THE EFFECT OF CONSCRIPTION OF INDUSTRY ON CONTRACTS FOR THE SALE OF GOODS

LOUIS M. BROWN †

INTRODUCTION

The business-as-usual policy which prevailed prior to the kaleidoscopic series of events that go to make up contemporary times has given way to a "realistic all-out defense program."¹ Legislation has been designed to further that program.² That the war program is fundamentally a matter of government leadership is implicit in its nature.³ Hence the legislation is chiefly intended to enable the government to pursue its policies.

One purpose is clear. It is to increase the national output of war materials.⁴ The economy becomes geared to the war program but the transition from pre-war to war economy is neither instantaneous, nor total, nor permanent. There is still a large sphere of commercial activity which, though aware of the program, is not directly part of it. We may, for want of a better term, designate such non-defense effort as "civilian." Actually, commercial activity in both defense and non-defense spheres occurs simultaneously. Whereas defense activities are subjected to large scale governmental regulation, civilian activity is not. But civilian activity is not commercially independent and cannot escape becoming enmeshed in the war effort.

The war program assumes that the goods for national defense will be largely produced by private persons. A very large field of

† A. B., 1930, University of Southern California; LL. B., 1933, Harvard University; member of Los Angeles Bar.

1. 2 DEFENSE No. 36, p. 4 (Sept. 9, 1941).

2. Harrison, *Conscription of Industry* (1940) 29 GEO. L. J. 77; Note, *American Economic Mobilization: A Study in the Mechanism of War* (1942) 55 HARV. L. REV. 427; Notes, *Mobilization for Defense* (1940) 40 COL. L. REV. 1374, 54 HARV. L. REV. 278, 50 YALE L. J. 250.

3. Martin, *Present Status of Priorities in Industry Goes to War*, READINGS ON AMERICAN INDUSTRIAL REARMAMENT (edited by Fraser and Teele, 1941) 93-108; MENDERSHAUSEN, *THE ECONOMICS OF WAR* (1940); Harrison, *Conscription of Industry* (1940) 29 GEO. L. J. 77, 87, "In the face of these considerations there is an obvious need on the part of the government for some influence over industry in the field of national preparedness and defense." Jaeger, *National Defense: Background and Aftermath* (1941) 29 GEO. L. J. 1009; Note, *American Economic Mobilization: A Study in the Mechanism of War* (1942) 55 HARV. L. REV. 427; BARUCH, *AMERICAN INDUSTRY IN THE WAR* (1941).

4. "The essence of this preparedness program as stated by the National Defense Advisory Commission, 'is the getting of an adequate supply of materials of the proper quality in the shortest space of time possible.'" Holtz and Barron, *Recent Federal Legislation Affecting Defense Contracts* (1940) 20 BOSTON U. L. REV. 642.

"The paramount purpose of priorities is the selective mobilization of the products of the soil, the mines, and the factories for direct and indirect war needs in such a way as will most effectually contribute toward winning the war." BARUCH, *AMERICAN INDUSTRY IN THE WAR* (1941) 324.

activity in the defense program concerns the inter-relations of these private persons. With the focus of attention directed to public law⁵ aspects of the defense program, the private law aspects are likely to be tabled and left almost entirely to the work of the courts. But adjustment of the private rights is demanded by these persons whenever the war program frustrates their activity, and such adjustment manifestly has an important effect on the program. It is likewise important for the war program that these legal determinations shall not be in conflict with the demands of the program.

Only one such possible source of conflict will here be considered; *viz.*, the commercial activity of purchase and sale of goods. This activity occurs in both the civilian and defense spheres and contracts for the sale of goods are entered into between private persons in the furtherance of the war program. Public law regulation of such contracts occurs, among other ways, by governmental pre-emption of goods, that is, by priorities, allocations, commandeering, requisitioning, and the like. The effect of governmental pre-emption on contracts for the sale of goods entered into between private persons is the subject of this article.⁶

"CONSCRIPTION" STATUTES AND REGULATIONS

"Conscription of property" seems to be a term coined during World War I⁷ to describe the operation of the national defense legislation then enacted. The National Defense Act of 1916⁸ authorized, among other things, creation of a Board on Mobilization of Industries Essential for Military Preparedness and authorized the President, through the head of any department of the Government, to place orders for required materials or products in accordance with the Act, and made compliance with all such orders obligatory. In the case of munitions plants the President was authorized to take immediate possession of any such plant which refused to give governmental orders preference, or to furnish the materials ordered by the Secretary of

5. Pound, *Public Law and Private Law* (1939) 24 CORNELL L. Q. 469; *cf.* Boudin, *Private Law as Public Law* (1940) 3 NAT. LAWYERS GUILD Q. 66; Stone and Pettet, *Revision of Private Law* (1940) 54 HARV. L. REV. 221.

6. Discussion of contract problems engendered by war can be found in the following: BLAIR, *BREACH OF CONTRACT DUE TO WAR* (1940); 5 PAGE, *CONTRACTS* (1921) c. 79, *War as Affecting Contract Rights*, 4798-4903; Hall, *Effect of War on Contracts* (1918) 18 COL. L. REV. 325; Dodd, *Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789; McNair, *Frustration of Contract by War* (1940) 56 L. Q. REV. 173; Page, *Impossibility of Performance Due to War* (1925) 3 WIS. L. REV. 210; Note, *Impossibility of Performance of Contracts Due to War-Time Governmental Interference* (1941) 28 VA. L. REV. 72.

7. Cohn, *Concerning the Power of the United States in War Time as to Taking Property* (1919) 53 AM. L. REV. 87, 97.

8. 39 STAT. 213 (1916), 50 U. S. C. A. § 80 (1934).

War, or to furnish such materials at a reasonable price as determined by the Secretary of War.⁹

There were provisions in the Acts of Congress to allow seizure of certain docks;¹⁰ to compel compliance with orders of the President for constructing ships;¹¹ to authorize the President to place compulsory orders for ships or materials as the necessities of Government to be determined by the President might require;¹² and to authorize Presidential requisition of food, feeds, fuels, and other supplies necessary to support the Army and Navy,¹³ requisition and seizure of factories, packing houses, oil pipe lines, mines,¹⁴ requisition of coal,¹⁵ railroad transportation,¹⁶ lands, homes and furnishings for certain industrial workers.¹⁷

During the present emergency Congress has again legislated.¹⁸ The National Defense Act of 1940 confers on the President authority to enforce priorities on Army and Navy Contracts,¹⁹ and on any contracts the fulfillment of which the President deems vital to national defense.²⁰ Other acts give the President power to requisition property for national defense,²¹ to allocate materials²² or to "place an order"

9. *Ibid.*

10. 40 STAT. 459 (1918).

11. 39 STAT. 1193 (1917), 50 U. S. C. A. § 82 (1934).

12. 40 STAT. 182 (1917), amended, 40 STAT. 535 (1918).

13. 40 STAT. 279 (1917).

14. 40 STAT. 284 (1917).

15. 40 STAT. 284 (1917).

16. 40 STAT. 451 (1918).

17. 40 STAT. 550 (1918).

18. The constitutionality of the legislation will be assumed. It should be noted, however, that there are constitutional limitations. See note 27 *infra*; United States v. McFarland, 15 F. (2d) 823 (C. C. A. 4th, 1926) (Regulations that wool dealers surrender excess profits invalid); cf. Rava, *Emergency Powers in Great Britain* (1941) 21 BOSTON U. L. REV. 403. For a discussion of much of the current legislation, reference should be made to, Note, *American Economic Mobilization: A Study in the Mechanism of War* (1942) 55 HARV. L. REV. 427.

19. Sec. 2 (a) (1), 54 STAT. 676 (1940), as amended by PUB. L. 89, 77th Cong. (May 31, 1941), provides in part: ". . . and deliveries of material under all orders placed pursuant to the authority of this section and all other Naval contracts or orders and all Army contracts and orders shall, in the discretion of the President, take priority over all deliveries for private account or for export."

20. Sec. 2 (a) (2) of the above act provides in part, "Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

"(A) contracts or orders for the Government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States';

"(B) contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States; and

"(C) subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this section.

"Deliveries under any contract or order specified in this section may be assigned priority over deliveries under any other contract or order. . . ."

21. Pub. L. 274, 77th Cong. (October 16, 1941).

22. Sec. 2 (a) (2), 54 STAT. 676 (1940), as amended by Pub. L. 89, 77th Cong. (May 31, 1941) provides in part, ". . . whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage

for certain materials,²³ to "requisition or purchase any foreign vessel,"²⁴ "to requisition and take over certain material,"²⁵ "to purchase, requisition, . . . or requisition the use of, or take over title to, or possession of . . . any foreign merchant vessel."²⁶

These statutes as well as those passed during World War I provide for fair and just compensation in the event of any governmental taking over.²⁷

These acts grant the enumerated powers to the President "in time of war or when war is imminent," or "in emergency or state of war." A limited emergency was proclaimed on September 9, 1939 and an unlimited national emergency was proclaimed May 27, 1941.²⁸ War on Japan was declared December 8, 1941; war on Germany and Italy was declared December 11, 1941.²⁹

The major impetus in the furtherance of the war program's production of goods is a method of priorities and allocations.³⁰ Contracts for the sale or purchase of goods become identified with the defense

in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. . . ."

