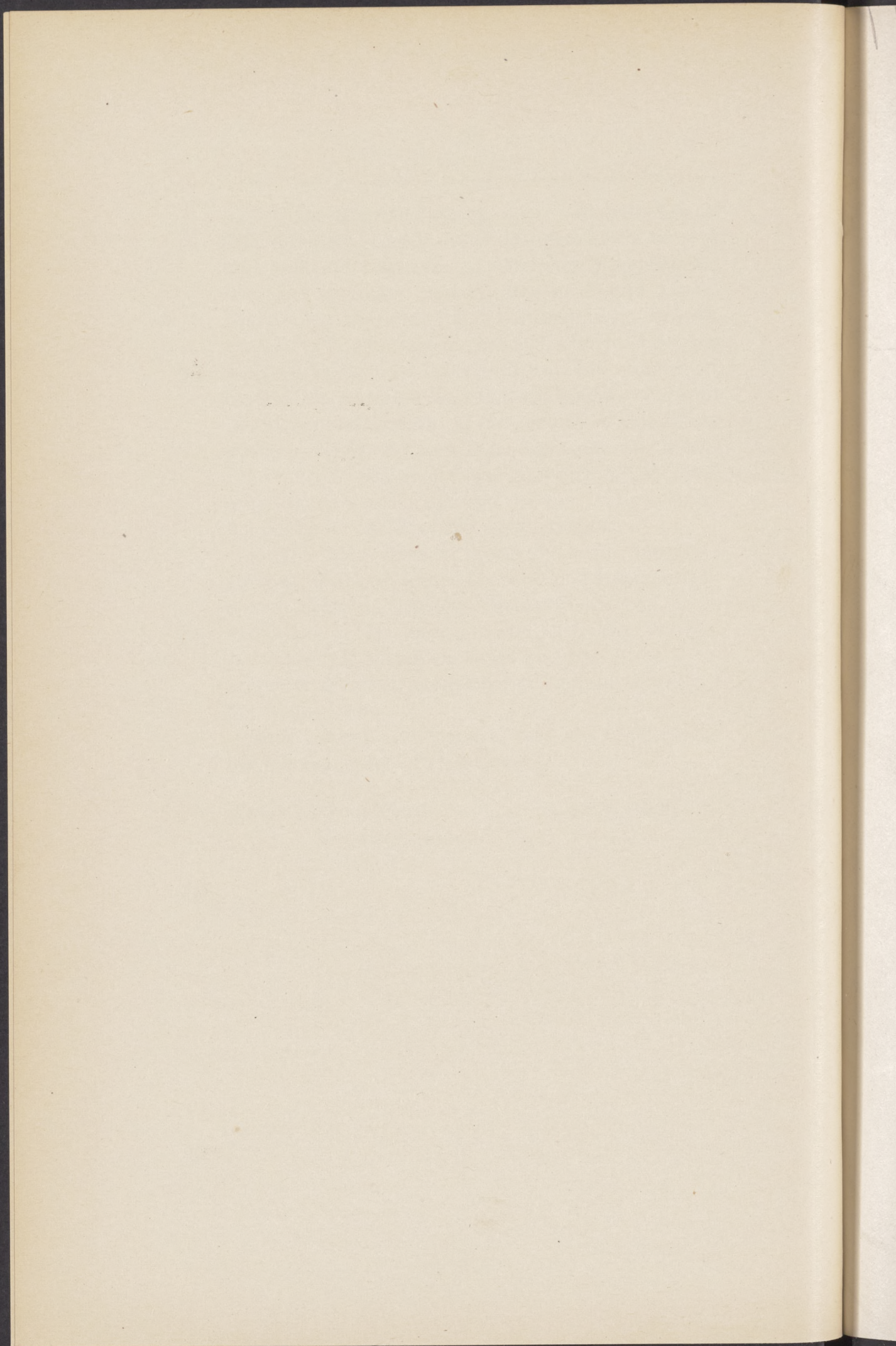
Respectfully advised
Merritt Lane
V. C.

E. R. Walker,
C.

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New Jersey Court of Errors and Appeals

Between

ALFRED J. KEPPELMANN, *et al.*, trustees,
etc.,

Complainants-Respondents,

and

ERICH P. KEPPELMANN, *et al.*,

Defendants-Respondents,

and

A. MITCHELL PALMER, as Alien Property
Custodian,

Defendant-Appellant.

*On Appeal from
Court of
Chancery.*

BRIEF FOR COMPLAINANTS-RESPONDENTS.

The controversy in this case arises on a bill filed by the complainants for instructions. Pursuant to the provisions of the testator's will, the complainants had made distributions in cash and in kind to all parties in interest as set forth on page 6 of the record. The shares of the enemy aliens were paid to Messrs. Schulz & Ruckgaber, the holders of the powers of attorney from them, respectively set forth in the record upon receipt of re-funding bonds. These distributions occurred before the United States entered the war. After the United States entered the war the complainants, having an accounting pending in the Orphans' Court of Essex County, under which they expected to make a large distribution of the estate, in kind, pursuant to the provisions of the will, and a controversy having arisen between Messrs. Schulz & Ruckgaber, holders of the powers of attorney and hereinafter called Attorneys in Fact, and the Alien Property Custodian, hereinafter called the Custodian, the complainants filed their bill asking instructions as to certain matters connected with the proposed distribution and the management of the estate, and also as to the conflicting claims of the Attorneys in Fact and the Custodian as to the shares of the three enemy aliens. The only portion of the decree entered on said bill that is appealed from is that which relates to the conflicting claims

of the Attorneys in Fact and the Custodian to the shares of the enemy aliens. The complainants, as to that controversy, cannot, with propriety, take either side, but they are vitally interested that they shall have full protection against the creditors of the estate. Under the statutes of New Jersey, the rights of the complainants to such protection, as well as the rights of the creditors of the testator to protection, arose and were in full force and effect prior to the entrance of the United States into the war and prior to the passage of the act under which the Custodian claims the property.

The Statutes of the State in relation to the administration of estates gives ample and absolute protection to the complainants. The Custodian insists on delivery to him of the shares of the enemy aliens, without compliance with the provisions of this statute. For the convenience of the Court, we here print amended Section 78 of "An act respecting the Orphans' Court and relating to the powers and duties of the Ordinary and the Orphans' Court and Surrogates" (Revision of 1898), approved June fourteenth, one thousand eight hundred and ninety eight (P. L. 1912, p. 276).

78. Every executor or administrator, on the payment of any legacy or distributive share to the person entitled to the same, shall take a refunding bond therefor; which bond shall be filed in the surrogate's office of the county in which letters testamentary or of administration were granted; and any creditor, who may be barred by virtue of any decree of limitation, may by order of the orphans' court, bring suit on such refunding bond in the name of the executor or administrator, but with the name of such creditor stated in the process and pleadings as the prosecutor thereof, and may recover thereon the proportion of his debt which ought to be paid out of the legacy or distributive share for which said bond was given, but shall not recover costs in such suit; and if judgment be given for the defendant therein, he shall have judgment against the prosecutor for his costs of suit, and not against the plaintiff; but there shall not be recovered on such bond, in the whole a greater amount than the legacy or share actually received by the person by or from whom it was given; provided, that nothing herein contained shall enable any person to recover any debt or demand barred by any limitation other than said decree; and provided also, that where any legacy or distributive share is payable to any executor, administrator, guardian or trustee it shall be an absolute bar in any suit for the recovery of said legacy or distributive share on any refunding bond given by said executor, administrator, guardian or trustee that prior to the commencement of said suit the moneys or property so received by said executor, administrator,

guardian or trustee have been lawfully paid over or distributed and that said executor, administrator, guardian or trustee has taken in the name of the executor or administrator of the original decedent a refunding bond or bonds therefor, and in case part of said moneys have been distributed by said executor, administrator, guardian or trustee and refunding bond or bonds taken therefor, recovery may be had for the unpaid part only, and in case refunding bond or bonds are taken as aforesaid, suit may be brought by any such creditor on said refunding bond or bonds in the same manner as if payment had been made by the executor or administrator of the original decedent direct to a legatee or distributee; but if said refunding bond or bonds shall not, prior to the commencement of suit as aforesaid, be filed in said surrogate's office, said executor, administrator, guardian or trustee shall at the time of the pleading said payment or distribution, file a proper refunding bond therefor in said surrogate's office and pay the plaintiff in such action his costs of suit which shall have accrued prior to plea filed."

The complainants insist that they are entitled to refunding bonds from the Custodian pursuant to the provisions of the above quoted act.

I.

The provisions of the act known as the "Trading with the Enemy Act" do not over-ride the statutes of New Jersey relating to the administration of estates.

The settled rule by which it is determined whether Federal legislation over-rides a State statute is declared by the Supreme Court of the United States as follows:

"A statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Savage v. Jones, 225 U. S. at page 535, where the above language is quoted with approval from *Sinnot v. Davenport*, 22 How., 227-243.

All the Federal cases on this subject are referred to and considered in the opinion of Justice Hughes in this case.

The brief for the Custodian, we think, misinterprets the functions of this act. It construes the act as a confiscatory act, whereas it is only a custodial act. It rests on the war power

and must be interpreted to accomplish the war purposes, but it cannot be extended by construction beyond the purposes which it can legitimately serve as a war measure.

Under international law the property of enemy aliens is not subject to confiscation. The law is thus stated in the Article on War in the Cyclopaedia. Vol. 40, page 332, as follows:

“Private property on land not being used in aid of the war is not subject to confiscation by the rules of international law. Private property may be seized, however, when needed in the course of military operations; but upon the conclusion of peace it should be restored or compensation made.”

This act must be construed with reference to the international law as to confiscation. Confiscation will never be implied but must be clearly expressed in the language of the legislation. See the leading case of *Brown v. U. S.*, 8 Cranch., p. 46.

The rights of enemy aliens in property in this country are well stated in the opinion of Chancellor Kent in *Bradwell v. Weeks*, 1 Johnson's Chancery, page 205, at page 208, where he says as follows:

“But I come to the very point before me and say that an alien enemy does not lose his *capacity* to take personal property by succession as next of kin. There is no instance in which such a disability has been declared. It would be repugnant to that spirit of mildness and moderation which now pervades the public law, as it is explained in the commercial codes, and in the writings of the most enlightened jurists. It is not within the reason, or the policy, of the rule of the common law, disabling aliens from taking real estate by descent; that disability, according to Sir Matthew Hale (1 Vent. 417) is founded on this reason, that as the alien cannot keep the freehold, the law, *quae nihil frustra*, will not cast it upon him. But an alien enemy *can* keep, and *does* keep, his personal estate. All his goods, chattels and credits, and all his civil capacities, as incident to personal property, are preserved to him, safe, and untouched, until the return of peace. If the sovereign sequesters the alien's property, (as has sometimes been done in time of war) yet the very meaning of sequestration is a taking in trust, subject to restoration. (Dig. 16. 3. 6.) When peace returns, the rights of the alien revive in their original force; and, as a general rule, his debtor, whether that debtor be the public or an individual, is answerable even for interest accrued during the season of hostility; for he has had, in the meantime, the enjoyment of the debt. If the debtor dies or becomes bankrupt, his representative, in the character of executor, administrator or assignee, holds the estate of the debtor,

whatever it may be, in trust, for the payment of the alien's debt, as well as the debts of other creditors. An alien is one of the next of kin, within the words of the act, though he is an *alien enemy*; and the policy of the law is fully and effectually answered by disabling the alien from demanding and drawing out of the country, his distributive share during the existence of the war; all that the laws of war require is that we should not benefit the enemy. Any further disability would be a useless relic of ancient barbarity."

In *American Exchange National Bank, complainant, v. A. Mitchell Palmer, Alien Property Custodian, &c., and John Simon*, the bank had \$358,830.86 on deposit in the name of Simon; the Custodian claimed and demanded it as property of Albert (an enemy). The bank filed a bill for relief and the Custodian moved to dismiss, claiming the bank was protected under Sec. 7 of the act. The Court by its opinion (Mar. 5, 1919, not yet reported) denied the motion, holding that the provisions of Sec. 7 afforded the bank no protection, as its language did not cover the situation, and, referring to the purpose of the "Trading with the Enemy Act," said:

"It is suggested in the brief submitted on behalf of the Custodian, that the Trading with the Enemy Act 'is not only to weaken the arm of the enemy by depriving him of resources, but also to strengthen the arm of the captor by furnishing means for the prosecution of the war.' Nowhere in the act is there evidence of any legislative intent that the purpose of seizing or taking enemy property under the act is to furnish our Government with means to prosecute the war. The final disposition of such property as has been or will be taken under the act, will be governed by treaty arrangements or Congressional legislation or both. In a broad sense, the United States is a trustee to hold enemy property taken under the act, until such time as the United States in orderly course, shall determine the final disposition thereof. It is fair to assume, that any treaty will safeguard the rights of American citizens whose property has been seized in enemy countries, and, therefore, that the provisions of such treaty will, in this respect, be reciprocal. Undoubtedly resources captured under this act, could, as an incident, be used by the United States in the course of its prosecution of the war, but the fundamental purpose of the act was to prevent the enemy from having the advantage of such resources as might be susceptible of capture under the act."

In *City National Bank of Selma v. Dresdner Bank of Bremen*, 255 Federal, at page 227, the Court proceeded on the theory that the act was custodial and held the case open, using the following language:

See U.S. Supreme Ct. *Watts v. Union &* decided Nov. 4, 1918 - N.S. Supreme Ct. *Advance Opinions No. 1, p. 1, Nov 15, 1918 not yet in official Reports.*

"I cannot anticipate what the proof on this subject may be and I should not undertake to pass upon the rights of these German firms until peace is declared between the United States and Germany, at which time they can come in and propound their claims and offer their testimony in support thereof."

The English "Trading with the Enemy Act" has been definitely construed to be custodial, not confiscatory.

See opinion of Warrington, L. J., in *Tingley v. Muller*, 2 L. R. Chy. Div. (1917) 144 at pp. 168-169

The Custodian is described in Section 12, as vested with "all of the powers of a common-law trustee" We are unable to find reference in the cases or books to a "common-law trustee," We assume that the act means that the Custodian is to have the powers which were vested by the common law in a trustee. These powers appear to be the right to possess, manage, and preserve the trust property and distribute the same. The amendment to Section 12 referred to on page 9 of the Custodian's brief manifestly enlarges the powers of a trustee at common law, so as to enable the Custodian to sell certain property in his custody under the special circumstances set forth in that section, but it does not in any wise enlarge the act so as to supersede the State statute as to the administration of decedents' estates.

By the amendment of March 28, 1918, to Sec. 4, intangible rights were included which might not be susceptible of formal conveyance or assignment or susceptible of formal transfer or delivery and Sec. 12 was amended Nov. 4, 1918, to give power to the Custodian over such rights. These amendments are wholly irrelevant to this controversy, where the complainants are ready to make delivery to the Custodian upon his complying with Sec. (e) which requires him "to execute, acknowledge and deliver such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance or discharge," which we claim includes a refunding bond; and where as here the complainants hold the property under a license issued by the War Trade Board.

The suggestion of the brief for the Custodian on page 4, that because of lapse of time it can be assumed that there are no valid debts of the testator outstanding is without force.

See Sec 9 where enemy alien is described as "the owner."

Also Amendment Sec. 7 in case of conversion by Custodian limiting right to proceeds of sale.

In the early case of *Cowell v. Oxford*, 6 N. J. L. at page 527, the Court says as follows:

"I cannot think that the epithet, rigorous, is properly applied to this provision of the legislature. It is an equitable provision, calculated and designed to secure an executor against debts of the existence of which he may be ignorant, and by which he might be involved in difficulty; neither can I see the propriety of the distinction, which it has been attempted to draw between an estate, the accounts of which have been settled before the Orphans' Court and one that has not. A settlement of this kind is not conclusive; it will not discharge an executor from the claims of a creditor of the estate, nor will it make any difference in the legal appropriation of the assets. I am therefore of opinion, that the case is clearly within the language and spirit of the act, and that it was essential to a recovery in this action, that a refunding bond should have been tendered."

Whether there are debts known or not is immaterial as to the right of the party administering the estate under the Orphans' Court Act to the protection of a refunding bond.

"There is no estate properly applicable to the payment of legacies until the testator's debts are paid. Legatees have no rights as such until the creditors of the testator are satisfied. A legatee is not entitled to the payment of his legacy until he has given a refunding bond. * * * A payment should, under no circumstances, be ordered to be made to the legatee except on condition that he first executed a refunding bond."

This is the declaration of the law in *Coddington v. Bispham*, 36 N. J. Eq. at page 227.

The refunding bond has a double function. It is essential under the statute to the protection of the party administering the estate and also it protects the creditor. In *Ordinary v. Executors of Smith*, 15 N. J. L. at page 99, the Court said:

"The administrator having faithfully administered on the estate, and settled his accounts in the Orphans' Court may fold his arms in security, until the persons claiming to be next of kin have obtained a decree of the proper tribunal establishing their title, ascertaining the amount due to them respectively; and shall tender to him a refunding bond for the sum 'allotted' to them respectively."

See *Harris v. White*, 5 N. J. L. at pp. 439, 425*;

Also see *Lloyd's Executors v. Rowe*, 20 N. J. L. at 684;

O'Donnell v. McCrann, 77 N. J. Eq. at 195;

Stone v. Todd, 49 N. J. L. at 274.

It is needless to cite further decisions of this state to the effect that the giving of a refunding bond is the final step in the administration of an estate in the Orphans' Court and that the legatee is not entitled to receive his legacy until such bond is given; that it is particularly for the protection of the party administering the estate and also for the benefit of the creditor.

The Custodian's brief seems to consider the requirement of a refunding bond as a matter concerning the creditors. The cases indicate that the particular purpose of it is to protect the party administering the estate, and he is entitled to it as a *right*, not as a remedy.