23. 54 STAT. 885 (1940); 39 STAT. 213-214 (1916), 50 U. S. C. A. § 80 (1928).

24. 49 STAT. 2015 (1936), amended, 53 STAT. 1254 (1939), 46 U. S. C. A. § 1242 (Supp. 1941).

25. 54 STAT. 1090 (1940), 50 U. S. C. A. § 99 (Supp. 1941).

26. Pub. L. 101, 77th Cong. (June 6, 1941).

27. E. g., "The compensation to be paid . . . shall be fair and just." 39 STAT. 213 (1916), 50 U. S. C. A. § 80 (1928), and 54 STAT. 885 (1940), 50 App. U. S. C. A. § 309 (Supp. 1941).

That these provisions are a constitutional requirement, see O'Rourke, *War Powers* (1939) 8 GEO. WASH. L. REV. 157, 164-5. But the requisitioning of the plant of a seller which thereby deprives the buyer of goods under a contract to sell does not require the payment of compensation by the government. *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923).

28. Proclamation of the President No. 2364, Sept. 8, 1939; Proclamation of the President No. 2487, May 27, 1941. 6 FED. REG. 2617 (May 29, 1941).

As to the powers made available to the President by the proclamations, see Opinion of Attorney General of the United States, October 4, 1939. C. C. H. War Law Serv. ¶ 2222.

29. Pub. L. No. 328, 77th Cong. (Dec. 8, 1941); Pub. L. Nos. 331, 332, 77th Cong. (Dec. 11, 1941).

30. "A system of priorities is the most important institution in the war economy." MENDERSHAUSEN, *THE ECONOMICS OF WAR* (1940) 153.

Executive Order No. 8875, August 28, 1941, 6 FED. REG. 4483 (Aug. 30, 1941), vested administrative control of priorities and other matters in the Supply Priorities and Allocations Board.

The War Productions Board was established by Executive Order No. 9024, promulgated by the President January 16, 1942, 7 FED. REG. 329 (Jan. 17, 1942), and Executive Order No. 9040 of the President, January 24, 1942, 7 FED. REG. 527 (Jan. 27, 1942). It is provided in these orders that "The Chairman of the War Production Board . . . shall . . . perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941," and ". . . Executive Order No. 8942 of November 19, 1941."

Though the "Administration of the priorities system shows a tendency toward increased use of direct allocation of certain materials rather than individual preference ratings" [(1941) 10 U. S. L. WEEK 1051], the effect of both priorities and allocations upon contracts for the sale of goods is, for practical purposes, the same. Both types of regulations pre-empt materials for governmental purposes.

References to the regulations are intended to be illustrative rather than exhaustive.

program by pursuing procedures adopted by the Supply Priorities and Allocations Board and its successor, the War Productions Board. The effort of the Board is to rate such contracts in their importance to defense and to provide methods by which contracts of highest rating are given first call on production.³¹ In general the identification of the relative importance of purchases and sales is accomplished by the use of priority certificates issued in accordance with the various orders of the Board.³² These orders seek to regulate private contracts, distribution and production of goods.³³ There is much that has to do with contracts for the sale of goods.

No longer is the choice of accepting an order an arbitrary privilege of the supplier where the order, even though not accompanied by a Preference Rating Certificate, is for defense.³⁴ The delivery of goods under civilian order has been seriously regulated.³⁵ Not only

31. Priorities Regulation No. 1, 6 FED. REG. 4489, tit. 32, c. IX, subc. B, part 944 (Aug. 30, 1941), amended, 6 FED. REG. 6680, tit. 32, c. IX, subc. B, part 944 (Dec. 24, 1941).

32. PM Release No. 791, July 28, 1941, gives a general statement of the various controls applicable as of that time.

33. Various types of orders have been issued: General Preference Orders, "M" Orders, provide for allocations and distribution of scarce materials entering into defense production; Preference Rating Orders, "P" Orders, are blanket orders granting preference ratings to classes of producers for obtaining certain materials; Distribution Orders, "E" Orders, provide for allocation and distribution of finished products; Limitation Orders, "L" Orders, provide for limitation on production of a product and for priority ratings for certain producers; and Suspension Orders, "S" Orders, provide for suspension of certain operations as punishment for violation of priorities orders. The first "S" Order will be found at 6 FED. REG. 5293, tit. 32, c. IX, subc. B, § 1010.1 (Oct. 17, 1941). For the background of the issuance of this order consult, 2 DEFENSE NO. 42, p. 3 (Oct. 21, 1941).

34. Priorities Regulation No. 1, 6 FED. REG. 4489, tit. 32, c. IX, subc. B, § 944.2 (Aug. 30, 1941), provides, "Defense Orders for any Material, whether or not accompanied by a Preference Rating Certificate, must be accepted and fulfilled in preference to any other contracts or purchase orders for such Material," subject to certain stated provisions.

Priorities Regulation No. 2, 6 FED. REG. 4684, tit. 32, c. IX, subc. B, § 944.22 (a) (Sept. 12, 1941) provides: "All preference ratings heretofore or hereafter duly issued under the authority of the Director of Priorities shall be mandatory and legally enforceable, any provision in the instrument assigning the same to the contrary notwithstanding."

35. E. g., General Preference Order M-2, Magnesium, 6 FED. REG. 1626, tit. 32, c. IX, subc. B, No. M-2 (March 26, 1941) provides: "No deliveries shall be made under any contracts or orders other than Defense Orders except by release pursuant to the assignment of preference ratings or by other specific order." This order has been superseded by Order M-2-b, 6 FED. REG. 5806, tit. 32, c. IX, subc. B, part 922 (Nov. 15, 1941). Priorities Regulation No. 1, 6 FED. REG. 4489, tit. 32, c. IX, subc. B, § 944.7 (a) (Aug. 30, 1941), provides, "Every delivery under a Defense Order shall be made in preference to deliveries under all other contracts. . . ."

Of paramount importance is the recent Directive No. 1 of the War Production Board, approved January 24, 1942, 7 FED. REG. 562 (Jan. 28, 1942), delegating authority to the Office of Price Administration with respect to rationing control over certain goods. Even prior to Directive No. 1, Tire Rationing Regulations were issued. Supplementary Order M-15-C, released, December 31, 1941; amended, January 12, 1942 (PM 2188) C. C. H. War Law Serv. ¶ 35,068.

For the judicial construction of an English regulation curtailing delivery, *Rappaport v. London Plywood and Timber Co., Ltd.*, (1940) 1 All Eng. Rep. 576 (K. B. D.). A regulation provided, "No person shall acquire or agree or offer to acquire for consumption any timber or box boards except under the authority of a license granted by the Minister of Supply or in accordance with a special or general direction issued by the Minister of Supply." The plaintiff had, prior to the making of this regulation pur-

has an order of preference been established to conform to priority ratings³⁶ but civilian deliveries of certain materials have been ordered ceased.³⁷ Deliveries of certain materials are restricted to the buyer's current needs for a calendar month or other period³⁸ and in other cases deliveries can only be made upon specific direction.³⁹ In one order, deliveries of high speed steel of the Class B type may not exceed in any month deliveries of Class A type.⁴⁰ Another order provides that a purchaser may not accept delivery of certain scrap materials unless a corresponding amount of such scrap has been sold or otherwise disposed of by him during the last preceding sixty days.⁴¹ For nickel bearing steel a method of rated deliveries based on prior shipments has been evolved.⁴² The use of copper has been limited to certain specified items.⁴³ Of less importance is the requirement that no deliveries can be made in certain instances unless the supplier has been furnished prescribed forms signed by the customer.⁴⁴

chased lumber from the defendant. Delivery had not been made. Held, that since the plaintiff was the owner of the lumber, the regulation would not be violated by delivery of lumber to the plaintiff.

36. Priorities Regulation No. 1, 6 FED. REG. 4489, tit. 32, c. IX, subc. B, § 944.5 (Aug. 30, 1941). "Preference Ratings, in order of precedence, are: AA, A-1-a, A-1-b, etc., . . . A-1-j; A-2, A-3, etc., . . . A-10; BB, B-1, B-2, etc., . . . B-8, AA being the highest rating presently assigned."

37. General Preference Order M-2, Magnesium, note 35 *supra*; General Preference Order M-1, Aluminum, 6 FED. REG. 1598, tit. 32, c. IX, subc. B, No. M-1 (Mar. 25, 1941); General Conservation Order M-85, To Conserve the Supply and Direct the Distribution of Kapok, 7 FED. REG. 784, tit. 32, c. IX, subc. B, § 1083 (Feb. 6, 1942). Section 1083.1 (e) of the latter order reads, "No manufacturer shall hereafter sell, transfer title to, or deliver any kapok to any person, except Defense Supplies Corporation, and no person, except Defense Supplies Corporation, shall hereafter purchase, accept any transfers of title to, or deliveries of, kapok from a manufacturer."

38. General Preference Order No. M-5-a, Nickel Bearing Steel, 6 FED. REG. 2237, tit. 32, c. IX, subc. B, § 926.2 (May 2, 1941), "Deliveries shall not be in an amount in excess of the amount actually required for current operations of customers . . ."; General Preference Order No. M-15, Rubber, 6 FED. REG. 3060, tit. 32, c. IX, subc. B, § 940.1 (June 24, 1941), restricts delivery to the needs of a customer for a calendar month; Priorities Regulation No. 1, 6 FED. REG. 4489 (Aug. 27, 1941), as amended, December 23, 1941, 6 FED. REG. 6680, tit. 32, c. IX, subc. B, § 944.14 (Dec. 24, 1941), provides in part: "Unless specifically authorized by the Director of Priorities, no Person shall knowingly make delivery of any Material whatever, and no Person shall accept delivery thereof if the inventory of such Material of the Person accepting delivery, in the same or other forms, is, or will by virtue of such acceptance become, in excess of the practicable minimum working inventory reasonably necessary to meet deliveries of the products of the Person accepting delivery, on the basis of his current method and rate of operation."

39. E. g., General Preference Order M-2, Magnesium, note 35 *supra*.

40. General Preference Order No. M-14, High Speed Steel, 6 FED. REG. 2876, tit. 32, c. IX, subc. B, part 939 (June 13, 1941).

41. General Preference Order No. M-72: To conserve the Supply and Direct the Distribution of Lead and Tin Scrap Containing Alloys Thereof, 7 FED. REG. 182, tit. 32, c. IX, subc. B, part 1054 (Jan. 9, 1942).

42. General Preference Order M-5-a, Nickel Bearing Steel, note 38 *supra*, revoked, 6 FED. REG. 4784, tit. 32, c. IX, subc. B, § 962 (e) (Sept. 18, 1941).

43. Conservation Order No. M-9-c, Curtailing the Use of Copper in Certain Items, issued October 21, 1941, 6 FED. REG. 5394, tit. 32, c. IX, subc. B, § 933 (Oct. 22, 1941).

44. E. g., General Preference Order M-7, Borax and Boric Acid, 6 FED. REG. 2791, tit. 32, c. IX, subc. B, § 930 c (2) (June 10, 1941), provides, ". . . the customer desiring such deliveries has duly filed copies of said affidavit in accordance with the provisions of paragraph (b) hereof." See also General Preference Order M-23, Vanadium, 6 FED. REG. 4103, tit. 32, c. IX, subc. B, § 966 (Aug. 16, 1941).

Not only in these ways have goods been removed from general circulation but, where it was thought advisable, producers have been required to allocate or set aside a stated percentage of their production in a pool, withdrawals from which are to be determined by the Director of Priorities.⁴⁵ In some cases the entire production was ordered set aside.⁴⁶ And producers have sometimes been ordered to cease production entirely,⁴⁷ or limit is severely,⁴⁸ or to limit consumption of certain raw materials,⁴⁹ or limit use of certain other materials.⁵⁰

It is generally provided that merchandise received on priority order must be used for the prescribed purpose and hence may not be used for civilian contracts or even for other defense orders.⁵¹ In one rather unique instance it is provided that an order, having been placed, may not be cancelled without a corresponding cancellation of an equal quantity of similar goods.⁵²

45. General Preference Order M-11, Zinc, 6 FED. REG. 2856, tit. 32, c. IX, subc. B, § 937 (June 12, 1941); General Preference Order M-15, Rubber, 6 FED. REG. 3060, tit. 32, c. IX, subc. B, § 940 (June 24, 1941); General Preference Order No. M-4, Neoprene, 6 FED. REG. 1719, tit. 32, c. IX, subc. B, No. M-4 (April 1, 1941).

46. Order No. M-22, Silk, 6 FED. REG. 4046, tit. 32, c. IX, subc. B, § 963 (Aug. 12, 1941).

47. *Ibid.*; Supplementary General Limitation Order L-2: To Prohibit the Production of Passenger Automobiles. 7 FED. REG. 473, tit. 32, c. IX, subc. B, part 981 (Jan. 23, 1942).

48. General Preference Order M-12, Cotton Linters, 6 FED. REG. 4212, tit. 32, c. IX, subc. B, § 942.1 (b) (Aug. 20, 1941): "No cottonseed oil crushing mill engaged in the production of Cotton Linters and using more than one cut in the process shall cut First Cut Cotton Linters to a higher proportion than 20% of its total cut." See also Supplementary General Limitation Order L-2-a, Further Restricting the Production of Passenger Automobiles, issued Oct. 24, 1941, 6 FED. REG. 5487, tit. 32, c. IX, subc. B, part 981 (Oct. 28, 1941).

General Limitation Order No. L-44: To Restrict the Production of Radio Receivers and Phonographs. 7 FED. REG. 520, tit. 32, c. IX, subc. B, part 1077 (Jan. 24, 1942), limits a Class A Manufacturer (a manufacturer of sets whose factory sales value during the nine months ending September 30, 1941, was \$1,000,000 or more) to a production of no more than 55% of one-third of the number of sets completed by him during the nine months ending September 30, 1941. It limits a Class B Manufacturer (one whose sales value was less than \$1,000,000 for the corresponding period) to a production of no more than 65% of one-third for a similar production period.

49. General Limitation Order L-15 to Restrict the Consumption of Waste Paper by Paper Board and Roofing Mill Plants in the East, issued October 25, 1941, 6 FED. REG. 5487, tit. 32, c. IX, subc. B, § 1007 (Oct. 28, 1941); Conservation Order No. M-78: Curtailing the Use of Mercury in Certain Items, 7 FED. REG. 519, tit. 32, c. IX, subc. B, part 1063 (Jan. 24, 1942).

50. Limitation Order L-20 to Limit the Use of Cellophane and Similar Transparent Materials Derived from Cellulose, issued November 8, 1941, 6 FED. REG. 5730, tit. 32, c. IX, subc. B, § 1015 (Nov. 11, 1941); Limitation Order L-28: To Restrict the Production of Incandescent Lamps, 7 FED. REG. 583, tit. 32, c. IX, subc. B, part 1049 (b) (Jan. 29, 1942), restricts the amount of nickel, brass and copper that manufacturers shall use in the production of incandescent lamps.

51. Priorities Regulation No. 1, issued August 27, 1941, 6 FED. REG. 4489, tit. 32, c. IX, subc. B, § 944.11 (Aug. 30, 1941): "Any person who obtains a delivery of any material under an order or specific direction of the Director of Priorities, or a delivery of material bearing a preference rating, must use such material, or an equivalent amount thereof, for the purpose specified in connection with the issuance of the order, direction or rating."

O. P. M. Release No. PM-841, July 31, 1941, C. C. H. War Law Serv. ¶ 23,479, apparently permitting the replacement of warehouse stocks by the use of preference rated orders has been drastically modified. PM Release No. 1258, September 29, 1941, C. C. H. War Law Serv. ¶ 23,546.

52. General Preference Order M-14, High Speed Steel, note 40 *supra*.

A priority certificate may perform two functions. It may compel⁵³ the production of certain goods on or before a certain date and it may provide a means whereby the producer can obtain goods from others to enable the completion of the original contract. The first function operates upon the "placing of the order" with the producer or supplier. The second requires an "extension"⁵⁴ of the priority certificate or rating. It is important to note that although the original certificate may be issued by the government to the producer and thus regulates a contract between the government and the producer, the extended certificate will regulate a contract between private persons. Such private contract is governmental in origin; that is, it emanates from an original government order. But many types of private contracts non-governmental in origin and which have no connection with a government purchase come within priorities regulations. The repair and maintenance order is one illustration.⁵⁵ A warehouse, manufacturing plant, certain public utilities or other specified industries may place an order carrying an A 10 rating for the repair and maintenance of plant or equipment with any supplier upon the purchaser's statement

53. Section 120 of the National Defense Act, 39 STAT. 213-214 (1916), 50 U. S. C. A. § 80 (1928), and Section 9 of the Selective Training and Service Act of 1940, 54 STAT. 892 (1940), 50 U. S. C. A. § 309 (Supp. 1941), empower the President to place an order; compliance with such order is made obligatory; and the President is authorized to conscript industry upon refusal.