As the "Trading with the Enemy Act" is a custodial statute and its purpose is to prevent enemy aliens from using funds here in a manner antagonistic to this government or beneficial to the enemy government, it would seem clear that its terms should not be extended by construction beyond that necessary to accomplish the purpose of the act. The whole act indicates that the Custodian takes solely in the right of the enemy alien; that until the enemy alien is entitled to receive the legacy the Custodian is not entitled to its possession. It is only when the enemy alien's interest in the estate or property is segregated in such form that he is entitled to receive it but for the state of war, that the Custodian can claim it, in the enemy alien's right. This is what the Vice-Chancellor meant by the language of his opinion, record, page 38, in which he says that the act deals with the interest of alien enemies *in* property and not with property *in which* alien enemies have an interest, and the authority of the Alien Property Custodian is over the property of, and interest of alien enemies *in* property, not in property *in which* alien enemies have an interest.

Until the estate is finally administered upon, pursuant to the provisions of the Orphans' Court Act, which includes the giving of a refunding bond and the filing of the same in the Surrogate's Office, there is no property which the enemy alien is entitled to receive.

The Custodian holds property for the benefit of whom it may concern—in the language of the act "to the end that the interest of the United States in such property and the rights of such persons as may ultimately become entitled thereto or the proceeds thereof, may be preserved and safeguarded." The act provides that the ultimate destination of this property shall be

determined by Congress. To effectuate the above purpose there is nothing that requires the over-riding of the statutes of the state in relation to the administration of estates.

The consideration of a situation that might well arise seems to demonstrate the necessity of this view of the legislation.

If a citizen of this state died leaving a will disposing of an estate of less than \$50,000 (in which case the executor's commissions are fixed by the statute) and before the executor had advertised for debts, the Custodian demanded that he turn over the estate to him, less his commissions fixed definitely by statute, would it for a moment be held that the executor is bound forthwith on demand to turn over the estate to the Custodian and forego the taking out of an order to limit creditors and at the expiration thereof, forego the taking of a decree barring creditors, and subject himself to the liability under our statute of being sued and liable to the creditors in the amount fixed by his inventory? We think that the executor would be directed to hold the estate until he was fully protected against the creditors thereof. We can see no distinction between the *interim* protection arising upon a decree to bar creditors and the *final* protection secured to the party administering the estate by a refunding bond. The language of the Trading with the Enemy Act does not compel the conclusion that it overrides the provisions of our statutes in relation to the administration of estates. It cannot under the decisions be held so to do. The brief of the Alien Property Custodian throughout assumes that the Trading with the Enemy Act simply deprives the *creditor of a remedy*. That brief, as we have already said, fails entirely to view our state statute as conferring the right of protection to the party *administering the estate*. As to the creditor and particularly as to the party administering the estate the deprivation of a refunding bond is a deprivation of a right, not of a remedy.

Under the rule laid down in *Savage v. Jones, supra*, our act is in full force as against the Custodian.

II.

A consideration of the provisions of the Trading with the Enemy Act clearly indicates that the Custodian has power to and should execute a refunding bond substantially in the form prescribed by our statute.

The ordinary and familiar form of a refunding bond acknowledges the receipt from the party administering the estate to the amount distributed and provides that if any debt or debts are thereafter sued for and recovered or otherwise made to appear, the obligor will refund and pay back to the executor his ratable part of such debt or debts and of the cost of suit and charges by reason of such debt or debts, out of the part of share so as aforesaid received by him thereby to enable the said executor to satisfy such debt or debts.

Sub-division (e), Sec. 7 of the "Trading with the Enemy Act" provides as follows:

"The Alien Property Custodian and such other persons as the President may appoint shall have power to execute, acknowledge and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge."

It is evident that the acquittance and discharge referred to mean a complete acquittance and discharge and involve such a form of instrument as will effect the same, and as the party administering the estate, under our law, can only be discharged as to creditors upon taking a refunding bond which is filed in the surrogate's office, the Custodian is fully authorized to execute and deliver such an instrument.

Nor is there any practical reason that we can see why the Custodian should not give the refunding bond, which is admittedly required by the statute of 1912, above quoted in full. He executes this bond only in his official capacity and is fully protected by his possession of the enemy alien's property and by his right to require a refunding bond when he turns over the property.

The authorization to the Custodian above quoted, to "execute, acknowledge and deliver any such instrument or instruments that may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge" immediately follows the provision that a transfer or payment to the Custodian "shall be a full acquittance and discharge for all parties of the obligation of the person making the same to the extent of the same."

Therefore, it would seem to follow that where, under the law controlling the administration of the funds in controversy, a particular form of an instrument is necessary in order to give a full acquittance and discharge to the party administering the estate, that the Alien Property Custodian is fully authorized by the act to make, execute, acknowledge and deliver such instrument as may be necessary under the State statute; indeed, that it is mandatory upon him so to do. In other words, the act does not provide that any discharge or receipt that the Custodian shall choose to give shall operate as a full discharge, but he must execute "such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise, such acquittance or discharge" and by the word "record" it means a public record, and clearly covers the refunding bond in controversy here, which becomes a record of the Orphans' Court.

The refunding bond alone discharges the Executor from decedent's creditors

III.

Unless the construction of the "Trading with the Enemy Act" claimed above is adopted, that act gives no protection to the creditors of a decedent or to the party administering an estate.

The Salamandra case, quoted from voluminously in the brief for the Custodian, does not pass upon a situation such as the one involved here. Nor do we in any wise question the law declared in that case as applicable to the situation then before the Court, but at page 589 *et seq.* of the report, it is very clear that the Court considered that the act was limited by the extent that the act itself provided a remedy to one whose rights were invaded or destroyed by the action of the Custodian, and it quoted at length Sec. 9 of the act. A careful study of that section of the act will demonstrate that it gives protection only to any person claiming any "interest, right or title in money or other property which may have been conveyed to the Alien Property Custodian * * * or to whom any debt may be owing from an enemy or ally of enemy."

The words in Sec. 9, "claiming any interest, right or title in any money or other property," clearly refer to a right in a *res* as distinguished from the debt due from the enemy alien. The refunding bond is not based on any right in any *res* either on the part of the party administering the estate or the creditor. The refunding bond gives no right except an action *in personam*

based on its provisions. The creditor's debt is the debt of the decedent, not the debt of the enemy alien. There is no protection under the statute given to the party administering the estate nor the creditor of the decedent.

Under the decisions above referred to, it is clear that the "Trading with the Enemy Act" must be construed so as to preserve the creditor's right and the right of the party administering the estate to protection under our New Jersey statute.

IV.

In the closing portion of the brief for the Custodian it is asserted that he is relieved from the obligation to protect the complainants and the creditors because his right is the right of the sovereign, to wit, the Government. He is merely a Custodian with limited power and performing administrative duties and is no more, under the act, the sovereign or Government than is the Collector of Internal Revenue or the United States District Attorney, and both have recently been held by the United States District Court for the Southern District of New York to be subject to injunction, in what is known as the 2.75% beer case.

The fundamental question is whether the "Trading with the Enemy Act" is in such language as to require that it shall override the protection that is given to the complainants and any creditors of the decedent under the New Jersey statute. As appears by Sec. 9, it does not give protection to the creditors of the decedent nor to the complainant.

The decisions regarding legislation under the war power relating to railroad and telephone rates do not determine this question, for the language of those acts clearly conferred exclusive power upon the Postmaster General and the Railroad Administrator to control the entire railroad and telephone systems. The whole purpose of the "Trading with the Enemy Act" is that stated above, to prevent during the war the use of the funds of the enemy alien against this country or in favor of the enemy country.

The provision of the decree continuing the trusts in the hands of the complainants, although included in the appeal, is not discussed in the brief for the Custodian. That provision is in accordance with the practice established by Chancellor Kent in the leading case of *Bradwell v. Weeks*, *supra*.

It is respectfully submitted that the Custodian is not entitled to receive the property in the hands of the complainants except upon compliance with the New Jersey statute in relation to re-funding bonds and that the decree should be affirmed.

EDWARD M. & RUNYON COLIE,
Solicitors for and of Counsel with the Complainants-Respondents.

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New Jersey Court of Errors and Appeals

No. 11—June Term.

Between

ALFRED J. KEPPELMANN, *et al.*, trustees,
&c.,

Complainants-Respondents,

and

ERICH P. KEPPELMAN, *et al.*,

Defendants-Respondents,

and

A. MITCHELL PALMER, as Alien Property
Custodian,

Defendant-Appellant.

On Appeal from
Court of
Chancery.

Copy of statutes relating to refunding bonds other than Section 78 of the Orphans' Court Act furnished to the Court by complainants-respondents, pursuant to leave for that purpose.

Act Concerning Legacies, Revision 1877, page 581 (Compiled Statutes, page 3089, Sec. 5):

“5. *Provided always*, that no suit shall be maintained for the recovery of any legacy or bequest until after a reasonable demand made of the executor or administrator *cum testamento annexo*, who ought to pay the same, and a tender of a bond to such executor or administrator signed and executed by the legatee, or by the guardian, if such legatee be an infant under the age of twenty-one years, in double the amount or value of such legacy or bequest with condition, that if any part or the whole of such legacy or bequest shall at any time thereafter appear to be wanting to discharge any debt or debts, legacy or legacies, which the said executor or administrator may not have other assets to pay, that then and in such case, he, the said legatee, will return his said legacy, or such part thereof as may be necessary for the payment of the said debts, or for the payment of a proportional part of the said legacies; and if the said executor or administrator shall not accept such bond, the plaintiff shall file the same in the said court before suing out process in such action, and for want thereof the action shall abate.”

Orphans' Court Act, Revision 1877, page 785 (Compiled Statutes, page 3877, Sec. 172):

“XIV. Distribution.

“150. Every person to whom any distribution or share of the goods, chattels and personal estate of any intestate shall be allotted, shall give bond, in double the sum at least of such distributive share, to the administrators, with condition, that if any debt or debts, truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, and which there shall be no other assets to pay, that then and in every such case, he or she shall respectively refund and pay back to the administrators, his or her ratable part of such debt or debts, and of the costs of suit and charges by reason of such debt or debts, out of the part and share so allotted to him or her; thereby to enable the said administrators to satisfy such debt or debts; which bond shall be good and sufficient if signed and executed by the next of kin giving the same, or the husband or guardian of such next of kin, without any sureties whatever.”

led Statutes
"husband"

Orphans' Court Act, Revision 1877, page 765, Sec. 68 (Compiled Statutes, page 3838, Sec. 79):

“68. In any action by a creditor to charge a legacy or distributive share as assets in the hands of an executor or administrator, for the payment of a ratable proportion of his debt, it shall be presumptive evidence that such legacy or distributive share, if not attached, was not paid to the legatee or distributee, if it appear that at the commencement of the suit no refunding bond had been filed therefor; and in such case such executor or administrator *shall be chargeable with such legacy or distributive share as assets, unless it shall be proved that such legacy or distributive share was actually paid over before the commencement of such suit, and such executor or administrator shall at the time of pleading such decree in bar file therewith a proper refunding bond, and pay the plaintiff in such action his costs of suit which shall have accrued before plea filed.*” (Italics ours.)

Respectfully submitted,

EDWARD M. & RUNYON COLIE,

Solicitors and of Counsel with the Complainants-Respondents.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

ALFRED J. KEPPELMANN, *et*
als., Trustees &c.,

Complainants,

Respondents,

and

ERICH P. KEPPELMANN, *et*
als.,

Defendants,

Respondents,

and

A. MITCHELL PALMER, as
Alien Property Custodian,

Defendant,

Appellant.

ON APPEAL FROM
COURT OF CHAN-
CERY.

BRIEF FOR SCHULZ AND RUCKGABER,
RESPONDENTS.

STATEMENT OF THE CASE.

The complainants in the bill are the executors and trustees named in the last will and testament of Adolphus Keppelmann, deceased. The defendants are Erich P. Keppelmann, one of the children of the

said testator, Carl Goepel, Max Ruckgaber, Jr., and Paul Ruckgaber, co-partners constituting the firm of Schulz & Ruckgaber, attorneys-in-fact, and A. Mitchell Palmer, Alien Property Custodian. All of the partners of the firm of Schulz & Ruckgaber were, at the time of the execution and delivery of the powers of attorney, and now are, citizens of the United States of America, and were, in the lifetime of the testator, his brokers and private bankers, and were known to be such to the alien belligerent children who executed and delivered the powers of attorney. (Case, p. 34.)

The testator gave the entire residue of his estate to his executors in trust, and directed them to divide the same into seven equal parts and to distribute one of said parts to each of his seven children, to some of the children absolutely and to other children in trust. The testator, at the time of his death, was a citizen of the United States and a resident of the State of New Jersey. The shares of Bertha Von Borowsky, Pauline Adolphine Losch and Louise Pauline Schulz were payable absolutely. All of these beneficiaries were born in the United States, but two were residents of the German Empire at the time of the declaration of war between the United States and the Empire of Germany, and one was a resident of the Empire of Austria-Hungary at the time of the declaration of war between that country and the United States.

Prior to, and not in contemplation of, the declarations of war between the above countries, each of the said beneficiaries executed and delivered a power of attorney, wherein and whereby Schulz & Ruckgaber were created attorneys-in-fact, to collect the respective interests of the several beneficiaries in the estate of their deceased father and "with full power

and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present." (Case, pp. 21-22.)

These powers of attorney were executed by Bertha vonBorowsky on July 16, 1913, by Pauline Adolphine Losch on August 28th, 1913, and by Louise Pauline Schulz on August 5th, 1913, and thereunder, distributions by the executors and trustees were made to the attorneys-in-fact "prior to the existing state of war between the United States and the Empire of Germany." (Case, pp. 32-33.)

Under said powers of attorney, and prior to the state of war, the attorneys-in-fact "had represented the distributees in various reorganizations of corporations whose securities were held by the distributees." (Case, p. 33.) Since the declaration of a state of war the attorneys-in-fact "have represented the distributees in the collection of coupons on bonds and dividends of stock, belonging to and standing in capacity, as attorneys-in-fact for the said distributees, the names of the said distributees, and in such capacity have made all returns and have accounted to the Honorable A. Mitchell Palmer, Alien Property Custodian, as the Trading with the Enemy Act, approved October 6, 1917, requires." (Case, p. 33.)

The attorneys-in-fact, under the powers of attorney claimed the distributive shares of the alien belligerents, and claim also was made by the Alien Property Custodian for the said shares.

The executors and trustees thereupon filed in the Court of Chancery of this state a bill, wherein they prayed for instructions as to whom these distributive shares should be paid. The answers filed by both the attorneys-in-fact and the Alien Property

Custodian, prayed, that the shares of the three said beneficiaries should be paid to them, respectively.

The Alien Property Custodian refused to execute refunding bonds as provided by the statute of the State of New Jersey as a condition precedent to the taking or receiving or holding any of the shares. The attorneys-in-fact, however, are willing and are prepared to execute and deliver such refunding bonds in accord with the law of this state. (Case, pp. 33, 34.)

The attorneys-in-fact claimed the distributive shares of the alien daughters of the testator under valid and enforceable powers of attorney, executed in the ordinary course of business, prior to the declaration of war and not in contemplation of it, wherein and whereby an agency for the collection of such shares is by express words created. They admitted that the intervention of war prevented the transmission of the shares to the alien beneficiaries, and that the Trading with the Enemy Act required them to account to the Alien Property Custodian during the duration of the war for the shares of the alien beneficiaries so awarded. They also admitted that under the law of the State of New Jersey a refunding bond must be executed and delivered and filed before a distributee of a decedent's estate is entitled, by legal right, to receive his share.

The Alien Property Custodian challenged the enforceability of the powers of attorney, affirmed the abrogation of the state statute requiring the giving of a refunding bond, and demanded, under the powers alleged to be vested in him by the Federal Trading with the Enemy Act, the shares of the aliens, and refused to execute refunding bonds, in accord with the state statute. His position was that the Trading with the Enemy Act nullified the state sta-

tute which requires the execution and filing of such bond and conferred upon him the sovereign power to take the shares without giving such bond.

The learned Vice-Chancellor was of opinion that the interest of the aliens or the advantage to them was not so clear as to warrant the legal conclusion of the continued legality of the powers of attorney after the declaration of war; that refunding bonds were required for the protection of the executors and trustees of the testator, as well as for his (testator's) creditors; that the Federal statute did not suspend, nullify or abrogate the state statute requiring such bonds; and that the willingness of the attorneys-in-fact and the refusal of the Alien Property Custodian to execute such refunding bonds made necessary the entry of a decree that the executors continue to hold the shares of said aliens as trustees and to deposit said shares with the court, "pending the further orders or decrees in this cause" (Case, p. 70), and that the bill should be retained for the purpose of enabling the attorneys in fact to communicate with the aliens and "to obtain such authorization to execute and deliver said refunding bonds." (Case, p. 69.)

The Alien Property Custodian appealed from that part of the decree which adjudges that the said shares shall be turned over to the attorneys-in-fact upon their receiving authority from their principals to execute refunding bonds (case, pp. 68, 69), and contended in the court below and urges on this appeal that he is entitled to take the said shares immediately upon his determining that the property in controversy is alien owned, and demand made, notwithstanding the existence of the powers of attorney and without complying with the statute of the State of New Jersey.

ARGUMENT.

Under the above facts two questions are involved in this appeal. These relate to, *first*, the present enforceability of the powers of attorney, notwithstanding the provisions of the Trading with the Enemy Act, and *second*, the effect of this Federal statute on the State statute requiring the execution and filing or refunding bonds. It is evident that the latter inquiry becomes pertinent in this argument and on this appeal only in event the powers of attorney are held not to be enforceable, for if they are presently valid and the attorneys-in-fact are willing to execute refunding bonds, compliance with the State statute results. Consequently, the inquiry discussed at such great length in the appellant's brief should claim attention not until, and only after, this court has concluded that the powers of attorney are now neither valid nor enforceable. The argument on behalf of the attorneys-in-fact will be presented under the three following general propositions:

I. The powers of attorney are presently valid and enforceable and the attorneys-in-fact therein named, being willing to execute refunding bonds as required by the state statute, are entitled in right of the alien beneficiaries to have awarded to them the shares of such aliens, with obligation imposed by express terms of the Federal Trading with the Enemy Act to account to the Alien Property Custodian for the shares until the termination of the war.

II. Assuming that the powers of attorney are at the present time not enforceable, the Alien Property Custodian is entitled to take the shares of the alien enemies only upon his executing refunding bonds in

accordance with the state statute, and this because the Federal Trading with the Enemy Act is neither in conflict nor irreconcilable with, nor contradictory to, the provisions of the state statute.

III. The refusal of the Alien Property Custodian to execute such refunding bonds, and the assumed present non-enforceability of the powers of attorney, would seem to make necessary that the shares of the alien enemies should remain in the custody and control of the court until the termination of the war.

These several propositions will be considered in the order stated.

I.

THE POWERS OF ATTORNEY ARE PRESENTLY VALID AND ENFORCEABLE AND THE ATTORNEYS-IN-FACT THEREIN NAMED, BEING WILLING TO EXECUTE REFUNDING BONDS AS REQUIRED BY THE STATE STATUTE, ARE ENTITLED IN RIGHT OF THE ALIEN BENEFICIARIES TO HAVE AWARDED TO THEM THE SHARES OF SUCH ALIENS, WITH OBLIGATION IMPOSED BY EXPRESS TERMS OF THE FEDERAL TRADING WITH THE ENEMY ACT TO ACCOUNT TO THE ALIEN PROPERTY CUSTODIAN FOR THE SHARES UNTIL THE TERMINATION OF THE WAR.

The only fact that can vitiate the legality of the powers of attorney is that the distributees signing the same are at the present time alien belligerents.

The question then presented would seem to be

whether or not a power of attorney, authorizing the collection of a distributive share of an estate distributable in the United States, executed prior to the war and not in contemplation of it, is revoked by the subsequent declaration of a state of war between the country wherein the distributees and the agent reside and the estate is distributable.

The argument in support of the conclusion that the instant powers of attorney are not revoked either by the declaration of war or by any statute enacted by the United States Congress and approved by the President, or by any proclamation of the President, will be considered under five propositions:

First: At common law and in the absence of any statute prohibiting trade intercourse with the enemy, an agency for the collection of moneys due an alien belligerent was not revoked by war; but on the contrary, such agent could receive payments from the debtor, but could not transmit to his belligerent principal the funds so received until the termination of the war.

Second: This common law principle was applied by the courts under the Non-Intercourse Act of Congress of 1861, notwithstanding the express broad provisions of this Act prohibited "all commercial intercourse by and between" citizens of the United States and residents in the belligerent territory.

Third: This common law principle was declared and applied by the courts of England, notwithstanding the English Trading with the Enemy Act of 1914 and the several amendments thereto of 1914 and 1916, and the proclamations of the Crown No. 2 of 1914.

Fourth: The American Trading with the Enemy Act of 1917, in no way modifies the above rule as existing at common law or as applied under the Non-Intercourse Act of 1861; but on the contrary, expressly recognizes the existence of such rule and provides for its application.

Fifth: The absolute power of the Alien Property Custodian under the Trading with the Enemy Act to determine that property is enemy owned and to demand its delivery to him, applies only as to the nature of the property in a dispute between the custodian and the alien and as to its ownership in disputes between the alien and some third person, and does not apply as to property claimed in the right of the alien by his lawful attorney-in-fact, who admits the enemy character of the ownership.

These several propositions will be considered in the order stated:

First: At common law and in the absence of any statute prohibiting trade intercourse with the enemy, an agency for the collection of moneys due an alien belligerent was not revoked by war; but on the contrary, such agent could receive payments from the debtor, but could not transmit to his belligerent principal the funds so received until the termination of the war.

Mr. Justice Bradley, in *Insurance Company vs. Davis*, 1877, 95 U. S. 425, on page 431, refers to *Conn. vs. Penn*, 1 Peters Circuit Court Cases, 496, as "the leading authority on this subject in the country." The learned Justice refers to the facts of *Conn. vs.*

Penn, what it decided, as well as the authority for its decision, in the following language:

“The question in that case was whether the claimants of land in Pennsylvania, under contracts of purchase from the proprietaries (the Penns) before the Revolutionary War, were entitled to an abatement of interest during the war; and Justice Washington held that this depended on the question whether, during the war, the proprietaries, being alien enemies, ‘had in the United States a known agent, or agents, authorized to receive the purchase-money and quit-rents due to them from the complainants, the vendees.’ To enable the parties to adduce proof on this point, the court allowed further evidence to be taken. The same thing was held, at the same term, in the case of *Dennison, et al., vs. Imbric*, 3 Wash., 396, where Justice Washington says: ‘We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate.’ ”

In *Insurance Company vs. Davis (supra)*, Mr. Justice Bradley in his own language sets forth the following statement of the rule of law, on page 429:

“That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as they may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be main-

tained either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it."

See also the rule as stated in the *Cyclopedia of Law and Procedure*, Vol. 40, pages 321, 322, and the authorities therein cited. An examination of the cases there cited will disclose that there is no case decided by any State or Federal Court which either denies or modifies the above principle.

Two different theories are suggested by the courts as sustaining the conclusion. The one theory rests upon the consent of the parties to the continuation of the agency, notwithstanding the state of war, either expressed (*Insurance Company vs. Davis*, 95 U. S. 425) or implied (*Williams vs. Paine*, 169 U. S. 55-73-74).

Since expressed consent implies both knowledge of the state of war and communication among enemies, the consent must necessarily be implied, as pointed out in *Williams vs. Paine* (*supra*) on the presumption of self interest, i. e. an agency in the interest of the principal will be presumed to continue after war; while an agent's authority will then be termin-

ated, if the agent's authority may be exercised against the principal's interests.

The other theory emphasizes the subject-matter of the agency, i. e. whether or not the agency contemplates or makes necessary communication between principal and agent during the duration of the war. It is because an agency for the collection of money due the principal does not make necessary any communication between the principal and agent during the duration of the war that all courts uniformly have sustained the validity of powers of attorney for collection which are executed prior to war, and not in contemplation of it, during the continuance of the war, subject, however, to the limitation that the funds so collected shall not be transmitted during the war to the alien belligerent principal.

See in this connection *Ward vs. Smith*, 7 Wall, U. S. 477, *Robinson vs. Life Assurance Society*, 42 N. Y. 54, and *Fisher vs. Kutz*, 9 Kan. 501.

It is submitted that, at common law, the attorneys-in-fact could collect the monies due the alien principals, notwithstanding the subsequent declaration of war, and this because the powers of attorney were executed prior to the war, and not in contemplation of it, the continuance of the agency is to the interest of the alien principal, and the subject-matter of the agency neither contemplates nor makes necessary communication between principal and agent during the state of war.

The learned Vice-Chancellor was of opinion that "there is no rule of public policy which is offended by recognizing the validity of such powers and the right of attorneys-in-fact to act under them." (Case, p. 42.) He, however, refused present enforcibility because "it is plainly against the interests of the principals that the agency in the instant case, so far

as giving refunding bonds is concerned, should continue" (Case, p. 45), and assigned the following reason in support of his conclusion: "In return for the giving of these refunding bonds, for which in time of peace the principals would receive shares, they now get nothing. Many contingencies may arise which would cause the alien enemies to elect, rather than to give refunding bonds, to disclaim any interest in the shares." (Case, p. 45.)

It is suggested that it would not be against the interests of the principal personally, to execute a refunding bond, in times of peace, for it is only by the execution and filing of such refunding bond that that which was before a beneficial interest in the estate becomes an absolute vested right, with title to specific and segregated property in him.

With all deference to the opinion of the learned Vice-Chancellor, it is submitted that the alien principals, both in times of peace and of war, get the shares of the estate to which they are entitled upon the execution of the refunding bonds, and that that which was before a beneficial interest becomes a vested right, with title to specific and segregated property, upon the execution and filing of such bonds. The only difference is that in war the shares are held by a common-law trustee until the termination of the war, but the ownership always remains in the alien in both peace and war.

In order to justify the conclusion that the execution of the refunding bonds is against the interests and to the hurt of the alien principals, it is respectfully urged the possibility of disadvantage to the alien principals should not only be probable and imminent, but real and certain. Legatees have been known to refuse to accept legacies, but only under most exceptional circumstances, and then with such

rarity as to excite comment. Certainly, no legatee entitled to receive a patrimony of one-seventh of approximately a two million dollar estate would "disclaim any interest in the shares" and refuse to accept the legacy because of a vague, indefinite and nebulous possibility that at some time in the future, in some way, something might develop which would be to his financial disadvantage. Would an ordinarily prudent person refuse to execute a refunding bond essential to his receiving a legacy because of the fear that future legislation might be enacted prejudicial to him, when at the time of the execution of the refunding bond and the acceptance of the legacy the enactment of the prejudicial legislation was neither probable nor contemplated?

Second. This common law principle was applied by the courts under the non-intercourse Act of Congress of 1861, notwithstanding the express broad provisions of this act prohibited "all commercial intercourse by and between" citizens of the United States and residents in the belligerent territory.

A consideration of this proposition should be preceded by setting forth the provisions of the Non-Intercourse Act of July 13th, 1861. This act was concise and precise in its terms; the language of the enactment was general and not specific as to the prohibitions expressed within its terms. It authorized the President,

"by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and be-

tween the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States."

The act then provides, however:

"that the President may, in his discretion, license and permit commercial intercourse with any such part of said state or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest."

The U. S. Courts, as well as the Appellate Courts of all states which considered the question uniformly held that the above provisions of the Non-Intercourse Act of 1861, although broad enough to apply to the relation of debtor and creditor, and to prevent during hostilities the appointment of an agent or attorney-in-fact for collection, did not, however, prevent a resident in the territory of one of the belligerents having in time of war an agent residing in the territory of the other, to whom the debtor could pay his debt in money, provided such agent or attorney-in-fact was created before the war began and not in contemplation of it.

In *U. S. vs. Grossmayer*, 1869, 76 U. S. 72, Mr. Justice Davis, on page 74, says:

“But Congress did not wish to leave any one in ignorance of the effect of war in this regard, for as early as the 13th of June, 1861, it passed a Non-Intercourse Act, which prohibited all commercial intercourse between the states in insurrection and the rest of the United States. It is true that the President could allow a restricted trade, if he thought proper.”

He further says, on page 75:

“A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted.”

In *Montgomery vs. the U. S.*, 1872, 82 U. S., Mr. Justice Strong quotes Woolsey on International Law as authority for the same proposition. He says:

“Nothing is clearer than that all commercial transactions of whatever kind (except ransom contracts) with the subjects, or in the territory,

of the enemy, whether direct or indirect, as through an agent or partner who is neutral, are illegal and void. This is not inconsistent with the doctrine that a resident in the territory of one belligerent may have in times of war an agent residing in the territory of the other belligerent, to whom his debtor may pay the debt, or deliver property in discharge of it. Such payments or deliveries involve no intercourse between enemies."

In *U. S. vs. Lapene & Co.*, 1873, 84 U. S., Mr. Justice Hunt, in applying the above principle, said, on page 604:

"The agency to receive payment of debts due to Lapene & Co. may well have continued."

but he held that the principle had no application, because,

"Avegno was no debtor to that firm."

In *Fretz vs. Stover*, 89 U. S., Mr. Justice Davis, on page 206, says:

"Directed by his government to hold no intercourse with his agent, and therefore unable to change instructions which were not applicable to a state of war, yet he was bound by the acts of his agent in the collection of his debts the same as if peace prevailed."

See also *Cyclopedia of Law and Procedure*, Vol. 40, pages 326 and 327, and the authorities therein cited.

The principle of law above stated under the Non-Intercourse Act of 1861, has likewise by the U. S. Supreme Court been applied to an attorney-in-fact created by the terms of the power to execute and ac-

knowledge a deed, and to receive and account for the purchase money.

The case of *Williams vs. Paine*, (*supra*), is particularly applicable to the facts of the instant case, and this is because in each instance the inquiry arises as to the application of the general principle of agency to an attorney-in-fact created for the purpose of receiving money.

The opinion of Mr. Justice Peckham is likewise important, for it removes any misapprehension that may arise from some expressions of the court in *Ins. Co. vs. Davis* (*supra*) and makes clear and definite the decision of the Supreme Court that a power of attorney executed before the war is not revoked by a subsequent declaration of war where the attorney-in-fact resides in the belligerent country wherein the power is to be executed.

Mr. Justice Peckham quotes the following from Mr. Justice Gray in the case of *Kershaw vs. Kelsey*, 100 Mass. 561: (pp. 72-73).

“The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is consistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the

principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

He distinguishes *Ins. Co. vs. Davis* from the case then under consideration, in the following language:

"Under the circumstances of this case, we think the attorney-in-fact had the right to make the conveyance he did. It was not an agency of the class such as is mentioned in Insurance Company v. Davis, supra, and was not necessarily revoked and avoided by the war. Where it is principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. And on the other hand, where it is to the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then those acts are just as valid and binding upon the principal as if no war had intervened."

On pages 74-75 the learned Justice sets forth the peculiar facts in the case under consideration, and why the general principle above adverted to should control its decision.

It should be pointed out in this connection that the case of *Williams vs. Paine, supra*, was referred to with favor by two of the Judges in the late English case of *Tingley vs. Muller*, 1915, 2 Law Reports Chancery Division (1917) 144. See opinion of Lord Cozens-Hardy, page 156, and of Warrington, L. J. page 169.

Third.—This Common Law Principle was declared and applied by the Courts of England, notwithstanding the English trading with the Enemy Act of 1914 and the several Amendments thereto of 1914 and 1916 and the Proclamations of the Crown No. 2 of 1914.

Tingley vs. Muller, above referred to in the next preceding paragraph, reviews the English cases which have considered the subject of the effect of war on an agency for collection of a debt, and holds that, at common law, an irrevocable power of attorney to sell lands and give receipts for the purchase money, is not avoided by the donor of the power subsequently becoming an alien enemy, and further holds that such power of attorney is valid, notwithstanding the English Trading with the Enemy Act of 1914 (4-5 Geog. 5 c. 87) and notwithstanding the English Trading with the Enemy Amendment Acts of 1914 (5 Geog. 5 c. 12) or of 1916 (5 and 6 Geog. 5 c. 105) and also notwithstanding the Trading with the Enemy Proclamation No. 2, dated September 9th, 1914, paragraphs 3 and 5. The facts of that case are stated in the second paragraph of the syllabi as follows:

“The defendant, a German by birth, but for many years resident in England, although never naturalized, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solicitor his attorney to sell his leasehold house and to execute such transfers and deeds as were necessary. The power of attorney was made irrevocable for twelve months. On May 26, the defendant obtained a Government permit from the police to travel to Tilbury with the object of embarking for Germany, by way of Flushing, and started on that day. On June 2, 1915, the leasehold premises were sold to the plaintiff by public auction, and a deposit was paid and an agreement signed by him. There was no evidence as to the date when the defendant reached Germany, but it was some time between May 26 and June 11, 1915.”

Eve, J., in the court below, held that from the above facts the proper inference was that at the date of sale the defendant was not an alien enemy.

The Appellate Court, however, held that on June 2, 1915, the date of the sale, the defendant was an alien enemy, but that since the power of attorney had been given by the defendant at a time when he was not an alien enemy, the subsequent declaration of war, and his thereby becoming an alien enemy, did not affect the validity of the acts done by the donee under the power. The Court consequently held the contract of sale entered into pursuant to the power of attorney, should not be rescinded, and that the purchase money should be paid to the donee, but that its transmission to the belligerent enemy should await the final termination of the war. During the

interim, the purchase money may be vested in the custodian.

The importance of this case impelled six of the Judges to write separate opinions, wherein the reasons which particularly appealed to each are set forth. Five of the Judges, sitting in the Chancery Division on Appeals, reached the conclusion above set forth. One Judge (Scrutton) dissented. A few excerpts from the opinions of these different Judges should be given.

Lord Cozens-Hardy, on page 156, after demonstrating the error of Eve, J., in the court below as to the defendant's being an alien enemy on June 2, the date of entering into the contract of sale by the donee of the power of attorney, asks the following controlling inquiry:

“But can it be said that the power of attorney was necessarily revoked when Muller became an alien enemy?”

He then answers in the negative, and refers to *Williams vs. Paine, supra*, in the following language: (p. 157)

“I think not. It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended. But such considerations have no bearing upon a special agency of this nature. Mr. Galbraith called our attention to a case decided in 1897 in the Supreme Court of the United States—*Williams v. Paine*. (2) A power of attorney granted by an officer and his wife resident in Pennsylvania to convey land in the city of Washington was held not to be revoked by the war, in which the grantors of the power took an active part with the Confederates, but to be well executed notwithstanding the war.”

Swinfen Eady, L. J. states the pivotal inquiry of the case as follows, p. 159:

“The question upon which this appeal turns therefore resolves itself into this: Was the agreement of June 2 illegal when made, or has it become illegal to carry it out?”

The learned Judge, after reviewing with particularity and setting forth the exact provisions of the original English Trading with the Enemy Act and its several amendments, as well as the proclamation of the Crown, concludes that there is nothing in the original act, or in either of the amendments, or in the proclamation which modifies the common law principle above adverted to. He concludes his opinion in the following manner, page 161:

“I am of the opinion that the contract of June 2, 1915, was a legal contract and that the property can be lawfully and effectually conveyed to the plaintiff, and that Mr. White, as the attorney of the defendant, can receive and give a valid discharge for the balance of the purchase money, and that the plaintiff is not entitled to have the contract rescinded or to be relieved from it.”

Bankes, L. J. was of the opinion that the power of attorney for the collection of the debt was neither unlawful at common law, nor forbidden by either the statutes or proclamation. On page 163, his conclusion tersely is expressed as follows:

“There remain, therefore, the two questions of whether the contract was unlawful at common law, and whether, assuming that not to be so, any proceeding to complete the purchase with knowledge that the defendant is an enemy

is forbidden by the statute and the proclamation. I think that these two questions, under the peculiar circumstances of this case, should be considered together."