Enforcement of priorities orders is now in the Compliance Section of the Priorities Division, O. P. M. Release No. PM-669, July 7, 1941, C. C. H. War Law Serv. ¶ 23,457. The release states, "In the event that efforts to obtain voluntary cooperation fail, action which may be taken includes: 1. Public statements as to violations or evasions which have taken place. 2. The restriction of supplies of critical materials until compliance is assured. 3. Court action to require compliance."

The administrative remedy of suspension has been invoked O. P. M. Release No. PM-1387, October 16, 1941, C. C. H. War Law Serv. ¶ 23,563. (It should be noted that this suspension did not compel compliance directly but rather penalized the company named by suspending its receiving certain materials.)

Priorities Regulation No. 1, 6 FED. REG. 4490, tit. 32, c. IX, subc. B, § 944.3 (Aug. 30, 1941), provides, "When a Defense Order for any Material has been rejected in violation of this Regulation, the Person seeking to place such Order may file with the Division of Priorities a verified report in form to be prescribed, setting forth the facts in connection with the alleged rejection. When the facts set forth justify such action, the Director of Priorities will thereupon direct the Person against whom complaint is made to submit a sworn statement setting forth the circumstances concerning the alleged rejection. Thereafter, such action will be taken by the Director of Priorities as he deems appropriate."

Each Order issued by the Director of Priorities may contain a provision relating to violations. E. g., Limitation Order L-20 to limit the use of cellophane and similar transparent materials derived from cellulose provides, "Any Person who violates any provision of this Order may be prohibited by the Director of Priorities from obtaining any further deliveries of materials subject to allocation, and the Director of Priorities may also take any other action deemed appropriate." 6 FED. REG. 5731, tit. 32, c. IX, subc. B, § 1015.1g (Nov. 11 (1941)).

54. Priorities Regulations No. 3, 6 FED. REG. 250, tit. 32, c. IX, subc. B, part 944 (Jan. 14, 1942), provides methods by which preference ratings may be extended.

55. Preference Rating Order P-22 Amended, issued October 16, 1941, 6 FED. REG. 5332, tit. 32, c. IX, subc. B, part 958 (Oct. 21, 1941); Preference Rating Order No. P-100: Repairs, maintenance and operating supplies, 6 FED. REG. 6548, tit. 32, c. IX, part 948 (Dec. 19, 1941).

to that effect on the purchase order.⁵⁶ No contractual relation with the government need be shown nor, in fact, need any specific connection with the war program be shown. The purchase order containing the required statement constitutes the priority certificate.

The application of and compliance with these regulations and statutory powers of conscripting industry cut across the field of contract law at two points: one, in regard to the law of making of contracts, and two, performance of contracts.

THE MAKING OF CONTRACTS

Privilege to make or refuse to make a contract on whatever basis the parties may arbitrarily choose seems traditionally accorded by our law, but the tendency away from such extreme doctrine of freedom of contract is strong.⁵⁷ The law of carriers, insurance, and public utilities furnishes illustrations of the tendency. Legislative enactments making compulsory the acceptance of orders⁵⁸ and regulations seriously limiting the arbitrary privilege of the offeree to refuse acceptance of an order are current illustrations of this same tendency.⁵⁹ The contract need not be a government contract. Neither the buyer nor seller need

56. Section (e) of the repair and maintenance order provides, in part, "A Producer or Supplier, in order to apply the preference rating to deliveries of Material to him, must endorse the following statement on the original and all copies of the purchase order or contract for such Material manually signed by a responsible official duly designated for such purpose by such Producer or Supplier:

Material for Maintenance, Repair, or Operating Supplies—Rating A-10 under Preference Rating Order P-22, as amended, with the terms of which I am familiar.

Such endorsement shall constitute a certification to the Office of Production Management that such Material is required for the purposes stated and that the application of the rating is authorized by this Order. . . ."

57. Williston, *Freedom of Contract* (1921) 6 CORN. L. Q. 365; Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454; see Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 COL. L. REV. 421, 429; Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 553.

58. Notes 19, 20 *supra*.

59. See note 34 *supra*. Priorities Regulations No. 1, issued Aug. 27, 1941, 6 FED. REG. 4489, tit. 32, c. IX, subc. B, § 944.2 (b) (Aug. 30, 1941), as amended, 6 FED. REG. 6680, tit. 32, c. IX, subc. B, § 944.2 (b) (Dec. 24, 1941), provides:

"(b) Any such order need not be accepted

(1) if delivery on schedule thereunder would be impossible by reason of the requirements of previously accepted orders bearing higher or equal preference ratings, unless acceptance is specifically directed by the Director of Priorities;

(2) if delivery on schedule thereunder can be made only by use of Material which is already completed when such order is received or which is scheduled to be completed within fifteen days thereafter, and which was specifically produced for delivery under Defense Orders previously accepted bearing lower preference ratings, unless the Preferred order bears a rating AA or acceptance thereof is specifically directed by the Director of Priorities;

(3) if the Person seeking to place such order is unwilling or unable to meet regularly established prices and terms of sale or payment, but there shall be no discrimination against such orders in establishing such prices or terms;

(4) if the Material ordered is not of the kind usually produced or capable of being produced by the Person to whom such order is offered;

(5) if such order specifies deliveries within fifteen days, and if compliance with such delivery dates would require the termination before completion of a specific production schedule already commenced."

be a public utility or similarly regulated business. With the increase of war production, almost the whole heterogeneous field of buying and selling will be affected.

The administrative regulations provide a method of complaint in the event that a particular supplier refuses to accept an order.⁶⁰ The machinery of government is designed to enable the war program to proceed by seeking to compel the delivery of the goods. But what of the civil rights between the parties? Can it be said that the purchaser is entitled to damages upon the failure of the supplier to accept and fill the order? Suppose the product which the purchaser seeks is a patented product obtainable only from one source, which source refuses to sell. Clearly on ordinary contract principles no relief is obtainable. But here a duty is violated. Neither the statutory law nor the regulations specifically give or deny to the buyer a remedy in damages. The problem in more general terms is whether the violation of a statutory obligation, or obligation imposed by administrative regulation, gives rise to a remedy in damages to the party injured where the statute or regulation is silent. The same problem was presented to the courts in cases growing out of violations of N. I. R. A. codes. It was generally held that no recovery was allowable.⁶¹ The enforcing provision of the N. I. R. A. was worded almost identically with that of the Sherman Act.⁶² Similar relief was denied under the Sherman Act in the case of *Paine Lumber Co. v. Neal*,⁶³ and that case was regarded as controlling, on the theory that since the N. I. R. A. was drawn with

60. Priorities Regulation No. 1, 6 FED. REG. 4490, tit 32, c. IX, subc. B, § 944.3 (Aug. 30, 1941), Rejected Orders, "When a Defense Order for any material has been rejected in violation of this Regulation, the Person seeking to place such Order may file with the Division of Priorities a verified report in form to be prescribed, setting forth the facts in connection with the alleged rejection. When the facts set forth justify such action, the Director of Priorities will thereupon direct the Person against whom complaint is made to submit a sworn statement, setting forth the circumstances concerning the alleged rejection. Thereafter, such action will be taken by the Director of Priorities as he deems appropriate."

61. *National Foundry Co. of New York, Inc. v. Alabama Pipe Co., et al.*, 7 F. Supp. 821 (E. D. N. Y. 1934); *Progressive Miners of America, Local Union No. 109, et al. v. Peabody Coal Co., et al.*, 7 F. Supp. 340 (E. D. Ill. 1934); *Western Powder Mfg. Co. v. Interstate Coal Co.*, 5 F. Supp. 619 (E. D. Ill. 1934); *Stanley v. Peabody Coal Co.*, 5 F. Supp. 612 (S. D. Ill. 1933). *Contra: Fryns v. Fair Lawn Fur Dressing Company*, 114 N. J. Eq. 462, 168 Atl. 862 (1933) (Employees, though not named as a party to the President's Re-employment Agreement with an employer, may maintain a suit thereon).

62. Section 3 of the N. I. R. A., 48 STAT. 195 (1933), reads, "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

The Sherman Act, 26 STAT. 209 (1890), provided, "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations."

63. 244 U. S. 459 (1917).

the use of almost identical language as was employed in the Sherman Act, and, since the Sherman Act was construed in the *Paine* case so as to deny a private remedy, no remedy would be afforded under the N. I. R. A. codes.⁶⁴ But the current defense statutes and regulations are not a throwback on the Sherman Act. Yet the basis of the decision in the *Paine* case, taken in connection with an earlier decision by the same court,⁶⁵ seems to be that the prohibitions of the statute were enacted to prevent harm to the general public rather than harm to the individual, and the remedies under the Sherman Act should be only co-extensive with such conception.⁶⁶ Since current war program regulations are primarily designed for the benefit of the general public, a private remedy would seem barred, even though such private suits would aid the enforcement of the regulations.⁶⁷

It should be borne in mind that the refusal to make a contract is not the only violation of defense regulations which may result in injury. Failure to perform a contract already made in accordance with the regulations may likewise result in injury. In such case no difficulty would seem to stand in the way of recovery; the action is essentially one for breach of contract.