Bankes, L. J. likewise makes clear the equity of the position contended for by the attorneys-in-fact in the instant case, in the following language, on page 163:

"I do not see any ground for saying that the fact that the defendant has become an enemy has put an end to the power of attorney. Even if it had, there is power in the Board of Trade under s. 4 of the Trading with the Enemy Act, 1916, to give the custodian full power to convey the property, so that no difficulty need arise on that ground. The completion of the sale will not involve any communication with the defendant, or any payment to him or for his benefit, while the war lasts.

"Why then should the Court interfere? Is there anything in the contractual relations of the parties at their present stage which can be said to offend against either the principles of the common law or the provisions of any statute if the purchase is allowed to proceed to completion? *I think not. The alternative appears to be either to condemn the property to remain derelict until the end of the war, or to hold the plaintiff to his bargain with the variation imposed by statute that the purchase money is to be held up and not paid over to the vendor until the war is over. I think that the latter is not only the reasonable course, but it is the one which is in accordance with the law. In my opinion the appeal fails.*"

Warrington, L. J. emphasizes the same consideration in the following language, page 168-9:

“The Proclamation of September 9, 1914, in par. 5 (1.) warns persons not to pay any sum of money to or for the benefit of an enemy. It is contended on behalf of the plaintiff that it would, under the rules of the common law and under the proclamation, be illegal for him to pay the purchase money inasmuch as that would be a payment for the benefit of the enemy, and that therefore he is excused from performance. The payment in the present case would properly be made to the attorney in this country and not to the enemy himself. The attorney in the present case has complied with s. 3 of the Trading with the Enemy Amendment Act, 1914, by communicating the facts to the custodian and asking for his directions, and the custodian in reply has directed him to keep the money. It must, I think, be presumed that Mr. White will do his duty as he has hitherto done it, and if so, the result will be that the enemy will part with his property and be kept out of his purchase money until the end of the war. *Moreover, if there be any doubt as to the propriety of the payment of the purchase money to the attorney, the last-mentioned statute provides machinery extended by the Trading with the Enemy Amendment Act, 1916, s. 4, whereby the right to recover and receive the purchase-money may be vested in the custodian, who will in that case hold it until the termination of the present war and thereafter deal with the same in such manner as His Majesty may by Order of Council direct. The result is, in my opinion, that the contract can be carried out without requiring the plaintiff to do any act which*

is illegal either at common law or under the proclamation or the statutes."

Bray, J. in the following terse sentences concludes that the power of attorney was neither against public policy at common law, nor prohibited by statute or proclamation. On page 186 he says:

"The result of the cases that I have referred to seems to be that in order to determine whether a contract such as this with an alien enemy is illegal and void it is necessary to answer the following questions: (a) Does the contract involve intercourse with an alien enemy? (b) Would it tend if valid to the detriment of this country or to the advantage of the enemy? (c) Is it against public policy? For the reasons I have already mentioned, having regard to the facts in this case, my answer to each of these questions is, No. Therefore, so far as the common law is concerned, this contract of June 2 was, in my opinion, neither illegal nor void."

As to the effect of the proclamation and statutes, he says, page 187:

"The remaining question is whether it was prohibited by any proclamation. The Proclamation of September 9, 1914, par. 5, provides as follows: 'From and after the date of this Proclamation the following prohibitions shall have effect. . . . and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions'; and by sub-par. 9: 'Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy'; and then at the end of par. 5: 'We do hereby further warn all persons

that whoever in contravention of the law shall commit, aid or abet any of the aforesaid acts, is guilty of a crime and will be liable to punishment and penalties accordingly.' Is this contract a contract with the enemy within the meaning of sub-par. 9? I think not. I do not think, having regard to the recitals in the preamble, that it applies to a contract like this, made not directly with an alien enemy, but through an agent in this country who had received his authority before the vendor became an alien enemy and who could carry through the transaction without any intercourse with the alien enemy."

It is therefore submitted that the powers of attorney in the instant case, had they arisen in the English Court, under the principle and provisions of the British statute, would have been held valid uniformly, both at common law and under the Trading with the Enemy statutes and proclamations at present existing in England.

Fourth.—The American Trading with the Enemy Act of 1917, in no way modifies the above rule as existing at common law or as applied under the non-intercourse Act of 1861; but on the contrary, expressly recognizes the existence of such rule and provides for its application.

Section 3, par. (a) of the American Trading with the Enemy Act of 1917, provides that:

"It shall be unlawful for any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, wilfully to trade, or attempt to trade, either di-

fectly or indirectly, with, to or from, or for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy, or in conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of an enemy or ally of enemy."

"To trade" by the Act is deemed to mean, Sec. 2, par. (a):

"Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation."

It is denied that it is within the inhibition of the statute to receive the distributive shares of the alien belligerents under the power of attorney which is the subject of inquiry in the present case.

By the express terms of the statute, this may be done "*with the license of the President granted to such person,*" even if it is within the inhibition of the statute.

Keeping this permission thus to trade with the license of the President in mind, paragraph B in Sec. 7 of the Act should be carefully read. It is submitted that the language of this section is declaratory of the principle of law hereinbefore adverted to as existing at common law, and has in express terms provided for the rule of law as expressed by the Supreme Court of the United States in the cases hereinbefore cited, which have arisen under the Non-Intercourse Act of 1861.

The following excerpts are particularly applicable:

"No conveyance, transfer, delivery, payment or loan of money or other property in violation of section three hereof, made after the passage of this act and not under license as herein pro-

vided, shall confer or create any right or remedy in respect thereof; and no person shall, by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy, have any right or remedy against the debtor, obligor or other person liable to pay, fulfill, or perform the same, *unless said assignment or indorsement or delivery was made prior to the beginning of the war or shall be made under license as herein provided, etc.*"

It will be observed that by express exception the trading with the enemy condemned in section 3 does not apply where the payment, though made after the passage of the act, was provided for by "an assignment, indorsement, or delivery prior to the beginning of the war."

The theory on which the non-revocation of an agency for the collection of money by subsequent war on which the common law principle was based and the controlling consideration with the Supreme Court in applying the same rule under the Non-Intercourse Act of 1861, was that the agency was created prior to the war, not in contemplation of it, and related to matters in no way detrimental to the interests of the Government.

It is the knowledge of this controlling consideration and of this rule of law that must have induced Congress to incorporate in par. B of Section 7, the following proviso:

"Provided that nothing in this act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by

an enemy or ally of enemy where, *prior to the beginning of the war, and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise, upon a person not an enemy or ally of enemy will be benefited by such carrying out, completion or performance otherwise than by release from obligation thereunder.*"

The following paragraph as a further exception to the Act can be construed in no other way, it is submitted, than to give validity to the powers of attorney, which is the matter of inquiry in the present case. The language of the Act is as follows:

"Nothing in this act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States, not an enemy or ally of enemy, *if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: Provided, that such payment shall not be made without the license of the President, general or special, as provided in this Act.*"

The proviso of this paragraph is in exact accord with the Non-Intercourse Act of 1861. It will be observed, however, that the preceding paragraph of the Trading with the Enemy Act of 1917, does not contain such proviso.

It is submitted that the above excerpts from Section 7, of the Trading with the Enemy Act of 1917,

can have no reasonable interpretation placed upon them other than they express the legislative intent to permit two things which except for the language therein contained would be inhibited by the general language of the Act of 1917.

The things excepted by the Act of 1917, are (a) performance of a contract made with an enemy prior to the war and not in contemplation of it, when the enemy's interest devolved to a present resident in the United States and not an enemy and said performance of contract will not benefit such alien enemy; and (b) the payment of money belonging or owing to an enemy, a resident of the United States, when the funds so paid were received prior to the war and arise from transactions entered into prior to and not in contemplation of war.

The general language of the first exception, it is submitted, applies to the powers of attorney now before this court and the conditions imposed by the Act are here present. (1) The instrument was executed and delivered prior to and not in contemplation of war; (2) the attorneys-in-fact to whom the alien enemy's interests devolved are residents in and citizens of the United States; (3) the alien belligerents will not benefit by the attorneys-in-fact receiving their respective distributive shares, for the securities and cash received by the attorneys-in-fact will be turned over to the Alien Property Custodian to be held by him until the termination of the war.

The language of the second exception (b) is express and clear in its application to the instant case. (1) The interests or property of the alien belligerents arose from matters in no way connected with the war. (2) The death of a father, his will and the distribution of his estate pursuant to the terms contained in the will, are certainly matters that took

place prior to the war, and (3) the powers of attorney were executed not in contemplation of war. These matters are certainly contemplated by the exception, and all of the essential conditions imposed by the Act are here present.

But if there were any doubt about this legal intent and purpose, or these paragraphs of Section 7, that doubt, by the application of three well recognized rules of construction, must be resolved in favor of the rule of law here contended for by the attorneys-in-fact, as announced at common law and as declared by the Supreme Court of the United States in construing the Non-Intercourse Act of 1861.

These rules of construction may be stated as follows:

(a) Statutes are to be considered with reference to the principles of common law in force at the time of their enactment.

(b) Hence statutes do not effect any change in the law other than that which is expressed or necessarily implied from the language used.

(c) Statutes should be construed as forming part of a uniform system of jurisprudence and hence their effect should be determined in conformity not only with the common law, but also in connection with other statutes on the same subject, no matter when enacted.

These several rules of construction will be considered in the order stated.

(a) Statutes are to be considered with reference to the principles of common law in force at the time of their enactment.

In *U. S. vs. Freight Association*, 59 Fed. 58, the principle was applied to the use of common law terms as defined by the common law for the purpose of explaining an offense defined by Congress. The Court in that case said:

“When Congress creates an offense and uses common law terms, the courts may probably look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common law offense, for the definition of the offense if it is not clearly defined in the Act adopting or creating it.”

In *Bradley vs. People*, 8 Colo. 599, it was held that where a statute provides that certain acts constitute larceny, it does not dispense with the common law rule requiring the existence of criminal intent as the necessary element of guilt.

See also *Cumberland Telephone, etc., vs. Kelley*, 160 Fed. 316.

Howe vs. Peckham, 10 Barb. 656;
36, *Cyclopedia of Law & Procedure*, p. 1145.

Applying this principle of construction to the Act of 1917, it has been demonstrated in the preceding paragraphs that at common law the powers of attorney were not revoked by war where the agent was charged with the duty of collecting money due the alien belligerents.

Congress is presumed to have knowledge of the existence of this rule of common law. Hence in the absence of express negative terms or express prohibitions the conclusion is justified that the act was not intended to modify or change the existing rule at common law.

Of course, the common law has never been formal-

ly adopted by Act of Congress as a part of Federal substantive law, but by judicial decision rules of law as they obtained under the common law have been embodied as a law in the United States. This is what the Supreme Court has done in announcing the principle here contended for by the attorneys-in-fact.

(b) Hence statutes do not effect any change in the law other than that which is expressed or necessarily implied from the language used.

The best statement of this principle of construction that a hasty search discloses is found in *Kleim vs. City of Reading*, 1907, 32 Pa. Sup. Ct. 613. In that case President Judge Rice quotes from Endlich on Interpretation of Statutes. He says, pp. 619 and 620:

“The next point to be noticed is that the Act of 1887, while particularly mentioning the statutes that were superseded or repealed, does not in express words abrogate this ancient, firmly established and useful rule of the common law, contains no provision which is repugnant to it, as, as we have suggested, provides no substitute for it. Statutes are not presumed to make any change in the rules and principles of the common law beyond what is expressed in their provisions, or fairly implied in them, in order to give them full operation; rules of the common law are not to be changed by doubtful implication; Endlich on Interpretation of Statutes, sec. 127. Indeed, the rule has been more broadly stated as follows: ‘In all doubtful matters and where the expression is in general terms, statutes are to receive such construction as may be agreeable to the rules of the common

law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the legislature had had that design they would have expressed it in the act:’ *Pettit v. Fretz’s Executor*, 33 Pa. 118.’”

The learned President Judge also quotes as follows from the early English case, p. 620:

“It is worthy of notice that in this very case Justice Woodward cited Townsend’s Case, Plowd. Com. 111, in which it was said: ‘But if a thing is at common law, a statute cannot restrain it unless it be in negative words.’”

See also *Johnson vs. Southern Pacific Railway Co.*, 117 Fed. 462.

Davis vs. Abstract Construction Co., 121 Ill. Appellate.

Rosen vs. Mfg. Co., 89 N. Y. Appellate Div. 245.

36 *Cyclopedia of Law and Procedure*, 1145, and authorities there cited.

In *Tingley vs. Muller*, *supra*, Bray, J. invokes this principle of interpretation, wherein he holds that the language of the English statute is not broad enough to prohibit the collection of the purchase money under the power of attorney then in suit. He says, on page 187:

“I think if it had been intended to prohibit a transaction of this kind much clearer language would have been used. I think we ought not to read the sub-section as going beyond the common law, unless the words used show a clear intention that it should do so.”

It is submitted that there is certainly nothing in the Act of 1917, which in express terms or by necessary implication is intended to change the rule of law given by the Supreme Court and then in force relative to the right of an agent or attorney in fact to collect money due the alien belligerent. On the contrary, as heretofore urged, the express right by the act is intended to be conferred.

(c) Statutes should be construed as forming part of a uniform system of jurisprudence and hence their effect should be determined in conformity not only with the common law, but also in connection with other statutes on the same subject no matter when enacted.

In *State vs. Boswell*, 104 Ind. 541, the learned Court announced the rule in the following language:

“If construction proceeded upon any other principle, the law of a state would consist of disjointed and inharmonious parts, and conflict and confusion be the result. The light needed for the just interpretation of a statute is not supplied by the statute itself, but comes from other statutes and from the principles declared by the courts of the land. It would be as illogical as mischievous to act upon a single statute found in a great body of law irrespective of other statutes and other laws, and against such a course the faces of the courts have been long and firmly set.”

See also 36 *Cyc. of Law and Procedure*, pp. 1146, 1147, 1148, and authorities there cited.

The following excerpt from the *Cyc. of Law and Procedure* should be here inserted. Vol. 36, p. 1148:

“The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. * * * So far as reasonably possible the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express words.”

The effort has been made in the foregoing paragraphs of this paper book to demonstrate the similarity of purpose of the Non-conformity Act of 1861, of the English Trading with the Enemy Legislature, and of the American Trading with the Enemy Act of 1917, and to show that under the Act of 1861 the Supreme Court of the U. S., and the English Courts, under all English Trading with the Enemy Acts, uniformly held that an agent for collection of money was, notwithstanding the subsequent declaration of war, permitted to receive payment from the alien debtor. It is submitted that the Act of 1917 should be so construed, for in this way can the law existing at the time of its enactment only be harmonized with the provisions of the act, and for the further and controlling reason that there is no express inhibition therein, but on the contrary the language of the act is clearly consistent with the exception here contended for.

The only plausible argument in support of the position taken by the Alien Property Custodian is to give the broadest effect possible to the 3rd Section of the act which prescribes the penalties, and even then to ignore its exceptions and utterly disregard the paragraphs contained in Sec. 7. The language of the 3rd Section of the act can only be made to apply to the payment by the executors to the attorneys in fact in the instant case on the supposition that payment to the agent is payment to the alien belligerents. But the courts have uniformly held that this is not the fact, but on the contrary is a payment to the agent in the *right* of the alien principal.

In *Ward vs. Smith*, 1868, 74 U. S., Mr. Justice Field held the Non-Intercourse Act of 1861, was violated only when payment was made direct to the alien belligerent. He buttresses his conclusion by a similar statement from the early case of *Conn. vs. Penn*, 1 Peters Cir. Ct., 496.

Mr. Justice Field, on p. 452, says:

“That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal. ‘The rule,’ says Mr. Justice Washington, in *Conn. vs. Penn*, ‘can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed

by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offense is imputable to him, and not to the person paying the money.' "

See also *Buchanan vs. Currey*, 19 Johnson, N. Y. 141;

Montgomery vs. U. S., 82 U. S. 400.

It is submitted that the only reasonable interpretation of the American Trading with the Enemy Act of 1917, is so to construe it as to give its provisions full force and effect and at the same time to give effect and operation to the substantive law as declared by the Supreme Court of the United States and by the English Courts at the time of the enactment of this act.

Fifth: The absolute power of the Alien Property Custodian under the Trading with the Enemy Act to determine that property is enemy owned and to demand its delivery to him, applies only as to the nature of the property in a dispute between the custodian and the alien and as to its ownership in disputes between the alien and some third person, and does not apply as to property claimed in the right of the alien by his lawful attorney-in-fact, who admits the enemy character of the ownership.

It has been decided that under the express words of sub-division (d) of Section 7 of the Trading with the Enemy Act, the determination of the custodian that property is enemy owned is conclusive and not the subject of precedent judicial decision. But this interpretation should obtain only where the alien

denies the fact as found by the custodian, or where some third person claims an "interest, right or title" in the property adversely to the enemy.

In the instant case, it should be pointed out, there is no dispute between the custodian and the attorneys-in-fact as to the nature of the property, i. e. the enemy ownership of the shares of the estate is admitted. Nor is there any claim by any third person of any "interest, right or title" (Sec. 9) in the property, adverse to the admittedly alien enemies. On the contrary, the attorneys-in-fact claim in the right of the alien enemies and admit that because of the enemy ownership they must account to the Alien Property Custodian for the shares immediately upon award to them, to the same extent and for the same reason as if the award had been made in the first instance to the alien enemies themselves.

The Salamander case, so much relied upon by appellant, makes clear why under either of the above circumstances, the custodian should have power of absolute determination of the nature of property and possession thereof pending dispute, and gives as the controlling consideration the fact that Sections 8 and 9 of the Act give exclusive and defined remedies for the protection of a person "who is not an enemy or ally of an enemy" and who contests the decision of the custodian as to the nature of the property or the interest of a third party claiming adversely the whole or any part of such property.

It will be observed that Sections 8 and 9 provide, in express terms, that the remedies therein set forth are given only to "any person not an enemy, or ally of an enemy, claiming any interest, right or title in any money or other property which may have been conveyed, etc.," and that Section 8 provides that

“Any person not an enemy, or ally of an enemy, holding a lawful mortgage, pledge or lien or other right, etc.”

It is evident that only a person “not an enemy or ally of an enemy” may invoke the remedies provided for in these several sections.

One who claims in right of the alien enemy and admits the enemy ownership of the property certainly would have no right to invoke any of the remedies provided in these several sections. Hence it is submitted that when the alien enemy or his agent admits the enemy ownership of the property and there is no dispute with an adverse claimant, the Courts have jurisdiction to enforce powers of attorney for collection executed by the aliens prior to war and not in contemplation of war, and that, as pointed out in the preceding paragraphs of this brief the Trading with the Enemy Act makes express provision for the enforcement of such instruments when payment is demanded of monies or property due an alien enemy. (Pages 27-39.)

Mr. Justice Knox, in the Salamander case, so restricts the application of Section 9, page 860: “Under the provisions of this section the rights of a *person who is not an enemy or ally of an enemy*, are adequately protected,” and again, on the same page, he states “that a *citizen or friendly ally will*, by such enforced surrender of the property wrongly determined by the custodian to be enemy in its character, be subject to inconvenience and possibly expense, goes without saying.”

II.

ASSUMING THAT THE POWERS OF ATTORNEY ARE, AT THE PRESENT TIME, NOT ENFORCEABLE, THE ALIEN PROPERTY CUSTODIAN IS ENTITLED TO TAKE THE SHARES OF THE ALIEN ENEMIES ONLY UPON HIS EXECUTING REFUNDING BONDS IN ACCORDANCE WITH THE STATE STATUTE, AND THIS BECAUSE THE FEDERAL TRADING WITH THE ENEMY ACT IS NEITHER IN CONFLICT NOR IRRECONCILABLE WITH, NOR CONTRADICTORY TO, THE PROVISIONS OF THE STATE STATUTE.

This proposition should be considered by this court only in event it is of opinion that the powers of attorney are not presently enforceable. It involves inquiries into the provisions of the statutes of New Jersey as to the execution of refunding bonds by the distributees of decedents' estates, and the effect of the Federal Trading with the Enemy Act on such State statute.

It is the position of appellant that the statute of the State of New Jersey does not apply to demands by the Alien Property Custodian, (a) because he is a sovereign and not included in the term "person" as implied in the Act (p. 37, appellant's brief), (b) because the Act is procedural and does not limit "the property rights of legatees" (p. 33, appellant's brief), and (c) because the Federal Trading with the Enemy Act abrogates the State statute.

The position of the attorneys-in-fact, as set forth in the above generalization, may be considered under the following counter-propositions:

First: Sections 78 and 79 of the Statute of New Jersey, relating to the rights of distributees in the settlement of decedents' estates, are not procedural; but, on the contrary, create and confer new substantive rights upon creditors of the decedent, limit the rights of distributees of decedents' estates, and impose fixed duties and liabilities upon executors and trustees.

Second: The Alien Property Custodian is a "person" within the contemplation of the State statute, and this because the alien enemy distributee is so included, and, under the Trading with the Enemy Act, the custodian's interest in or to property claimed in right of an alien enemy must be limited and defined by the interest of such alien enemy in the property claimed.

Third: The Trading with the Enemy Act does not abrogate the State statute requiring refunding bonds from distributees of decedents' estates, and this because the Federal statute is neither in conflict nor irreconcilable with, nor contradictory to, the State statute.

These several counter-propositions will be considered in the order stated.

First: Sections 78 and 79 of the Statute of New Jersey, relating to the rights of distributees in the settlement of decedents' estates, are not procedural; but, on the contrary, create and confer new substantive rights upon creditors of the decedent, limit the rights of distributees of decedents' estates, and impose fixed duties and liabilities upon executors and trustees.

Section 78 provides that "every executor or administrator on the payment of any legacy or distributive share to the person entitled to the same, *shall take a refunding bond therefor.*"

This is imperative language and imposes a duty upon the executor and limits the right of a distributee, for it is only by compliance with the terms of the statute that the distributee becomes entitled to receive his share in the estate. In other words, a distributee has only a beneficial interest in the estate, which can become a legal vested title to a segregated share upon his executing the bond. Clearly, a limitation is thereby imposed on a distributee's right to acquire legal title to his segregated legacy.

The Act then provides that "Any creditor * * * * may, by order of the Orphans' Court, bring suit on such refunding bond in the name of the executor or administrator."

This language creates and confers on creditors of the decedent a new and substantive right. This right is in the form of a refunding bond, and the enforcement of the right is the only thing in the Act which is, in nature, procedural. The real thing that the Act confers is the right to the refunding bond and to sue on it, and the procedure indicated is simply incidental to the enforcement, the right.

It is evident that the rights here conferred are substantive, in contradistinction to procedural, and that they are created in favor of a creditor of the decedent, in contradistinction to a creditor of a distributee.

Section 79 provides, in effect, that if any creditor sues for the ratable proportion of his debt, it shall be presumptive evidence that such legacy or distributive share was not paid to the distributee if such refunding bond was not filed at the commencement

of the suit. In such case, the executor or administrator shall be chargeable with such legacy or distributive share as assets, unless it shall be proven that it was actually paid over before the commencement of the suit, and the refunding bond is pleaded, in which case the executor shall pay the costs which have accrued.

The language of this section, in express terms, imposes a penalty on an executor or trustee who has neglected or failed to take from a distributee a refunding bond.

Second: The Alien Property Custodian is a "person" within the contemplation of the state statute, and this because the alien enemy distributee is so included, and, under the Trading with the Enemy Act, the custodian's interest in or to property claimed in right of an alien enemy must be limited and defined by the interest of such alien enemy in the property claimed.

Admitting that the term "person" does not apply to the sovereign, unless clearly expressed or necessarily implied from the words in the statute, it is suggested that this principle of interpretation has no present application, and this because the Alien Property Custodian can claim an interest only to the extent and in no higher right than the alien enemy was entitled to receive the property. If this were a question wherein the Alien Property Custodian, as a distributee directly, were claiming the share, and not in right of some other person, the principle of interpretation now insisted upon by appellant might apply. The Alien Property Custodian, however, is not a distributee of this estate, and only claims an interest in the property or share of

a distributee who is a "person" within the contemplation of the Act. Consequently, it is not so much a question of the capacity in which the Alien Property Custodian may act, but whether or not, in succeeding to or claiming an interest in property of a "person" within the contemplation of the Act, he must comply with the terms and conditions imposed by the Act on such "person" in order to have the share or interest vest in such "person" to the end of his acquiring possession of it.

Moreover, appellant contends that under the provisions of the Trading with the Enemy Act, the Alien Property Custodian may arrogate to himself the functions of a sovereign. It is submitted that he is not a sovereign unless the terms of the Act, in express language, confer sovereignty upon him, and one will look in the Act in vain for any expression of this character, either by words or implication.

It is not the position of the attorneys-in-fact that the Federal Government could not delegate sovereign power on an agent and, having conferred such power, thereby abrogate a state statute in conflict with the exercise of such sovereignty, but our position is that such sovereign power has not been conferred by the Federal Statute.

Third: The Trading with the Enemy Act does not abrogate the State statute requiring refunding bonds from distributees of decedents' estates, and this because the Federal statute is neither in conflict nor irreconcilable with, nor contradictory to, the State statute.

These several counter-propositions will be considered in the order stated.

Many pages of appellant's brief are devoted to an attempt to demonstrate the propositions (a) that the Federal Congress may grant to the Custodian, under the war clause of the constitution, power to determine what is enemy property and define the manner in which it may be sequestered, and to prescribe the remedies by which relief may be given to persons whose rights in the property taken may be protected, and (b) that "this power granted to the Federal Government is supreme and controlling, and any State legislation must fall which is *inconsistent* with the Federal statute which is an exercise of this Federal power." (p. 29, appellant's brief.)

The attorneys-in-fact never have and do not now question the validity of the first of the above general propositions, nor is the second proposition questioned, if by "inconsistent" State legislation is meant "repugnant and contradictory" legislation. But the first proposition as stated and the second proposition as modified are denied to be applicable to the facts of the instant case.

(a) The controlling question in the first proposition is not the abstract constitutional power, but rather is whether or not the Trading with the Enemy Act grants such power under the facts presented in the record of this case.

As hereinbefore pointed out in this brief, it may be conceded—for whatever of doubt may have existed at the time of the presentation of this case to the attention of the Vice-Chancellor has since been removed by the decision of the Salamander case—that such power is granted by the Act, but it is exercisable only in disputes as to ownership of or interest in property between the alien enemy and a third person who claims adversely to him, and in

a controversy as to the nature of the property, e. g. when the alien or one claiming in his right denies that the property is enemy owned. But it is submitted such power, by the terms of the Act, is not vested in the custodian when an attorney-in-fact, under a power of attorney executed prior to the war, in the right of an alien enemy, claims the right to collect money or property due such principal, who is admittedly an enemy, and this for the reasons already pointed out in the preceding paragraphs of this brief, pages 39-41.

There is nothing in this Act which, in express words or by implication, gives the custodian the power to nullify the valid contract of the alien to collect money or property executed by the alien in times of peace and which, but for the subsequent declaration of war, admittedly would be enforceable. All courts, Federal and State as well as English, uniformly have held in accord with the views of the Vice-Chancellor that, notwithstanding a subsequent declaration of war, "there is no rule of public policy which is offended by recognizing the validity of such powers and the right of the attorneys-in-fact to act under them." (Case, p. 42.)

The Act, instead of enabling the custodian to take property which the alien has authorized an attorney-in-fact to collect and take, in express terms exempts from the broad inhibition of any trading whatever with the enemy, the collection of money or property under powers of attorney or instruments in writing similar in character to those in suit. (pp. 27-39 of this brief.)

The argument upon which appellant relies to support his conclusion of sovereign power vested in the custodian by the terms of the Act, is that the Act provides specific and complete remedies for the

relief of persons aggrieved by his arbitrary act. The conclusive answer to this argument, as hereinbefore pointed out in this brief (p. 41) is that neither the attorneys-in-fact nor the creditors of the decedent, by sections 8 or 9, are included in the description of persons who may invoke the remedies therein provided. It is submitted that the only forum in which the respective rights of the attorneys-in-fact under the powers and the creditors under the State statute, can be enforced is at this time, in this proceeding.

(b) In the second proposition above quoted from page 29 of appellant's brief, is found a suggestion of the accurate statement of the rule of law as to the supremacy of Federal over State law. This is disclosed in the word "inconsistent". Appellant, in his brief, in all other references to the supremacy of Federal law over State law, assumes this supremacy irrespective of any conflict, inconsistency, contradiction or repugnance between the several enactments.

It is urged that the true rule is that stated by Mr. Justice Hughes, in the case of *Savage vs. Jones*, 1911, 225, U. S. 501, where, on page 533, he says:

"When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the Act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. (cases cited.)

“But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, *such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.*” (cases cited).

In that case, Congress enacted under the Interstate Commerce clause the Food and Drugs Act, and in express terms prohibited misbranding, but did not require publication of ingredients. A statute of the State of Indiana regulated the sale and required publication of the formula of a concentrated commercial food for stock. It was held that there was no conflict between the Federal and State enactments and that the State act was valid. Mr. Justice Hughes, on page 539, says:

“The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the Federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of State to Federal authority.”

The illustrative cases cited in this opinion should here be adverted to.

In *Reid vs. Colorado*, (1902) 187 U. S. 137, the Supreme Court, in an opinion by Mr. Justice Harlan on page 148, says:

“It should never be held that Congress in-

tends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said—and the principle has often been reaffirmed—that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*”

The facts of this case are stated by Mr. Justice Hughes in *Savage vs. Jones, supra*, page 536, as follows:

“The question arose under a statute of Colorado which had been passed to prevent the introduction into the State of diseased animals. The statute made it a misdemeanor for any one to bring into the State, Territory or county south of the 36th parallel of north latitude, unless they had been held at some place north of that parallel at least ninety days prior to the importation, or unless the owner or person in charge should procure from the State Veterinary Sanitary Board a certificate, or bill of health, to the effect that the cattle or horses were free from all infection or contagious diseases and had not been exposed thereto at any time within the preceding ninety days.”

As to what the Court held, the following statement is made by the same Justice on page 536:

“It was insisted that the statute of Colorado was in conflict with the Animal Industry Act

of Congress, but the Court sustained the State law for the reason that, although the two statutes related to the same general subject, they did not cover the same ground and were not inconsistent with each other."

In *Missouri, Kansas & Texas Ry. Co., vs. Haber*, (1898) 169 U. S. 613, in the language of the same Justice page 535, *Savage vs. Jones, supra*, it was held that "Federal legislation did not override the statute of the State; that the latter created a civil liability as to which the Animal Industry Act of Congress had not made provision."

See also in this connection *Sinnot vs. Davenport*, 22 How. 227, and particularly page 243, where the general rule above adverted to is announced by Mr. Justice Nelson.

Appellant assumes the Trading with the Enemy Act is inconsistent with the State statute. It is suggested, under the above authorities, that mere inconsistency is not sufficient to override a State statute. On the contrary, in order to abrogate or nullify a State statute "the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together."

Not only is the legislation under present consideration not repugnant nor contradictory nor in conflict, but it is not even inconsistent. The Federal Act was enacted admittedly as a war measure under the delegated power to wage war. The State statute was passed under the reserved powers for the purpose of defining the rights of persons in and of regulating the settlement of decedents' estates. The Federal Congress cannot legislate directly as to decedents' estates, and only indirectly thereto by defining the rights of litigants in the United States

courts, or as necessary and incidental to the exercise of a delegated power, e. g. to wage war. The State legislature is restricted as to this power by its grant to the Federal Government.

The Federal Act provides for the sequestration of enemy owned property as a means of weakening the enemy in times of war by depriving it, in economic production, of the use of property. It was designed to take only such property or "interest, or right, or title" therein which the alien enemy had, as is admitted in appellant's brief, p. 37. The State statute defines certain formalities and conditions that must be complied with before the beneficial interest of a distributee in a decedent's estate becomes as separate segregated property vested in him absolutely or in legal right. The Federal statute did not, in time of war, in express language or by implication, confer on the custodian any higher power over property of the alien enemy than such alien enemy himself had in time of peace. Nor did the State statute make any distinction as to the requiring of refunding bonds in times of peace or in war.

These acts, then, are in accord and not in conflict, and are complementary instead of either repugnant or contradictory. The State statute simply defines when the beneficial interest of an alien enemy becomes his absolute separate segregated property and vests in legal right. It imposes a condition under which a distributee may legally acquire his segregated distributive share in the decedent's estate.

The Federal statute empowers the custodian to take such property as the alien enemy had, and prescribes remedies for the enforcement of the right. The Federal act did not, however, as contended by appellant (p. 37 appellant's brief), provide any further or additional remedies "for reducing that

interest to possession as the enemy might have had," and particularly did not give to the custodian a remedy whereby he could acquire possession of property in higher right of the alien enemy and in violation of the rights of the executors and trustees of a decedent's estate and of the creditors of such decedent.

It should be pointed out in this connection that the Federal act has not, as is assumed in the argument of convenience (appellant's brief, p. 33), "enunciated a national policy in regard to enemy interests in estates."

The purpose of the Federal act was to declare a war policy in regard to all enemy owned property and the interests of aliens in decedents' estates was but incidental thereto, and this because it was a form of property. Appellant, seemingly impressed with the consistent nature of the Federal and State statutes, did not urge as the reason for Federal supremacy either their repugnant or contradictory nature. He would seem to base his conclusion on that other well settled ruling as stated in the early case of *Prigg vs. Pennsylvania*, 16 Pet. 539, wherein it is said on page 617:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given matter, and in a certain form, it cannot be that the State legislatures have a right to interfere."

But this principle has no application to the legislation under present consideration for the reason that, contrary to the fact, appellant assumes that the Trading with the Enemy Act was intended for the purpose of establishing general legislation relating to the rights of alien enemies in estates of

decedents and for such purpose prescribed certain remedies for the enforcement of the rights. Of course, when the Federal Government has enacted a general statute regulating, in a comprehensive manner, a particular subject, e. g. pure food and drugs, or the regulation of the rates under the interstate commerce clause, or bankruptcy under that power, such legislation supersedes State statutes which embrace a similar subject-matter which is contradictory to the Federal act.

N. Y. C. R. R. vs. Winfield, (1917) 244 U. S. 147, *Mondou vs. R. R. Co.*, 1915, 233 U. S. 1, the so-called "Wire" cases just decided by the Supreme Court of the United States, and other cases cited in appellant's brief, are all cases of this character, and are decided on the theory that the Federal legislation was a general and comprehensive regulation of a particular delegated constitutional subject to which the State statute was contradictory.

It is submitted since the State statute places a limitation on a property interest of an alien distributee in the estate of a decedent, and since such limitation imposes liabilities upon executors and trustees of such estates and confers substantive rights upon creditors of such decedent, and since the Federal Trading with the Enemy Act in its general scope and purpose relates to enemy owned property and only incidently to the interest of an alien enemy in a decedent's estate, and since the Alien Property Custodian can acquire no higher right, title or interest in the alien owned property than that possessed by the alien enemy himself, that such Federal and State legislation are not contradictory or repugnant but, on the contrary, are consistent and reconcilable, and that both can be enforced and stand together.

III.

THE REFUSAL OF THE ALIEN PROPERTY CUSTODIAN TO EXECUTE SUCH REFUNDING BONDS, AND THE ASSUMED PRESENT NONENFORCIBILITY OF THE POWERS OF ATTORNEY, WOULD SEEM TO MAKE NECESSARY THAT THE SHARES OF THE ALIEN ENEMIES SHOULD REMAIN IN THE CUSTODY AND CONTROL OF THE COURT UNTIL THE TERMINATION OF THE WAR.