THE PERFORMANCE OF CONTRACTS—GENERALLY

The effect of "conscription of industry" upon the performance of contracts made before, but not in accordance with, the regulations is, however, a more vital matter than at first appears. One need not labor the point that compliance with regulations will result in non-performance of contracts. Impossibility of performance due to domestic law will be alleged to excuse such failure of performance. The fail-

64. Note, *Governmental Agencies and Private Remedies in the Enforcement of the National Industrial Recovery Act* (1934) 28 ILL. L. REV. 673, 686. "That this was the legislative intent seems evident, for although Congress incorporated § 4 of the Sherman Act almost verbatim into the N. I. R. A., it failed to adopt a section similar to § 7 of the Sherman Act which provides for suit for triple damages by a private individual, or one similar to § 16 of the Clayton Act which gives a private injunctive remedy."

65. *Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165 (1915).

66. Note, *Governmental Agencies and Private Remedies in the Enforcement of the National Industrial Recovery Act* (1934) 28 ILL. L. REV. 673, 684-5.

67. The private suit, either under the N. I. R. A. code or current defense regulations, would be grounded on violation of the regulations. The plaintiff would be required to allege and prove such a violation. The claim in damages to which the defendant might be thus subjected would act as a further deterrent to violations of the regulations.

It should be noted that the Emergency Price Control Act of 1942 specifically provides for civil liability for a violation of a regulation, order or price schedule. Pub. L. No. 421, 77th Cong. (Jan. 30, 1942) § 205e.

The comment in 28 ILL. L. REV. 673, suggests two other theories of recovery under the N. I. R. A. codes. Since the codes are in the form of a contract a few decisions allowed relief on a contract theory. It is also suggested that a cause of action might be framed on the theory that it is an obligation of every man to conduct his business in a lawful manner. But since one must look to the regulations to determine what is a lawful manner, the regulations should also determine the remedy. Furthermore, the duty of conducting one's business in a lawful manner has, in the few cases cited, been a duty running to a competitor, not to a buyer.

ure to perform a contract due to change in domestic law is excusable⁶⁸ even though performance is in fact possible.⁶⁹ Impossibility due to compliance with law or governmental regulations may thus be different in kind from impossibility occasioned by war. In some types of war cases, performance is factually not possible.⁷⁰ There is still another type of failure to perform, which though not impossible at all, either legally or factually, is excusable; that is, frustration.⁷¹

The foundation of the doctrine of excusable impossibility has been put in terms of an alternative presented to the law. The alternative presented is either to "adopt a strict rule which will require the parties, when they form a contract, to foresee its consequences as accurately as possible, though at the expense of serious hardship to one of them if unforeseen circumstances render it impossible to perform his promise, or a rule giving an excuse under such circumstances. The early cases accepted the former alternative; the later cases tend to adopt the other."⁷² The tendency seems grounded on the notion that the maintenance of the commercial equilibrium requires that failure of performance be excused in some cases even though performance was promised.⁷³ "The law of contract is the handmaid of commerce; and the doctrine of the discharge of contract by impossibility is a

68. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1938; RESTATEMENT, CONTRACTS (1932) § 458; 6 PAGE, CONTRACTS (2d ed. 1921) § 2697.

The "law" need not be a legislative enactment. It may be an administrative order. "Clearly, prevention by an executive order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual." 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 5434.

69. The term "impossibility" has a variety of meanings. "With reference to the means by which a contract is rendered impossible, impossibility may be classed as impossibility caused by certain facts, and impossibility caused by the act or operation of the law or of the state." 5 PAGE, CONTRACTS (2d ed. 1921) § 4697. When impossibility is excusable due to change of law performance by the promisor may still be possible in the factual sense, i. e., the promisor can still perform.

70. E. g., *Tennants v. Wilson*, (1917) A. C. 495 (inability to supply magnesium chloride due to war conditions); *Blackburn Bobbin Co. v. Allen*, (1918) 2 K. B. 467, *affirming*, (1918) 1 K. B. 540 (inability to deliver birch wood from Finland to England).

71. The leading case of *Krell v. Henry*, (1903) 2 K. B. 740, held that the defendant need not pay for the privilege of using a balcony on a day named in a contract, being the day it was expected that the coronation of King Edward VIII would occur. The King's illness caused a postponement of the ceremony. The balcony was at the disposal of the defendant all the day. *Accord*, *Alfred Marks Realty Co. v. "Churchills"*, 90 Misc. 370, 153 N. Y. Supp. 264 (1915). The case is treated as one in which the expected value of performance was fortuitously destroyed. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1954; Conlen, *The Doctrine of Frustration as Applied to Contracts* (1922) 70 U. OF PA. L. REV. 87; McNair, *Frustration of Contract by War* (1940) 56 L. Q. REV. 173; Rothschild, *The Doctrine of Frustration or Implied Condition in the Law of Contracts* (1932) 6 TEMP. L. Q. 337; Note, *Impossibility and the Doctrine of Frustration of the Commercial Object* (1924) 34 YALE L. J. 91.

72. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 5407.

73. Rothschild, *The Doctrine of Frustration or Implied Condition in the Law of Contracts* (1932) 6 TEMP. L. Q. 337, 338; Smith, *Some Practical Aspects of the Doctrine of Impossibility* (1938) 32 ILL. L. REV. 672, 675, "In all of such cases the real problem before the courts was whether the equities of the case, considered in connection with the best interests of society required throwing the risk of disruption or complete destruction of the contractual equilibrium on the defendant or the plaintiff under the circumstances of the given case—a problem of the utmost difficulty."

product of commercial necessity.”⁷⁴ The maintenance of a peacetime commercial structure may not be the same as a commercial wartime structure. Multitudinous regulations and legislation indicate that a different policy is demanded. Cognizance of the difference is important in determining the advisability of allowing or disallowing the excuse.

The allowance or disallowance of the excuse has other effects. It, of course, has bearing on which party is to bear the risk of loss, for the allowance of the excuse serves to shift the risk.⁷⁵ The allowance of the excuse also makes easier the enforcement of governmental regulations⁷⁶ but the danger in such case is that it may substitute the promisee for the government as the enforcing agency—a burden which the promisee should not bear. Thus, in any case where performance of the contract and compliance with the regulations are both possible, adherence to the regulations should be accomplished by proper governmental enforcement rather than shifting the risk upon the promisee.

Statutory statement of the burden of the risk of loss is to be found in what will be here termed the “no damage statute.” It reads: “No person shall be held liable for damages or penalties for any default under any contract or purchase order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section.”⁷⁷ This provision has been repeated in a number of specific regulations.⁷⁸ The statute, however, does not provide a solution in every type of case that might arise,⁷⁹ nor should it be

74. Wade, *The Principle of Impossibility in Contract* (1940) 56 L. Q. REV. 519.

75. Smith, *Some Practical Aspects of the Doctrine of Impossibility* (1938) 32 ILL. L. REV. 672, 675.

76. From the promisor's point of view he may be called upon to do one or both of two things: (1) obey the government regulations, (2) perform the contract. To excuse the promisor from performing the contract makes obedience of the government regulations more likely.

77. Section 2 (a) (2) of Public Act 671, as amended by Pub. L. 89, 77th Cong. (May 31, 1941). There is legislation in England to the same effect. Sec. 7 (7) of the Ministry of Supply Act, 1939, provides: “Where the failure to fulfil any contract, whether made before or after the commencement of this Act, is due to compliance with directions given by the Minister of Supply under this section, proof of that fact shall be a good defence to any action or proceeding in respect of the failure.”

78. E. g., Priorities Regulation No. 1, 6 FED. REG. 4490, tit. 32, c. IX, subc. B, § 994.13 (Aug. 30, 1941), “No person shall be held liable for damages or penalties for any default under any contract or purchase order which shall result directly or indirectly from his compliance with any rule, regulation or order issued by the Director of Priorities.”

79. The statute seems to have been enacted to allow a defense in only one type of situation. H. R. REP. No. 460, filed April 29, 1941 (C. C. H. War Law Serv. ¶ 23,102, at p. 23,106) reads, in part, “Orders placed by the armed services are in most instances not compulsory but the manufacturer who accepts these orders knows that a preference rating will usually be assigned to such orders the moment he accepts them. He therefore knows in accepting such orders that he will in many instances be required to postpone or eliminate deliveries under other orders from civilian customers which are already on his books.”

If such manufacturer is sued for damages by one of such customers for default under such customer's contract, there is some legal doubt whether the manufacturer can plead impossibility of performance since he has accepted the military order with

assumed⁸⁰ that every compliance with the regulations will, even when related to the statute, necessarily be excusable.⁸¹

PRE-EMPTION AS A DEFENSE TO NON-PERFORMANCE

Direct Pre-emption as a Seller's Defense

The focal point of contact between governmental conscription, or pre-emption, and impossibility of performance arises in the case where the seller seeks to excuse an alleged breach of sales contract on the assertion that the failure of performance is due to governmental pre-emption upon him. Whatever doubt⁸² may have previously existed, it was settled in cases growing out of the National Defense Act of 1916 during World War I that a defense is available to the seller.⁸³

However, the excuse thus afforded has been subjected to judicial scrutiny with the result that not every assertion of the excuse has been upheld. If the seller can in fact fill the buyer's contract and also the government pre-emptive order, then performance is not impossible; nor failure, excusable.⁸⁴ Nor is the mere establishment of

knowledge that it will require such default. It is important to give clear statutory protection to all manufacturers who comply with priority orders."

80. A contrary opinion has been expressed. Note, *Impossibility of Performance of Contracts Due to War-Time Governmental Interference* (1941) 28 VA. L. REV. 72, 77, "The whole question of breach of private contracts made impossible by preferential government orders has been rendered academic in the present war by the enactment of appropriate legislation in both England and the United States, providing in substance, that no one shall be liable for breach of any contract caused by government orders, allocation of materials, or priorities."

81. A somewhat similarly worded English statute was asserted as a defense in a case decided during World War I. *Associated Portland Cement Manufacturers v. William Cory and Son*, 31 T. L. R. 442 (1915). Rowlatt, J., in giving judgment for the plaintiff, stated, "that the section afforded no protection to the defendants in the present case" (p. 444).

82. *Dodd, Impossibility of Performance of Contracts Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789. The opinion was formerly expressed that a distinction should be drawn between impossibility due to administrative regulations supported by actual statutory authority for their enforcement and those whose enforcement provisions were potential rather than actual. Where the regulation could only be enforced "potentially", it was felt that no excuse should be afforded the defendant. Until later reversed, the case of *Mawhinney v. Millbrook Woolen Mills, Inc.*, 105 Misc. 99, 172 N. Y. Supp. 461 (Sup. Ct. 1918) so held. Reversed in 231 N. Y. 290, 132 N. E. 93 (1921).

83. *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2d, 1920), cert. denied, 253 U. S. 498 (1920); *Mawhinney v. Millbrook Woolen Mills, Inc.*, 231 N. Y. 290, 132 N. E. 93 (1921), 234 N. Y. 244, 137 N. E. 318 (1922); *Metropolitan Water Board v. Dick, Kerr & Co.*, (1918) A. C. 119; *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration*, (1915) 3 K. B. 676; *Lipton, Limited v. Ford*, (1917) 2 K. B. 747; BLAIR, BREACH OF CONTRACT DUE TO WAR (1940) 58-63.

The buyer may not maintain an action for specific performance against the seller whose plant has been requisitioned. *Kneeland-Bigelow Co. v. Michigan Central Railroad Co.*, 207 Mich. 546, 174 N. W. 605 (1919).

The buyer has no right to the proceeds received by the seller pursuant to government requisitioning of the seller. *Atlantic Steel Co. v. Campbell Coal Co.*, 262 Fed. 555 (N. D. Ga. 1919).

The court will probably take judicial notice of the regulations. See note 93 *infra*.
84. *Ingram Day Lumber Co. v. Kola Lumber Co.*, 122 Miss. 632, 84 So. 693 (1920).

government regulation an excuse.⁸⁵ If the seller's breach occurs prior to the pre-emption, the seller and not the buyer will suffer the risk of loss.⁸⁶ And where the seller, by voluntary sale of his business to the government,⁸⁷ or voluntary distribution of his goods to others,⁸⁸ puts it out of his power to perform, the impossibility is not excusable. If the pre-emption results in partial impossibility then the seller is excused only to that extent,⁸⁹ and where the seller has several buyers his obligation is to prorate his residual inventory among them.⁹⁰ And to pre-empt one of the commodities of the seller does not excuse performance of a contract for another commodity.⁹¹

These limitations thus engrafted on the defense seem to fall under the principle that the pre-emption must, in order to give rise to an excuse, be the sole cause of the failure to perform.⁹² And the seller

85. *J. C. Lysle Milling Co. v. Sharp, et al.*, 207 S. W. 72 (Kansas City Ct. of App. Mo. 1918). Nor are such acts construed to operate retroactively. *Rock v. Deason & Keith*, 146 Ark. 124, 225 S. W. 317 (1920) (Food Control Act of August 10, 1917, 40 STAT. 280).

86. *Krulewicz v. National Importing Co., Inc.*, 195 App. Div. 544, 186 N. Y. Supp. 838 (1st Dep't 1921).

87. *Graves v. Miami S. S. Co.*, 29 Misc. 645, 61 N. Y. Supp. 115 (Sup. Ct. 1899) (Voluntary sale of ship to the government). However, the fact that the vendor may have sought the government work does not destroy the excuse. *Mawhinney v. Millbrook Woolen Mills, Inc.*, 231 N. Y. 290, 132 N. E. 93 (1921), 234 N. Y. 244, 137 N. E. 318 (1922); *Nitro Powder Company v. Agency of Canadian Car and Foundry Company*, 233 N. Y. 294, 135 N. E. 507 (1922).

The line of demarcation between a "voluntary" sale which is not excusable, and a sale wherein the vendor encourages the government to buy may, indeed, be a thin one. Compelling the vendor, in order to preserve his excuse, to insist on government formalities, might in some cases slow the defense program. But to allow the excuse in the event of a truly voluntary sale to the government would provide too easy an escape for the vendor from contract obligations. Notes, *Mobilization for Defense* (1940) 40 COL. L. REV. 1374, 1379, n. 51, 54 HARV. L. REV. 278, 299, n. 51, 50 YALE L. J. 250, 273, n. 51.

88. *B. P. Ducas Co. v. Bayer Co., Inc.*, 163 N. Y. Supp. 32 (Sup. Ct. 1916).

89. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1962; RESTATEMENT, CONTRACTS (1932) § 464 (1). But the buyer need not accept less than the agreed amount. *Prescott v. Powles*, 113 Wash. 177, 193 Pac. 680 (1920) (The buyer was held justified in his refusal to accept about eighty per cent. of the quantity fixed by the contract although the seller, because of government commandeering of transportation facilities, was excused from full performance).

90. See *Ranney-Davis Mercantile Co. v. Shawano Canning Co.*, 111 Kan. 68, 206 Pac. 337 (1922); cf. *Hermann v. Bower Chemical Mfg. Co.*, 242 Fed. 59 (C. C. A. 3d, 1917); *McDuffee v. Colwell*, 207 Mich. 154, 173 N. W. 355 (1919) (Landlord unable to heat building fully due to government restrictions, required to heat building to the best of his ability).

91. *Ingram Day Lumber Co. v. Kola Lumber Co.*, 122 Miss. 632, 84 So. 693 (1920). However, it would seem that if the seller can show that such pre-emption makes it actually impossible to perform both the government pre-emption and the buyer's contract, even though another commodity is involved, the seller would be excused. *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2d, 1920); *Mawhinney v. Millbrook Woolen Mills, Inc.*, 231 N. Y. 290, 132 N. E. 93 (1921), 234 N. Y. 244, 137 N. E. 318 (1922).

92. *Eminence Distillery Company v. Fremd*, 191 Ky. 191, 229 S. W. 369 (1921); *Varagnolo v. Partola Manufacturing Co.*, 209 App. Div. 347, 204 N. Y. Supp. 577 (1st Dep't 1924).

Under the Defence of Realm (Amendment), No. 2 Act, 1915, 5 GEO. V. c. 37, § 1 (2), providing that "where the fulfillment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the admiralty . . . that necessity is a good defence to any action or proceedings taken against that person in respect of

has the burden of alleging and proving the defense.⁹³

The defense has been generally regarded as one of excusable impossibility, yet in a strict sense this is not true. One avenue of performance open to sellers has not been judicially explored. No obligation seems to have been imposed upon the seller to increase the productive capacity of its plant so as to be able to fill both the pre-emptive and civilian orders or to prove that such expansion is not possible.⁹⁴ If expansion is possible, then failure to perform the buyer's contract is not due to government pre-emption but rather is caused by failure to expand facilities.⁹⁵ But since an excuse is afforded even though one avenue of possible performance is apparently disregarded, the

the non-fulfillment of the contract so far as it is due to that interference", it was held that performance being nevertheless possible there was no excuse. *Associated Portland Cement Manufacturers (1900) (Limited) v. William Cory and Son (Limited)*, 31 T. L. R. 442 (K. B. 1915).