This proposition logically follows if this Court should be of opinion, as was the learned Vice-Chancellor, that the powers of attorney are not presently enforceable and that the State statute is consistent with the Federal enactment, and the Alien Property Custodian refuses to execute refunding bonds in accord with such State statute. It should be observed that the Alien Property Custodian, by the execution of the refunding bonds, does so only in a representative capacity, i. e., as a trustee at common law, as by the terms of the act he is defined to be. His liability is not personal, but only to the extent that funds come into his possession for which, as trustee, he is liable to account.

It should not be overlooked that while Congress may have the powers to confiscate the property of the alien enemy principals, the Federal act does not so provide. It is an act of sequestration. The Alien Property Custodian holds in interest of the Alien enemy only such property interests which the alien himself had. If the Alien Property Custodian refuses to comply with a condition or limitation, the performance of which will confer absolute property in the alien enemy or in one who claims in his right, then it would seem that such property should remain in the custody of the court until the termination of the war.

SUMMARY.

To deny validity to the powers of attorney in this case is, in effect, to interpolate into the act of 1917 words that are not there, to impute an intent that is not to be gathered from the words employed in the act, to ignore the rule of law existing at common law at the time of its enactment, to overlook established rules for the construction of statutes, and to disregard the decisions of the Courts of England which have enforced similar powers of attorney for collection of moneys, notwithstanding similar legislation enacted for the same purpose as was the Federal Trading with the Enemy Act of 1917.

It is to emasculate a written instrument, made in time of peace, not in contemplation of war and not against public policy, and without any advantage whatever accruing to the Government of the United States, but on the contrary to the impairment of rights of the executors of the will of the decedent of creditors of the decedent, of the attorneys-in-fact, and of the alien belligerents.

It is, moreover, to abrogate a State statute which confers rights upon executors and trustees of decedents' estates and upon creditors of such decedent, and which limits and defines property rights of distributees and which is not repugnant to nor in conflict with, a Federal statute.

It is submitted that since the Government of the United States is in no way injuriously affected, but on the contrary its interests better subserved, the executors of the will of this decedent have a right to be protected by the release and receipt of these attorneys-in-fact, who have been designated by the distributees to receive their respective shares of the

estate and to execute releases; that the attorneys-in-fact have a right to receive the distributive shares to the end of properly performing the duty imposed on them by the trust, which they have accepted; that the alien belligerents have a right to ask the courts of this country to apply the law as it existed at the time of the enactment of the act of 1917, as expressly declared therein; and that the executors and trustees of the decedent's estate, as well as the creditors of the decedent, have a right to insist that refunding bonds be executed and filed in compliance with the State statute, for the protection of their respective rights conferred by such statute.

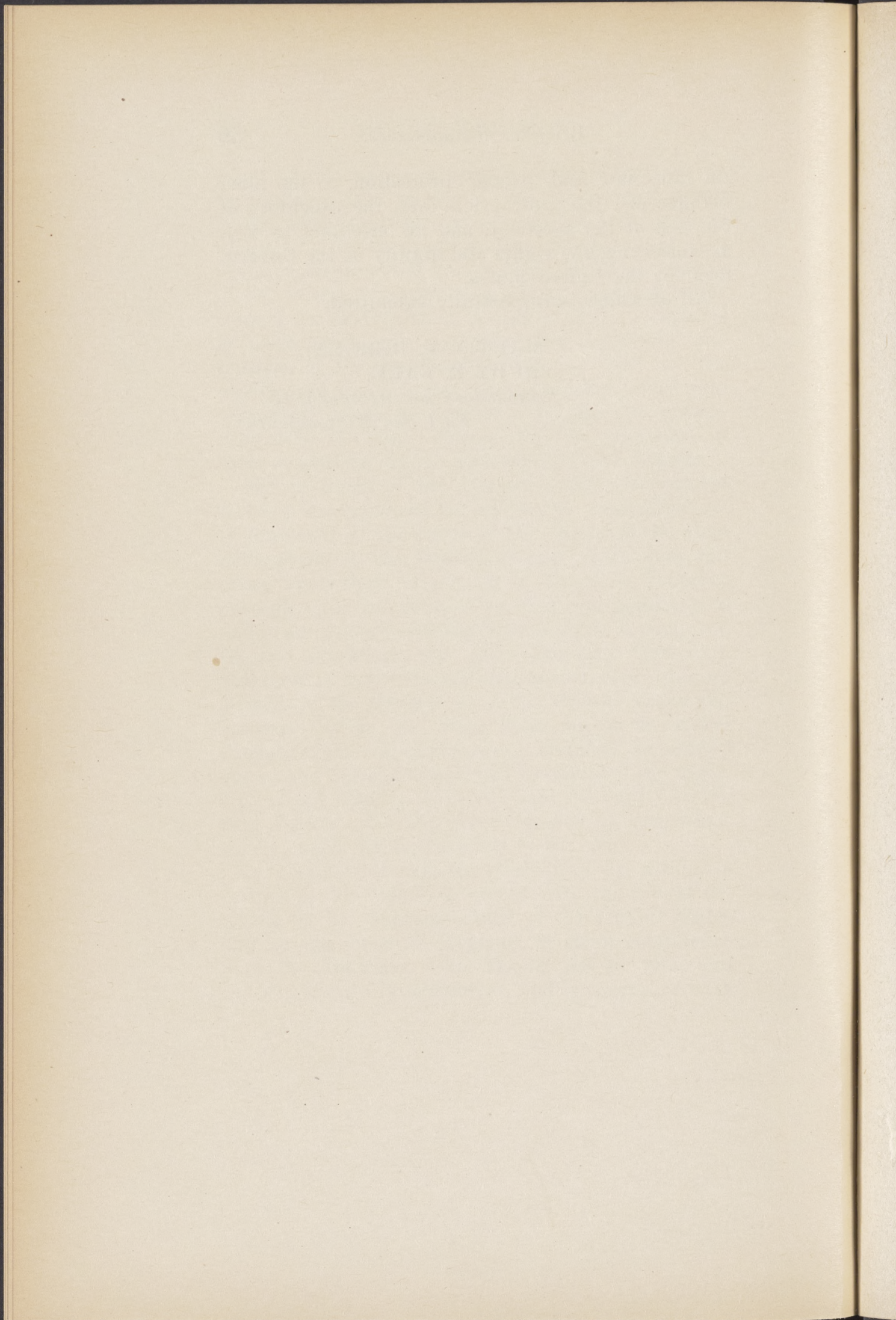
The interests of the United States Government will not be prejudiced but will be the more effectively protected by the award of the shares of the alien belligerents to the attorneys-in-fact, with duty imposed upon them to account to the Alien Property Custodian for the moneys so received, pursuant to and in accordance with the Federal Alien Enemy Act. By this procedure, the Alien Property Custodian will have to deal with the attorneys-in-fact, who are citizens of the Government of the United States and resident therein, and from them can be demanded custody of the respective shares, and thus, as pointed out by the English Court, will be obviated the necessity of any trading whatever with the enemy, or, in fact, dealing with him in any manner or form whatsoever, until the termination of the war.

It is submitted that the position of the attorneys in fact in this case is in accord with the law as declared by the Supreme Court of the United States and by the courts of England, in strict compliance with the American Alien Enemy Act of 1917, and the President's Proclamation, and is consonant with

the adequate and proper protection to the alien belligerents, the attorneys-in-fact, the executors of the will of the decedent, and his creditors as well as conserving the rights and dignity of the Government of the United States.

All of which is respectfully submitted.

MARTIN V. BERGEN,
RUBY R. VALE,
*Counsellors for Attorneys-in-
Fact and Respondents.*



NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
ALFRED J. KEPPELMANN ET AL,
trustees, etc., complainants, re-
spondents,

and

ERICH P. KEPPELMANN ET AL., DE-
fendants, respondents,

and

A. MITCHELL PALMER, AS ALIEN PROP-
erty Custodian, defendant, appel-
lant.

On Appeal
from Court
of Chancery.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal by A. Mitchell Palmer, as Alien Property Custodian, from a final decree of the chancellor, made November 15, 1918, on a bill for instructions filed by the respondents, Alfred J. Keppelmann and Edward M. Colie, as trustees of the will of the late Adolphus Keppelmann.

The testator gave the residue of his estate to his executors in trust. As trustees, they were directed to pay over certain parts thereof to Bertha von Borowsky, Pauline Adolphine Losch, and Louise

Pauline Schulz. These persons are "enemies" of the United States, as that term is defined in common law and in the "Trading with the enemy Act." (*Case, p. 35.*)

Prior to the war these beneficiaries executed instruments which purported to give to the respondents, Schulz & Ruckgaber, full power to collect the interests of these beneficiaries in this estate. (*Case, p. 33.*) The Alien Property Custodian, previous to the filing of this bill, determined these beneficiaries to be "enemies" under the "Trading with the enemy Act," and pursuant to the provisions of section 7 (c) of the act, made a demand upon the respondents, Keppelmann and Colie, as executors and trustees, that they should pay to him the shares of these enemies in this estate. (*Case, p. 9, line 1, and p. 24, line 31, to p. 25, line 12.*)

The trustees thereupon filed a bill for instructions as to whether they should turn over these shares to Schulz & Ruckgaber or to the Alien Property Custodian. (*Case, p. 1.*) The Custodian, by answer, prayed that the shares of the three enemies be paid over to him, in accordance with the "Trading with the enemy Act." (*Case, p. 24.*) The trustees refuse such delivery unless the Alien Property Custodian shall execute to them refunding bonds under section 78 of the Orphans' Court Act of New Jersey (3 N. J. Comp. Stat. 3837, as amended by ch. 180, Laws of 1912), a condition which the Custodian says can not lawfully be imposed upon him. (*Case, p. 49.*)

There is no controversy about the facts.

The question is whether the Alien Property Custodian by virtue of his demand became entitled forthwith and unconditionally to the possession of the enemy interests in this estate. It is urged that the chancellor erred in deciding that the Alien Property Custodian is not so entitled because:

I. By the "Trading with the enemy Act" Congress has given to the Alien Property Custodian the power to require an immediate and an unqualified compliance with his demand for enemy property.

II. The grant of power thus given by Congress to the Custodian is constitutional.

III. No state legislation can hinder or obstruct the operation of the "Trading with the enemy Act."

IV. Section 78 of the New Jersey Orphans' Court Act does not apply to demands by the Custodian for enemy legacies.

The appellant appeals from so much of this decree as adjudges that the appellant is not entitled to receive from the complainants the shares which in the proposed distribution of the assets of the estate would go to respondents, Pauline Adolphine Losch, Bertha von Borowsky, and Louise Pauline Schulz, unless he shall execute and deliver the refunding bonds required by the statutes of this State. (*Case*,^{p. 52} p. 68, lines 1 to 25.) The appellant also appeals from so much of the final decree as adjudges that the respondents, Carl Goepel, Max Ruckgaber, jr., and Paul Ruckgaber, partners constituting the firm of Schulz & Ruckgaber, who held powers of attorney from the

said Losch, von Borowsky, and Schulz, respectively, shall, upon receiving authority from their principals to execute refunding bonds, be entitled to receive the respective shares of their principals. (*Case, p. 68, line 26, to p. 69, line 23.*) The appellant says that the decree should have adjudged that, as Alien Property Custodian, he was entitled to receive the shares of the said Losch, von Borowsky, and Schulz, to be by him held, administered, and accounted for as provided by law; and that his right thereto is not subject to control by any statute of New Jersey.

It may be said here that no New Jersey creditors seek to protect their rights in this Court, nor is it alleged that there are creditors whose rights would be affected by this decision. Since the will was proved on February 15, 1913, the claims of creditors have no doubt been satisfied or barred by limitation.

Were there such New Jersey creditors, the Custodian would say that their rights are effectively safeguarded by section 9 of the "Trading with the enemy Act," and that the federal procedure adopted as a part of a measure designed to serve a high national interest must of necessity control and supersede previous state enactments for the protection of creditors of decedent's estates.

In fact, we say that the sole question before the court is whether the exercise of the sovereign belligerent powers of the nation may be nullified or interfered with by any State statute, especially one regulating procedure.

I.

By the "Trading with the enemy Act" Congress has given to the Alien Property Custodian the power to require an immediate and an unqualified compliance with his demand for enemy property.

The essential portion of the "Trading with the enemy Act" is section 7 (c), which as originally enacted on October 6, 1917, reads as follows:

(c) If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

The power of the President under this section has been vested in the Alien Property Custodian by Section XXIX of the Executive Order of October 12, 1917, pursuant to the provisions of the act.¹

¹ XXIX. I hereby vest in an alien-property custodian, to be hereafter appointed, the executive administration of all the provisions of section 7 (a), section 7 (c), and section 7 (d) of the trading with the enemy act, including all power and authority to require lists and reports, and to extend the time for filing the same, conferred upon the President by the provisions of said section 7 (a), and including the power and authority conferred upon the President by the provisions of said section 7 (c), to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other properties owing to, or belonging to, or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the trading with the enemy act, which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held.

Section 7 (c) of the "Trading with the enemy Act" contains no qualifications on the duty of those holding enemy property to turn it over to the Alien Property Custodian other than these: (a) That the property shall, after investigation, have been determined by the President to be enemy owned. (b) That the President shall require the property to be turned over. There is no qualification in section 7 (c) to the effect that the demand need not be complied with if state laws permit the demandee to retain the property or debt demanded. The words of section 7 (c) are, moreover, strengthened by a consideration of other sections of the "Trading with the enemy Act." Examination of the "Trading with the enemy Act" and its basic policy show clearly that the omission of any reference in section 7 (c) as to the effect of state laws on the duty to turn over enemy property was intentional and with a view that these laws should not be applied.

Section 8 (a) provides that persons holding mortgages, pledges, or liens on enemy property entitling them to dispose of the property may continue to hold the property and dispose of it on default.¹

¹ SEC. 8. (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: * * *

If section 7 (c) had not been intended to apply to cases where state laws permit the retention of the property, section 8 (a) as applied to liens arising by operation of law would be surplusage. Since Congress thought it necessary to provide specifically for holders of possessory liens, it is a reasonable inference that retention for other reasons was not contemplated.

It is expressly provided in section 7 (e) that "No person shall be held liable in any court for or in respect of anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this act." And it is furthermore provided in the same section that "Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same."

The provisions of section 7 (e) are a corollary to the requirements of section 7 (c). The immunity clause with which section 7 (e) begins is all inclusive, and together with the first sentence of the next paragraph gives complete protection to any person who complies with the requirement of the President made under section 7 (c).

Section 9 provides a means whereby any person who is aggrieved by the order of the President has his remedy, whether the grievance may arise out of any right or claim which he has in the property itself or by virtue of any debt which may be enforced against the property. Section 9 of the act also provides that

except as provided in the act no money or other property in the hands of the Alien Property Custodian shall be liable or subject to any order or decree of any court.¹

¹ SEC. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; and the President, if application is made therefore by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

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 shall not apply, however, to money paid to the Alien Property Custodian under section ten hereof.

The purpose of the act is to provide an exclusive procedure for dealing with enemy property in the United States.

Let us now see how Congress in the amendments to the "Trading with the Enemy Act" has given effect to this exclusive procedure.

The administrative powers of the Alien Property Custodian are found in section 12 of the act. The original enactment read that the Alien Property Custodian should be vested with all the powers of a common-law trustee in respect of all property "which shall come into his possession in pursuance of the provisions of this act." The amendment of March 28 changed this provision in a radical way. The language of the amendment is: "The Alien Property Custodian shall be vested with all the powers of a common-law trustee in respect of all property other than money which has been or shall be, *or which has been or shall be required to be conveyed*, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this act." Congress by this change in the law expressly placed all property within the power of the Alien Property Custodian upon the issuance of his requirement as fully and completely as it was so placed by the original enactment when actually transferred and delivered.

Finally, in order conclusively to settle any doubts as to the intention of Congress, it enacted by the amendment of November 4, 1918, that—

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, trans-

ferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

And section 16 imposes penalties, among other things, for the willful violation, neglect, or refusal to comply with any order of the President issued in compliance with the provisions of the act and provides for the forfeiture of property concerned in such violation.

The whole doctrine of confiscation is built upon the foundation that is an instrument of coercion. It is a powerful economic weapon appropriately placed in the hand that holds supreme command of the military weapon; it deprives the enemy of property which would otherwise be within reach of the power of the enemy, and, at the same time, furnishes to the capturing power means for carrying on the war. Let us, therefore, emphasize that the property embraced in the demand of the Alien Property Custodian in this case, is property belonging to the class which, if left free and in the hand where it rested at the time of the demand, is in legal contemplation within the reach of the power of the enemy.

Congress, aware of this danger and of its gravity, enacted prohibitions to be enforced with severe penalties against trade, communication, and intercourse

with the enemy, but it was not willing to assume that the danger would be avoided by any means short of actual capture. It therefore, in the due exercise of its power to make rules respecting captures, conferred upon the Commander in Chief absolute power to require transfer and delivery of enemy property to the Alien Property Custodian. It required the Commander in Chief, as a condition to the exercise of this power, to make an investigation and reach a determination of enemy character and enemy ownership but the power of investigation and determination was placed in the Commander in Chief alone. We say in the hands of the Commander in Chief alone, because there is not in the statute to be found any provision for the review or reversal of the determination of the Executive.

Congress alone is vested with the power of raising armies. If Congress so prescribes, personal liberty must be surrendered and obligations undertaken which may and do result in the loss of life. No toleration would be given to the suggestion that the courts are free to interfere in the exercise of these powers. What then is the basis of the suggestion that the courts have some inherent power—none is conferred by the terms of the act—to supervise, review, or restrain the exercise of the constitutional power in Congress to regulate captures of property? It has ever been true of the English-speaking people that liberty and life enjoy greater protection under the law

than does property. The suggestion would not be tolerated that the courts guard more jealously the rights of the citizen in and to property than his rights to his liberty and his life.

Furthermore, the capture of property is inherently an Executive not a judicial act. The fact that judgment is required does not determine that the act is necessarily judicial. To the contrary, the Executive can investigate and determine the facts in matters committed to the Executive judgment as effectively and conclusively as can the judiciary where its power is invoked.

Turning again to section 7 (c) of the Trading with the enemy Act, we at once see that it is the character of the ownership which supports the power of capture. The ownership must therefore be determined and the character (whether friend or enemy) of the owner. These determinations are committed to the Executive. It was contemplated by Congress, of course, that there would be inconsistent and disputed claims of ownership. Such claims have existed since the institution of private property. But Congress was unwilling that a disputed claim of ownership should prevent the power of capture in those cases where the Executive had investigated and reached a determination. The conception was that property determined by the Executive to be owned by an enemy was in danger of being availed of by the enemy unless placed beyond the reach of the power of the enemy.

Congress realized that time is an element in the prosecution of war. It might have conferred the power of determination on the judiciary if, in its wisdom, it had seen fit; but it chose to confer the power upon the Executive and to make the courts an auxiliary power to aid—not obstruct—in the enforcement of the demands of the Executive. And there is nothing strange in this conception. The prisoner must be arrested before he can be tried. He may have *habeas corpus* after he is arrested but not injunction to prevent his arrest. Time out of mind, captures on the water have been made without prior judicial investigation. Capture on the water indeed is essential to the jurisdiction of the prize courts, and was held to be jurisdictional in the proceeding to confiscate in *Miller v. United States*, 11 Wall. 268.

Analysis of the various sections and of the basic policy of the Trading with the enemy Act makes clear that, except as provided in the Act itself, a person from whom property has been demanded must turn over the property to the Alien Property Custodian; that in turning over this property he is to be protected as against all persons; and that all contentions as to the right of the Alien Property Custodian to hold this property are to be settled in the Federal courts under the terms of section 9.

In the words of Judge Knox in *Salamandra Insurance Company v. New York Life Insurance and Trust Company*, recently decided in the United States District Court for the Southern District of New York, (254 Fed. Rep. 852)

“the Alien Property Custodian, having determined that the fund in question is alien owned, and even though that conclusion may be founded upon evidence which would appear to this court to be insufficient, the determination of the Custodian, so long as it is not reached in bad faith, must determine the possession of the fund.”

II.

The grant of power thus given by Congress to the Custodian is constitutional.

A. *This grant of power is a valid exercise of the war power of Congress.*

Congress in enacting the Trading with the enemy Act exercised the war power and not the municipal or civil power. Let us therefore note in the beginning those broad distinctions between the war power and the municipal or civil power, which are fundamental and universally acknowledged to exist.

The Constitution, which created the Government of the United States, granted both powers in separate provisions appropriate to each, but the provisions of neither apply to the other. These powers—war and municipal or civil—differ even as war differs from peace. The civil or municipal power is, of course, the normal power because peace is the normal condition. In the grant of the civil or municipal power there is distribution between the legislature, the executive, and the judiciary, with appropriate checks and balances and express limitations, such as the

due process clause of the fifth amendment. The war power is conferred in the provisions authorizing Congress to declare war, to raise armies, to create a navy, to grant letters of marque and reprisal, and to make rules respecting captures on land and water. It is found again in the provision which makes the President *ex virtute officio* Commander in Chief of the military forces. The war power, furthermore, is of necessity an inherent power in every sovereign nation. It is the power of self-preservation, and that power has no limits other than the extent of the emergency. Moreover, of that emergency and the measures necessary to meet it, Congress is the sole judge in the field of legislation and the Commander in Chief in the field of action.

In a state of war every citizen becomes a belligerent, and his duty as a belligerent may, during the emergency, supplant and suspend what would be his rights as a citizen in a state of peace.

In construing the war power conferred by the Constitution, it must be remembered that the Constitution itself was one of the fruits of the victory in the war for independence. The framers of the Constitution knew by bitter experience the hard realities and stern necessities of war. They knew that war is a contest of force; that victory in war depends upon a preponderance of men, material, and money—upon relative strength and endurance. They dared not frame a Government to take its seat as a member of the family of nations with less power than other nations to command every element

of strength. If its power should be less in any respect than that of other nations, it must inevitably succumb in case of conflict. The war power conferred upon the Government was solely in the interest of the citizen and for the protection of his citizenship—for of what value would citizenship be in a nation which could not exercise all the powers available, to the end that it might survive, and surviving, perpetuate the privileges of its citizenship?

We have seen that Congress has power to raise armies. This power and the other war powers mentioned are free from express or implied limitations or conditions. The power to raise armies includes the power to impose compulsory military service in the armies. If Congress so prescribes, the citizen must surrender his liberty to the discipline and command of the Commander in Chief, put off the garb of a civilian, put on the uniform and equipment of a soldier, and go forth, if so commanded, to the ends of the earth and yield up his life in battle. (See *Selective Draft Cases*, 245 U. S. 366.)

We turn now to the particular war power immediately pertinent and universally recognized by the nations of the earth—the confiscation of the private property of enemy individuals. The express power in the Constitution to make rules respecting captures on land and water includes, of course, the power to confiscate the property of enemy individuals.

There has recently been decided, after exhaustive argument before the United States District Court for the Southern District of New York, the case of

Salamandra Insurance Company v. New York Life Insurance and Trust Company, which interpreted the (254 Fed Rep. 85) "Trading with the enemy Act" and the powers of the Alien Property Custodian thereunder. In this case the Alien Property Custodian had served upon the defendant corporation a demand under the provisions of section 7 (c) of the act, which, after reciting that the Custodian had determined the Salamandra Insurance Company to be an enemy, and that the sum of approximately \$35,000 in cash and Liberty bonds of a par value of \$80,000 were due by it to the insurance company, required that the trust company forthwith pay and transfer the money and the property to the Alien Property Custodian. The insurance company made a motion for injunction *pendente lite* against compliance with the demand made by the Alien Property Custodian on the ground that the property demanded was not in fact enemy owned. The court denied the injunction *pendente lite*. From this order of the court no appeal was taken by the plaintiff, and it has since complied in full with the demand of the Custodian.

Judge Knox in this case discussed in considerable detail the nature and extent of the Congressional war powers involved in the Trading with the enemy Act. He said on this point:

As to the power of Congress to address itself to legislation looking to the seizure of alien-enemy owned property, there is no need of discussion. The war legislation of Congress, from

the time of the Revolution to the present, indicates the power of Congress in the premises.

See resolution regarding alien property, November 27, 1777, IX Journal of the Continental Congress, 971 (p. 212); resolution regarding the seizure of property belonging to alien enemies, October 22, 1778, XII, id., 1036 (p. 222).

* * * * *

I am unable to see any difference in principle between the seizure of the person of an alien enemy in our midst and the seizure of his property; the latter may, by the use to which it may be put, be quite as dangerous as the former. The seizure of both may be essential to the safety of the community. If we assume this to be true, and Congress has by appropriate action provided for such contingency, and haste and speed which are exercised in the seizure become of the highest importance, and, it would be an incongruous situation—indeed, it would be intolerable—that, pending a determination of a dispute between the possessor of property determined by a responsible official to be alien-owned and the office making the demand, the property in question should remain in the possession of him against whom the demand is made. The effectiveness of a seizure in such circumstances would be greatly impaired, if not wholly destroyed.

I do not apprehend that any one would argue that this court should exercise its extraordinary powers of injunction to restrain the marshal from executing a presidential

warrant issued for the arrest of an alleged alien enemy, even though it was asserted by such person that he was a citizen or a friendly alien. Once the warrant was executed, the person arrested would, upon *habeas corpus*, be heard upon the question of his citizenship. If the determination of the Executive can, in the first instance, deprive an individual of his liberty, I am unable to see why it should be that property should enjoy any greater rights as respects its possession, once the Executive has determined it to be alien-owned.

The power exercised by Congress in the enactment of the trading with the enemy act is, I suppose, by reason of its dealing with the subject matter of alien enemies, who exist only in times of war, based upon the war power of Congress. The power of Congress to declare war carries with it all the powers which are necessary to make the war so declared effective.

* * * * *

What, can it be asked, is, in the present days, more appropriate to the effective carrying on of war than to seize, and thus render impotent, the money and property determined by the Executive to be owned by alien enemies?

In *Brown v. United States* (8 Cranch, 110) Chief Justice Marshall in unequivocal language declared the existence of the power of the sovereign to take the persons and confiscate the property of the enemy wherever found.

It follows that wherever the enemy is present, and where his property is situated, Congress may determine there exists the element of danger, and to the extent of the jurisdiction of Congress the power exists not only of seizure but of disposition to the limits of the necessity. *Miller v. United States* (11 Wall. 268).

B. *There is no want of due process.*

It has been squarely held by the Supreme Court of the United States that the fifth amendment to the Constitution—commonly called the due process clause—does not operate against the exercise of the war power. In the case of *Miller v. United States* (11 Wall. 268) the court said:

But if the assumption of plaintiff in error is not well made; if the statute were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the ^{sovereignty} ~~Government~~ of the United States; if, on the contrary, they are an exercise of the war power of the Government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been ^{conceded} ~~considered~~ in the argument.

It follows, therefore, that any further discussion of the constitutionality of the act might be considered superfluous. We wish, however, to point out that in so far as is consistent with the national defense, Congress has been most careful to protect those persons not enemies in their rights. Con-

gress recognized the justice of making provisions for the rectification of possible mistakes and providing remedies for just and proper claims. It, therefore, enacted section 9, which provides a simple, expeditious, and inexpensive remedy by Executive relief, and which further allows any claimant failing to obtain Executive relief or preferring not to seek it, his relief in the Federal courts. That remedy is adequate and complete. But let it be noted that it is not available except in respect to property actually conveyed, transferred, delivered, or paid over and held by the Alien Property Custodian or by the Treasurer of the United States. The courts are shut to those who would obstruct the Executive in the prosecution of the war; they are at once open to those who comply with Executive demands.

Looking to the whole situation presented by the "Trading with the enemy Act" and by the case in hand, the decision in the case of *Haycraft v. United States* (22 Wall. 81) is of peculiar interest. This case involves the right to sue for return of property taken under the captured and abandoned property act of 1863. The plaintiff contended that he was not restricted to the remedy provided by that act. The court, speaking through Mr. Chief Justice Waite, denied the validity of this contention. The two quotations which follow bear on the reason for the remedy provided by that act and the exclusiveness of this remedy.

In the indiscriminate seizure which was likely to follow such an authority, it was anticipated that friends as well as foes might

suffer. Therefore, to save friends, it was provided that any person claiming to have been the owner might, at any time within two years after the suppression of the rebellion, prefer his claim, and upon proof of his ownership and loyalty, receive the money realized by the United States from the sale of his property. That expresses all there is of the trust or the remedy provided.

There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemy's property on land. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and in such cases the remedy provided is exclusive of all others. The demandant in this case neglected to avail himself of the remedy provided and, consequently, he is now without any. That remedy was the only one of which the Court of Claims or any other court has been authorized to take jurisdiction. It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided.

It is of peculiar interest because the captured and abandoned property act provided for Executive seizure without judicial aid or interference. The court coming to construe and apply its provisions said: "In the indiscriminate seizure which was likely

to follow such an authority, it was anticipated that friends as well as foes might suffer." This did not contain any suggestion of any impropriety or possible illegality in the enactment or in its enforcement. To the contrary, the court in further elucidation of the provisions of the statute said: "Therefore, to save friends, it was provided that any person claiming—might prefer his claim, and upon proof of his ownership and loyalty, receive the money realized by the United States from the sale of his property." There was not in that act any provision such as that in the amendment of November 4, expressly confining litigants to the remedies provided by the act, but the court, nevertheless, following settled principles of interpretation, held that the remedy provided by the statute was necessarily exclusive.

Judge Knox in the Salamandra Insurance Company case commented on section 9 as affording due process thus:

And in the present legislation, at least so far as it affects the case at bar, there is no contravention of the fifth amendment of the Constitution. The very act, in section 9 thereof, contemplates the possibility of mistaken action upon the part of the Custodian, and to the end that no loyal citizen or friend shall be deprived of his property without due process of law, the section reads * * *

Judge Knox, after quoting the section in full, continues:

Under the provisions of this section the rights of a person who is not an enemy or ally of enemy are adequately protected. If the

property which has come into the hands of the Custodian belongs to a citizen of the United States, or indeed to a friendly alien, the title of such person thereto is not finally divested. Any title which vests in the Custodian will be defeasible in its nature. Whether the defeasance, if it may be called such, shall operate will depend upon the outcome of the proceedings to be instituted by the citizen or friendly alien, who, in appropriate proceedings under section 9, asserts title to the property. Pending a determination of the issues arising in such proceedings, the possession at least, and perhaps a defeasible title, is in the Custodian, and as an administrative matter I do not see where else it could be if the act is to have any salutary effect in the way of rendering enemy property unavailable for the purpose of the enemy.

That a citizen or friendly alien will, by such an enforced surrender of property wrongly determined by the Custodian to be enemy in its character, be subjected to inconvenience, annoyance, and possible expense, goes without saying—the justification for these considerations must be the purpose intended to be served. They are, in the final analysis, but incidents to the operation of a protective and preventive measure which has for its purpose the protection of the Nation.

Section 9, so far as it relates to suits in the Federal courts and so far as it is applicable to this case permits a suit by a nonenemy creditor for a liquidated claim against any debtor whose property has been

taken under the "trading with the enemy act." It is well-settled law that a legatee is liable to creditors of the estate out of which he receives his legacy for a ratable proportion of the debts of the estate. The orphans' court act recognized and enforced this liability by requiring the executor to take a bond from the legatee or distributee and permitting the creditor to sue on that bond. It did not create a new right in the creditor; it merely provided him with a statutory instead of an equitable remedy. (See *Coddington v. Bispham* (1882), 36 N. J. Eq. 224, and *Pratt v. Brody* (1897), 55 N. J. Eq. 181.)

Section 9 of the "Trading with the enemy Act" creates no rights; it is a remedy to enforce existing rights in respect to property taken over by the Government. It follows, therefore, that if, under the "Trading with the enemy Act," the statutory remedy is suspended, or if, as we shall show at a later place, the New Jersey statute does not cover distributions made to the Alien Property Custodian acting in the exercise of a public right, there is no destruction of the fundamental right of these creditors, but merely a change in the remedy by which they enforce their claims.

If, then, the creditor has a remedy under section 9, may this remedy be postponed until the property has actually been turned over to the Government? In this connection it is first to be noted that the necessity for the actual possession of enemy property by the United States is of the utmost importance and that the interest of persons who may have failed to

present their claims to the executors before final distribution are of rather small importance as compared with a claim of ownership by an American citizen.

Nevertheless in the Salamandra decision the court held that even where the person seeking to prevent property being turned over claimed to be the owner thereof, his remedy should and must be postponed until that event.

The purpose of the "Trading with the Enemy Act" would be nullified if the Government before taking possession of enemy property were put to the delay resulting from litigation with every person who urged some claim to the property, while the property remained in possession of the enemy. In this connection the cases involving the collection of Federal taxes by Executive action are significant.

In the case of *Murray v. Hoboken Land Company* (18 Howard 274; 59 U. S. 373) the Supreme Court held that an act of Congress authorizing a warrant to be issued without oath against a public debtor for ~~for~~ the seizure of his property was valid, that the *warrant was conclusive evidence of the facts stated in it*, and that the proceeding was due process of law. This view was reaffirmed in the case of *Springer v. United States* (102 U. S. 586), and it was there said:

The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress or

the people who make congresses to see that the evil was corrected. The remedy does not lie with the judicial branch of the Government.

The case of *Dodge v. Osborn* (240 U. S. 118) is particularly applicable to the present case in that there was involved there the question of the constitutionality of the tax which the collector was seeking to enforce. Even under those circumstances the Supreme Court of the United States was of the opinion that the interests of the Government required payment of the tax before the question as to its constitutionality could lawfully be determined. It said in this connection:

The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * *Cheatham v. United States* (*Cheatham v. Norvekl*), 92 U. S. 85, 88, 23 L. Ed. 561, 582, and again in *State R. Tax Cases*, 92 U. S. 575, 613, 23 L. Ed. 663, 673, it was said by this court that the system prescribed by the United States in regard to both customs duties and internal-revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues

* * * * *

There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes, and giving a right to sue in case of his refusal to refund, are wanting in due process, and therefore there is jurisdiction. But we think it suffices to state that contention to demonstrate its entire want of merit.

The application of the doctrines laid down in the decisions dealing with the taxing power to the situation produced by the demand of the Alien Property Custodian under section 7 (c) of the "Trading with the Enemy Act," was clearly set forth by Judge Knox in the *Salamandra* case. He says:

The situation presented by this case, assuming the contention of the complainant to be justified, is no more rigorous, I may say harsh, than it would be if the taxing authorities of the Government should assess a tax against the complainant the authority for which assessment the complainant disputed. The collector, for instance, of internal revenue would issue a warrant under which the chattels of the complainant, however just its claim for immunity from the tax so assessed and collected might be, nevertheless, in order to recover the chattels distrained, would be forced to bring suit against the collector, and thus subject itself to inconvenience, annoyance, and expense. However, by decisions too numerous to cite the courts have uniformly held that the revenues of the Government are too important for the

carrying on of governmental activity to permit, prior to the collection of the tax, of lawsuits in which the correctness of the construction of the tax gatherer of the provisions of the statute under which he acts is determined. The insolvency of the sovereign is unthinkable. Money wrongly collected may be recovered, and as a matter of policy the interests of the Government in such matters take precedence over the rights of the citizen. If this be true even in times of peace, it certainly should be true, and I think it is, in time of war, when the subject matter is properly asserted by a responsible Government officer to be that of an enemy.

III.

No State legislation can hinder or obstruct the operation of the "Trading with the enemy Act."

This follows as a logical consequence from the fact that the "Trading with the enemy Act" is, as we have seen, an exercise of the power expressly granted by the several States to the Government of the United States to declare war, to raise armies, to create a navy, to grant letters of marque and reprisal, and to make rules respecting captures on land and water—commonly known as the war powers. It is unnecessary to cite authorities to show that this power granted to the Federal Government is supreme and controlling, and any State legislation must fall which is inconsistent with a Federal statute which is an exercise of this Federal power.