93. If performance remains possible in a non-prohibited way the seller is not excused. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1951, n. 7. And it would seem that the defendant has the burden of pleading and proving that performance is not possible in a non-prohibitive way. *Bernhardt Lumber Co. v. Metzloff*, 113 Misc. 288, 184 N. Y. Supp. 289 (Sup. Ct. 1920); *Commonwealth v. Neff et al.*, 271 Pa. 312, 114 Atl. 267 (1921); *Taylor & Co. v. Landauer & Co.*, 85 Sol. J. 119 (K. B. 1941). See *Tipler-Grossman Lumber Co. v. Forrest City Box Co.*, 148 Ark. 132, 229 S. W. 17 (1921); *Salembier, Levin & Co., Inc. v. North Adams Mfg. Co.*, 178 N. Y. Supp. 607 (Sup. Ct. 1919); *Commonwealth v. Bader*, 271 Pa. 308, 114 Atl. 266 (1921); *Thompson & Stacy Company v. Evans, Coleman & Evans*, 100 Wash. 277, 170 Pac. 578 (1918); *Corbin, Discharge of Contracts* (1913) 22 YALE L. J. 513, 521.

The court will take judicial notice of the regulations. *Caha v. United States*, 152 U. S. 211 (1894) (rules and regulations prescribed by the Interior Department in respect to contests before the Land Office); *United States v. Miller*, 249 Fed. 985 (S. D. Fla. 1918) (Presidential regulations issued under Selective Service Act of May 18, 1917, 40 STAT. 76); *Lawrenceburg Roller Mills Co. v. Chas. A. Jones & Co.*, 204 Ala. 59, 85 So. 719 (1920) (The Food Control Act, Aug. 10, 1917, 40 STAT. 280, and regulations thereunder); *The London & Lancashire Indemnity Co. of America v. Board of Commissioners of Columbiana County et al.* (2 cases), 107 Ohio St. 51, 61, 140 N. E. 672, 675 (1923). "All such acts of congress, and the creation of boards pursuant thereto, and the promulgation and publication of executive orders, and orders of such boards, and all other official acts of general public interest of the federal executive department, and the proclamation and order of the President taking possession and assuming control of transportation systems for war purposes, will be judicially noticed.

The regulations of the Office of Production Management and other Defense Agencies are published in the FEDERAL REGISTER and should therefore be noticed. 9 WIGMORE, EVIDENCE (1940) § 2572, n. 16. *Contra*: *Smith v. City of Shakopee*, 97 Fed. 974 (C. C. A. 8th, 1899) (regulations of Federal Lighthouse Board, not noticed).

Evidence of the effect of these regulations upon the seller must be introduced into evidence. *Tipler-Grossman Lumber Company v. Forrest City Box Co.*, 148 Ark. 132, 229 S. W. 17 (1921).

94. See *Dodd, Impossibility of Performance Due to War-Time Regulations* (1919) 32 HARV. L. REV. 789, 803; Note, *Effects on Contracts of War Orders or Other Acts of States* (1919) 28 YALE L. J. 399, 400. To require proof that such expansion is not possible would follow from the general rule as stated in note 93 *supra*.

95. Even granting that such expansion might create a financial hardship, increased financial hardship has, except in extreme cases, been held no excuse. 5 PAGE, CONTRACTS (2d ed. 1921) § 2706; 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1963. Held not excusable in: *Columbus Railway, Power & Light Co. v. City of Columbus*, 249 U. S. 399 (1919) (increased cost due to fifty per cent. increase in wages by action of War Labor Board); *City of Moorhead v. Union Light, Heat & Power Co.*, 255 Fed. 920 (D. Minn. 1918) (increased costs due to war conditions); *Davison Chemical Co. v. Baugh Chemical Co.*, 133 Md. 203, 104 Atl. 404 (1918) (war conditions increased cost of raw materials). In *North German Lloyd v. Guaranty Trust Co.*, 244 U. S. 12 (1917), a greatly increased hardship due to war was held a valid excuse, but a similar hardship was held no excuse in *Piaggio v. Somerville*, 119 Miss. 6, 80 So. 342 (1918).

courts have deviated from the strict doctrine of excusable impossibility.⁹⁶ The duty of such expansion or the burden of proving its impossibility might be placed upon the seller.⁹⁷ Furthermore, to impose such a duty or the burden of proving its impossibility would be welcomed as tending to increase the nation's productive capacity. Insofar as excusable impossibility is grounded on public policy the imposition of such a duty is consistent with that defense. Moreover, legislation has been enacted to encourage such expansion.⁹⁸ Nor does the "no damage statute" in a strict sense mitigate against the imposition of such a duty since the default of the seller is, as has been explained, due to failure to expand facilities, rather than compliance with government rule, regulation or order.

The government regulations upon which the excuse is grounded are basically a part of the emergency legislation brought on by the national defense program. Performance of any contract made impossible by the regulations will become possible after the duration. The inquiry, then, is whether the excuse discharges the contract entirely or merely justifies the temporary non-performance of the seller.⁹⁹ Priorities regulations are designed to give preference to defense needs but not to discharge non-defense contracts.¹⁰⁰ That is, these regulations are designed to justify the seller in postponement of the time of performance. But in spite of the temporary character of the regulations, their duration is of uncertain length.¹⁰¹

96. RESTATEMENT, CONTRACTS (1932) § 454, defines impossibility to mean "not only strict impossibility but impracticality because of extreme and unreasonable difficulty, expense, injury or loss involved." But even if impossibility be so defined, the burden of proving that expansion comes within the definition would be upon the seller.

97. The difficulties that may be encountered in new construction work (S. P. A. B. Release No. SPA-9, Oct. 9, 1941, and O. P. M. Release No. PM-1425, Oct. 23, 1941, C. C. H. War Law Serv. ¶¶ 23,554, 23,570) is not conclusive proof of the impossibility of expansion. Taylor & Co. v. Landauer & Co., (1940) 4 All Eng. Rep. 335 (K. B.).

98. Notes, *Mobilization for Defense* (1940) 40 COL. L. REV. 1374, 1402-1406, 54 HARV. L. REV. 278, 304-9, 50 YALE L. J. 250.

99. Atlantic Steel Co. v. Campbell Coal Co., 262 Fed. 555 (N. D. Ga. 1919); Schoelkopf v. Moerlbach Brewing Co., 184 N. Y. Supp. 267 (1920), *aff'd without opinion*, 198 App. Div. 965, 189 N. Y. Supp. 954 (4th Dep't 1921); 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1957.

It should be noted that the "no damage statute" excuses the promisor "for any default." The question whether the contract is discharged or only its performance postponed is not concluded by the statute.

100. Nowhere in the rules, regulations, orders or statutes enacted pursuant to the defense program is there a statement that civil contracts are discharged. The motivating idea of the defense program is that "First Things Come First," that defense needs shall come ahead of non-defense needs. Cf. J. C. Lysle Milling Co. v. Sharp, 207 S. W. 72, 73 (Kansas City Ct. of App., Mo., 1918) (food regulations), "Congress in authorizing the establishment of such regulations, did not undertake to invalidate prior contracts, nor did it do so"; U. S. Trading Corp. v. Newmark Grain Company, 56 Cal. App. 176, 186, 205 Pac. 29, 34 (1922) (embargo); Hadley v. Clark, 101 Eng. Rep. R. 1377, 3 B. & P. 291, 410, 4 East. 42, 546 (1799) (embargo).

101. It has been said of war that, "It is impossible for any court to speculate as to the duration of the war." Viscount Haldane in Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co., (1916) 2 A. C. 397, 411.

In cases of installment contracts an additional problem can arise. For example, consider a contract made in 1936 whereby a seller agrees to sell and the buyer agrees

By the application of settled law we may conclude that the contract is discharged where performance after the termination of the regulations would impose a burden on the seller substantially greater than would have been imposed on him had there been no regulations;¹⁰² but otherwise the performance is suspended.¹⁰³ That is, there is permanent discharge if the temporary impossibility goes to the essence of the contract.

But when may or must it be determined whether the essence of the contract has been affected by the existence of the regulations? At the time regulations are enacted? At the time performance is due? At the time of suit? Or later? Commercial practice would prefer that the obligation of a contract or its discharge be determinable immediately upon the happening of the critical event, that is, the enactment of the regulations,¹⁰⁴ rather than to be left for future determination.¹⁰⁵ The commercial practice that makes such a demand assumes a business-as-usual era. Commercial and legal desires of such an era must give way to the demands of extraordinary circumstances now prevailing. Thus it would seem that the parties must at the outset regard the excuse as postponing the time for performance. When at some later date, if the duration continues, it can be ascertained that the burden of performance on the promisor would be substantially greater, then the seller's entire obligation is discharged. The buyer can insure the

to buy a certain amount of goods annually for a period of ten years. Assume that the "duration" lasts three years. The possibilities are three-fold. There may be, (1) a discharge of the entire contract, (2) an "abatement" of the contract for so long as the "duration" continues, in which event performance will be excused during the "duration", but the contract will terminate in 1946 as originally agreed, or (3) an extension or postponement of the contract for a length of time equal to the duration in which event, though performances will be excused during the "duration", the contract will terminate in 1949.