Indeed this principle has been extended so that it is well-established law that even though a congressional enactment does not expressly cover a particular situation and is not in words ⁱⁿ consistent with a State statute, yet if Congress has clearly expressed its intention to legislate on the whole of a subject of national importance, State legislation can neither add to nor subtract from the powers or duties, rights, or remedies which the Federal statute establishes.

A striking illustration of this doctrine may be found in the case of *N. Y. Central R. R. Co. v. Winfield* (1917) (244 U. S. 147). The Federal employees liability act provided that a remedy was to be given under that act where an employee engaged in interstate commerce was injured through the negligence of the railway carrier. A New York workman's compensation statute provided for the recovery of compensation to railway employees regardless of the carrier's negligence. Under this statute the State workman's compensation commission awarded the defendant in error compensation. In denying the power of the State to make this award, the court said as follows:

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mis-

take to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania* (16 Pet. 539, 617; 10 L. Ed. 1060, 1089), "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it can not be that the State legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

The "Trading with the enemy Act" is an exercise by the Federal Government of its power to deal with the capture of enemy property. It is an exercise of power which resides solely in the Federal Government. It provides for a mode of determining what is enemy property and prescribes the manner in which such property shall be sequestered and administered, and prescribes a method by which persons who may suffer injuries through its application may obtain relief. The propriety and the necessity of undelayed and unhindered sequestration is obvious. Congress proposed to cover the field of dealing with enemy property in the United States; it

can not be contended that Congress had any intention of permitting the States to regulate the conditions under which the Federal Government may capture enemy property.

Nor is it an answer to the appellant's contention that the "Trading with the enemy Act" excludes from operation section 78 of the New Jersey Orphans' Court act to say that the New Jersey statute is an exercise of the State's right to regulate the disposition of a decedent's estate. Almost every State law which has been declared unconstitutional on the ground that it interfered with Federal powers was enacted in the exercise of some acknowledged State power, such as taxation or police power. This fact has never deterred the Supreme Court of the United States from uniformly deciding that the powers of the State are subordinate to the power of the Federal Government.

A striking illustration of the supremacy of Federal powers over State powers is afforded by the situation which exists as to the right of aliens to inherit or dispose of real estate. The States have undoubted power to control the ownership and disposition of real estate within their borders; nevertheless, when Congress in the exercise of its treaty-making power has declared that aliens shall be entitled to hold and dispose of real estate under conditions other than those provided in the laws of the several States, it is well established in the decisions that the State power of dealing with real estate

is suspended in so far as it conflicts with the Federal treaty power.

Hauenstein v. Lynham (1880), 100 U. S. 483; 25 L. Ed. 268.

Geoffroy v. Riggs (1890), 133 U. S. 258; 33 L. Ed. 642.

Bahaud v. Bize (C. C. D. Neb. 1901), 105 Fed. 485.

It follows that if Congress has enunciated a national policy in regard to enemy interests in estates, every State policy in regard to this subject must give way to the will of the Nation. As was said in *Mondou v. N. Y., N. H. & H. R. R. Co.* (Second Employers' Liability Cases, 223, U. S. 1, pages 55 et seq.):

When Congress in the exercise of the powers confided to it by the Constitution adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected accordingly in the courts of the State.

IV.

Section 78 of the New Jersey Orphan's Court Act does not apply to demands by the Custodian for enemy legacies.

A. *Section 78 is procedural and does not limit the property rights of legatees.*

We have suggested previously that section 7 (c) provides a distinct mode of procedure open to the Alien Property Custodian for reducing into his

possession enemy interest in property. It follows that the Alien Property Custodian is not limited to such remedies as the enemy, if he were able to enforce his right, might be entitled to employ. In view of the almost universal prohibition of suit by enemies, it is obvious that the Trading with the enemy Act could not be enforced if the Alien Property Custodian were deemed to succeed to the rights of the enemy, subject, however, to his personal disabilities.

When the Vice Chancellor states that the Alien Property Custodian takes the enemy interest *cum onere*, he fails to distinguish between the interest of the enemy in the property and the procedure by which he may collect it. Thus if a State statute declares that property shall not descend to alien enemies, the Alien Property Custodian can not acquire any interest in a bequest to a person within that class, since the enemy himself has no interest in the bequest, but if the enemy has a valid cause for action the Alien Property Custodian may take over that cause of action, and his right to prosecute is not affected by the fact that the enemy could not have brought such an action during the war. See *Rothbarth v. Herzfeld* (1917) (179 App. Div. 865), where Shearn, J., in the course of his opinion said, on this point, as follows:

Since the motion was made an Alien Enemy Property Custodian has been appointed by the President under the trading with the enemy act. Upon the situation being called

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to his attention, that official may intervene, and take over and continue the prosecution of the action, but it certainly can not be further prosecuted by or in the interest of these plaintiffs.

The provision as to the refunding bond contained in section 78 of the New Jersey statute is a mere matter of remedy. It is to be noted in the first place that it appears in an act dealing solely with practice and procedure; in the second place the act does not make it unlawful for a legatee to receive a legacy without executing a refunding bond; it simply permits the executor to withhold the legacy until bond is given. If the legatee receives the legacy without a refunding bond, his liability to creditors of the estate is the same as if the refunding bond statute had never existed. This point was made clear in the case of *Pratt v. Brody* (1897) (55 N. J. Eq. 181), where the court said:

The liability of legatees is an equitable liability independent of the statute, and is not a legal liability, except to the extent provided by statute under our orphans' court act, section 67. And the complainant, being sole legatee, who, as appears by her bill, has taken possession of all the assets of the estate after paying all the claims presented to her as executrix, the statutory method of enforcing the liability of the legatee does not appear to be applicable.

So, in the present case, when we consider the existence of the Trading with the enemy Act, and the necessity thereunder of an unqualified compliance

with the demand of the Alien Property Custodian, and the exclusive remedy given by section 9 of that statute, the conclusion can not be escaped that "the statutory method of enforcing the liability of a legatee does not appear to be applicable" to the situation in hand.

Looking at the matter from a slightly different point of view, since section 7 (c) is a distinct mode of procedure not open to the enemy, it follows that the procedure under section 7 (c) must be determined by the provisions of the Trading with the enemy Act and can not be qualified by the limitations which a different procedure might impose upon the enemy. In the present case the enemy acquires his right to the property through the laws of testate or intestate succession of the State of New Jersey. His mode of collecting it from the executor, if he was still in a position to collect it in person, would be covered by section 78, etc., of the orphans' court act. The right of the Alien Property Custodian to collect this interest is not based on the duty of the executor under the New Jersey law to turn it over to the legatee, which subjects this duty to the condition that the legatee give a refunding bond; but this right is based on the duty under the trading with the enemy act resting upon an executor or trustee who holds enemy property for, on account of, or in behalf of an enemy on demand to deliver such property to the Custodian. This duty arises solely by virtue of the Trading with the enemy Act and does not depend for its effectiveness upon State statutes; nor can its

enforcement be limited or qualified in any manner except as the Trading with the Enemy act itself may provide. This duty by the terms of the Federal act is unconditional and unqualified.

In short, while the Alien Property Custodian acquires no greater interest than the enemy had in the property, he is not limited to such remedies for reducing that interest to possession as the enemy might have had, but may and does rely upon the procedure set forth in the Trading with the enemy Act.

B. The term "person" as used in Section 78 does not include the United States as represented by the Alien Property Custodian.

It would seem to be clear from the previous discussion that the provisions of the "Trading with the enemy Act" must override any State law which seeks to deal with enemy property in the United States.

But some consideration will disclose that the section of the orphans' court act on which Vice Chancellor Lane based his opinion has no application to the case at bar. Let us consider the language of this section so far as it is pertinent.

Every executor or administrator on the payment of any legacy or distributive share (P.L. 1912 p. 276)
to the person entitled to the same shall take a refunding bond therefor; * * * and any creditor who may be barred by virtue of any decree of limitation, may, by order of the orphans' court, bring suit on such refunding bond in the name of the executor or adminis-

trator, * * * *provided* that nothing herein contained shall enable any person to recover any debt or demand barred by any limitation other than said decree; *and provided also*, that where any legacy or distributive share is payable to any executor, administrator, guardian or trustee it shall be an absolute bar in any suit for the recovery of said legacy or distributive share on any refunding bond given by said executor, administrator, guardian or trustee that prior to the commencement of said suit, the moneys or property so received by said executor, administrator, guardian or trustee have been lawfully paid over or distributed and that said executor, administrator, guardian or trustee has taken ~~into~~ the name of the executor or administrator of the original decedent refunding bond or bonds therefor. * * *

It is well-settled law that the term *person* in statutes limiting rights or remedies does not apply to the sovereign unless it is expressly named therein or included by necessary implication. As illustrations of this doctrine see for example:

United States v. Wilson (1823), 8 Wheaton, 253.

United States v. Hoar (1821), 2 Mason, 311; Fed. Cas. No. 15373.

United States v. Hewes (1840), Crabbe, 307; Fed. Cas. No. 15359.

United States v. Backus (1853), 6 McLean, 443; Fed. Cas. No. 14491.

McKnight v. United States (1904), 130 Fed. 659.

Trustees of Public Schools v. City of Trenton (1879), 30 N. J. Eq. 667.

The last cited of these cases was argued before this honorable court. ~~of chancery~~. The question presented was whether a provision of the charter of the city of Trenton making taxes imposed on land a lien paramount to prior judgments, mortgages, and other incumbrances applied to a mortgage in which the State of New Jersey was mortgagee. The court decided that the statute did not by its terms apply to the State. We quote from its opinion:

The common-law doctrine is that where the King has any prerogative, right, title, or interest, and the statute is general, he shall not be barred of them by the general words of the act, for the King shall not be bound unless the statute is made by express words to extend to him. (*Magdalen College Case 11, Co. 74; Plowden, 239; Bac. Abr. Statutes (E).*) Independently of any doctrine founded on the notion of prerogative, the same construction ought to prevail, founded upon the legislative intent. Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be reached, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put a construction on a statute which would affect its rights. (*United States v. Hoar, 2 Mason, 314.*) The statute of limitations, which most effectively puts an end to and determines the rights of private individuals, by lapse of time, will be inoperative as against the Crown or the State suing for the enforcement of its rights in

property, unless it is specifically named therein. (*Lambert v. Taylor*, 4 B. & C. 138; *United States v. Buford*, 3 Pet. 12; *United States v. Hoar*, 2 Mason, 314; *People v. Gilbert*, 18 Johns. 227.) A discharge under the bankrupt or insolvent laws will not release the debtor from any of his obligations for debts due to the Crown or to the State, for the reason that the public is not bound by statutes of this kind, unless expressly mentioned. (Anon. 1 Atk. 262; *United States v. Nelson*, 8 Wheat. 253; *Glenn v. Humphreys*, 4 Wash. D. C. 424; *People v. Rosseter*, 4 Cow. 143. * * *.)

In *United States v. Hoar* (1821) 2 Mason 311, 15 Fed. Cas. No. 15373, Justice Story considered the applicability of a State statute of limitations to a suit by the United States. He discussed the underlying basis of the rule as follows:

But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different and often contrary force to the Gov-

ernment itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law that the general words of a statute ought not to include the Government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.

United States v. Greene (1827) 4 Mason 427, 26 Fed. Cas. No. 15258, involved the construction of a Federal statute prohibiting suits in the Federal courts where the maker and the payee of a promissory note were citizens of the same State as applied to a suit by the United States as indorsee. On this point the court by Justice Story said:

The fair construction of the terms, under such circumstances, is to restrain their generality; to look to the primary and leading intention of the provisions; and to restrict the words to obvious cases. Effect may thus be given to the whole language, without breaking in upon a very important national policy.

It is unnecessary to furnish the many illustrations of the application of this rule that might be made. As this honorable court has stated, considerations of public policy constitute the true ground for its application. It is obvious that the purpose of the New Jersey statute is to protect the creditor from the loss which might result if the assets out of which he can realize his claim were permitted to pass into the hands of an ordinary legatee or distributee without any security therefor. The legatee may be financially irresponsible or may waste the property which

he receives. He may be in another jurisdiction, and thus the creditor be subjected to great delays and difficulties in collecting his claim.

These are the "obvious cases" to which the statute refers, but the United States, apart from any consideration of the policies involved in the "trading with the enemy act," is not an ordinary legatee or distributee. It is unthinkable that the United States should be unable to pay, or that a creditor by appropriate procedure would not be able to satisfy his claim. There is, therefore, no necessity, in order to preserve the State's policy for the protection of creditors, so to extend the meaning of the words "person entitled to the same" to include the United States. Moreover, as has been shown in discussing the construction of the "Trading with the enemy Act," a national policy of the highest importance requires that property demanded by the Alien Property Custodian should be promptly delivered to him. This court can not apply the State statute in this case without, in the language of Judge Storey in *U. S. v. Greene*, "breaking in upon a very important and necessary policy." The local policy of New Jersey presents no reason for including the United States within the terms of section 78 of the orphans' court act, and the national policy of the United States presents every reason for its exclusion.

The reluctance of the court so to interpret State statutes as to limit or obstruct the public rights of the United States should control not only the interpretation of the New Jersey statute under discussion,

but must be given weight in the solution of the whole question before the court. If this court should give to the "Trading with the enemy Act" a construction narrower than its language or its purpose requires; if this court should attempt to set up the local policies of New Jersey in opposition to the policies of the Nation, as declared by Congress, it would act in a spirit directly contrary to that which has previously characterized the courts of this country, and would most seriously endanger the highest interests of the Nation.

The decree of the chancellor should be reversed and a decree entered requiring the respondents, Alfred J. Keppelmann and Edward M. Colie, as executors and trustees under the will of Adolphus Keppelmann, deceased, to convey, transfer, assign, deliver, and pay over to the Alien Property Custodian the shares bequeathed by the decedent to Bertha von Borowsky, Pauline Adolphus Losch, and Louise Pauline Schultz, without requiring the Alien Property Custodian, or anyone in his behalf, to execute to the executors or trustees the bond mentioned in section 78 of the orphans' court act of New Jersey.

Respectfully submitted.

LA RUE BROWN,

Assistant Attorney General of the United States.

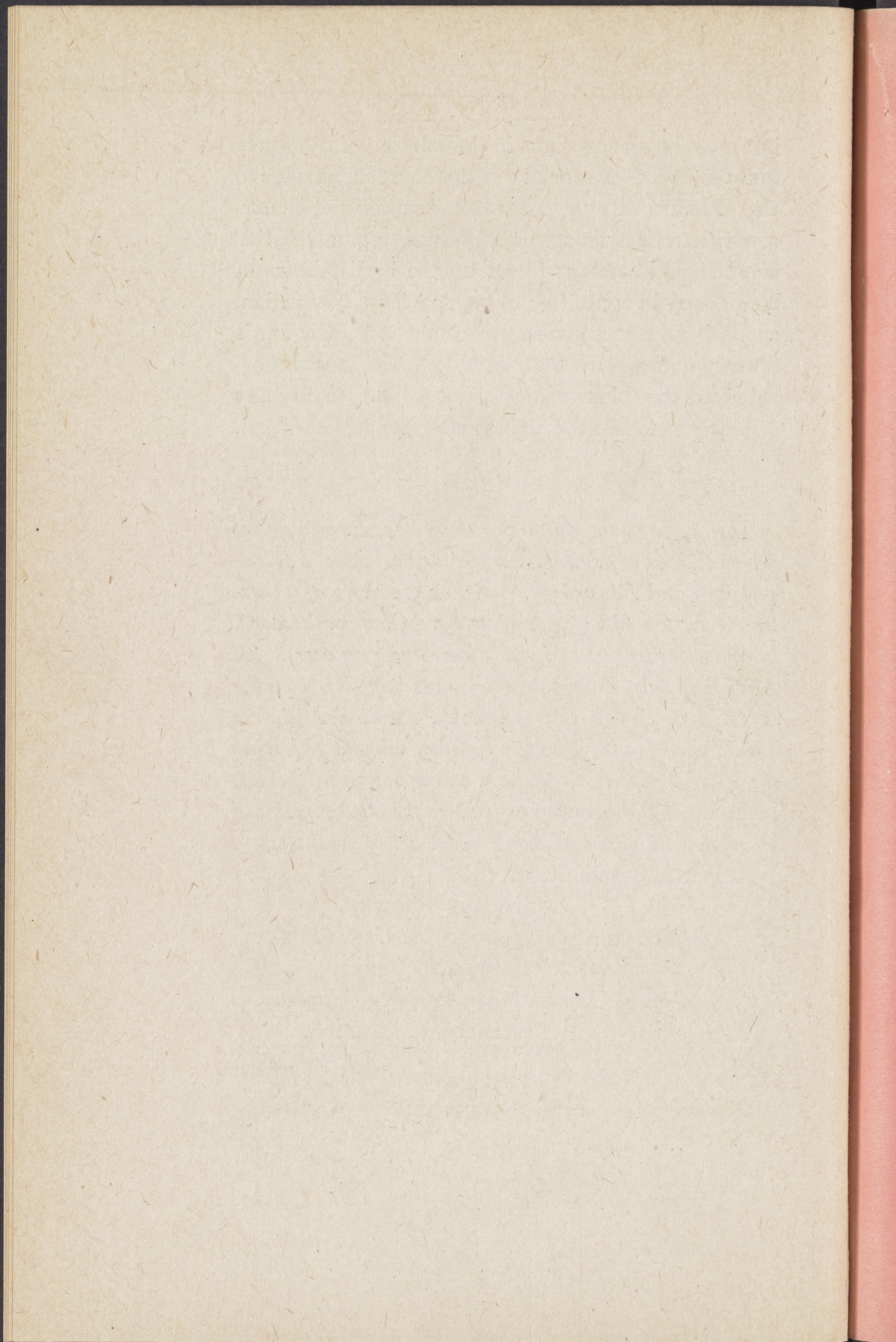
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