The problem of whether, in the absence of a discharge, there should be an "abatement" or postponement was briefly considered in *Atlantic Steel Co. v. Campbell Coal Co.*, 262 Fed. 555, 560 (N. D. Ga. 1919). "That its performance should be only temporarily excused would be less harsh, and, if time were not of the essence of the contract, it might be thought that no hardship would result in a mere postponement. To apply the rule of postponement, however, to the many contracts that were indefinitely arrested by government action, both in coal mines and manufacturing establishments, during the war, would perhaps result in an accumulation of obligations to make deliveries or to receive and pay for goods that would be ruinous to the persons involved."

102. *Metropolitan Water Board v. Dick, Kerr & Co.*, (1918) A. C. 119; 6 *WILLISTON, CONTRACTS* (Rev. ed. 1938) § 1958; *RESTATEMENT, CONTRACTS* (1932) § 462; cf. *Maurer & Co. v. Tubeless Tire Co.*, 272 Fed. 990 (N. D. Ohio, 1921).

103. *Palmer v. Lorillard*, 16 Johns. 348 (N. Y. 1819); *A. L. Young Machinery Co. v. Lee Loader & Body Company*, 218 Ill. App. 427 (1920); 6 *WILLISTON, CONTRACTS* (1938) § 1958; *RESTATEMENT, CONTRACTS* (1932) § 462; cf. *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 Fed. 177 (C. C. A. 2d, 1920), cert. denied, 253 U. S. 498 (1920); *Mawhinney v. Millbrook Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921), reversed, 234 N. Y. 244, 137 N. E. 318 (1922).

104. But this, too, may be ambiguous. Is it the enactment of the law by Congress, declaration of the emergency by the President, establishment of the agency to administer the law, or promulgation of the regulations by the agency?

105. "Now there is nothing more repugnant to business men who have to look ahead and make their arrangements in advance than uncertainty of their engagements already made." *Bailhache, J., in Anglo-Northern Trading Co., Ltd. v. Emlyn, Jones & Williams*, (1917) 2 K. B. 78, 84.

termination of the contract under such circumstances by rescission.¹⁰⁶ Whether the regulations have persisted for a time sufficient to go to the essence of the contract depends upon the facts in each individual case.¹⁰⁷ It seems pertinent to ascertain the length of time the impossibility has continued,¹⁰⁸ whether the contract is for performance at a definite stated time or at some approximate time, whether the contract is one requiring a single performance or performance over a period of time, and other matters.¹⁰⁹

As distinguished from cases involving war as a ground of excusable impossibility, no exculpatory clause is required to make the defense of impossibility due to law available.¹¹⁰ But it is quite another matter whether the seller may by a contract provision waive the defense. The validity of such a provision may well be questioned. The defense is basically allowable on the ground that public policy so demands. An attempted waiver would run counter to that policy and hence would seem invalid.¹¹¹

Direct Pre-emption as a Buyer's Defense

Although attention has been directed mainly at cases wherein the seller, being pre-empted, seeks an excuse, the converse situation may

106. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 5490, "If the impossibility persists for a length of time sufficient to go to the essence of the contract (and only in that case) the temporary non-performance on one side will justify the other party in rescinding the contract altogether." *Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co.*, 136 Md. 278, 110 Atl. 486 (1920); *Mawhinney v. Millbrook Woolen Mills, Inc.*, 231 N. Y. 290, 132 N. E. 93 (1921), *reversed*, 234 N. Y. 244, 137 N. E. 318 (1922); *cf. Pierson and Company v. American Steel Export Company*, 194 App. Div. 555, 185 N. Y. Supp. 527 (1920) (under the facts of this case it was held that before rescission became effective a reasonable time within which the other party could perform must elapse).

107. *Kinzer Const. Co. v. State*, 125 N. Y. Supp. 46 (1910), *aff'd*, 204 N. Y. 381, 97 N. E. 871 (1912); *BLAIR, BREACH OF CONTRACT DUE TO WAR* 42 (1940); *cf. 6 WILLISTON, CONTRACTS* (Rev. ed. 1938) § 1956.

108. *Metropolitan Water Board v. Dick, Kerr & Co.*, (1917) 2 K. B. 1, *aff'd*, (1918) A. C. 119, "The contractors treated it as of such a nature as to terminate their liabilities under the contract, and the fact that the restraint, which had been in force for six months at the date of the trial, has not been in existence for twelve months is a matter we are entitled to have regard to." *Brevard Tannin Co. v. J. F. Moser Co. et al.*, 288 Fed. 725 (C. C. A. 4th, 1923) (embargo lasting but a few days did not excuse performance); *U. S. Trading Corp. v. Newmark Grain Company*, 56 Cal. App. 176, 205 Pac. 29 (1922).

109. *Societe Anonyme des Suceries de Saint Jean v. Bull Insular Line, Inc.*, 276 Fed. 783 (C. C. A. 2d, 1921) (U. S. Shipping Board requisitioned ships of the defendant); *Tanner v. Ballard & Ballard, Inc.*, 273 Fed. 671 (C. C. A. 2d, 1921) (contract provision important); *Atlantic Steel Co. v. Campbell Coal Co.*, 262 Fed. 555 (N. D. Ga. 1919) (subsequent action of the parties regarded as important); *Barish v. Brander et al.*, 180 N. Y. Supp. 447 (1920) (contract provision important); *cf. Edward Maurer Co. v. Tubeless Tire Co.*, 272 Fed. 990 (N. D. Ohio, 1921) (Price Control: In this case the court also considered as important the fact that the market value of the goods fluctuated in price).

110. *Blackburn Bobbin Co. v. Allen*, (1918) 2 K. B. 467, *aff'd*, (1918) 1 K. B. 540 (Contract not discharged by outbreak of war); *Dwight v. Callaghan*, 53 Cal. App. 132, 199 Pac. 838 (1921) (contract not excused by war conditions); *Richard, Effect of Present War on Contracts* (1940) 18 CHI-KENT. REV. 164, 177.

111. See note 144 *infra*.

be presented. It is of no moment to the administration of governmental pre-emption whether the company pre-empted is seller, buyer or both. A company thus affected may seek to excuse performance of a *purchase* contract. Illustrations are not readily available in decided cases—the situation seems rarely to have been presented to an appellate court.¹¹²

Suppose that *B*, a manufacturer, customarily produces two different items, *X* and *Y*. He purchases products needed for article *X* from *SX* and products needed for article *Y* from *SY*. A pre-emption order requires *B* to turn his entire production into article *X* so that he can no longer produce article *Y*.¹¹³ Does *B* have an excuse for refusal to accept materials purchased from *SY*? It is clear that the buyer's performance, payment for the goods, is not rendered impossible; hence, the case appears as one of subjective non-excusable impossibility. Yet the matter lies deeper. *SY* will almost always know at the time of accepting *B*'s purchase order that the goods are intended for product *Y*.¹¹⁴ After being pre-empted, the materials from *SY* are by defini-

112. No case has been found where a purchaser of goods has claimed an excuse. *Federal Sign System v. Palmer*, 176 N. Y. Supp. 565 (1919), however, is a case where the lessee of an electric sign claimed an excuse on the ground that an order of the Fuel Administrator subsequently made it unlawful to light the sign except on Saturday nights. The excuse was disallowed. In accord is *Leiston-Cum-Sizewell Urban District Council*, (1916) 2 K. B. 428. "Both of these cases are in seeming conflict with *Krell v. Henry*, (1903) 2 K. B. 740." BLAIR, *BREACH OF CONTRACT DUE TO WAR* (1940) 25-26, n. 3.

More recent is the case of *Williams v. Mercer*, (1940) 3 All Eng. Rep. 292, involving restrictions on the lighting of a neon sign. Held, that the lessee could not terminate the lease. But in *White & Carter, Ltd. v. Carbis Bay Garage, Ltd.*, (1941) 2 All Eng. Rep. 633 (C. A.), a contract for a display sign was held discharged where government regulations required the obliteration of all place names, obliteration of the name of the advertiser (whose name included a place name) and the name of the town. The lessee was not required to furnish other suitable matter for display.

113. This may well occur in situations illustrated by *Roxford Knitting Co. v. Moore & Tierney*, 265 Fed. 177 (C. C. A. 2d, 1920), and *Mawhinney v. Millbrook Woolen Mills, Inc.*, 231 N. Y. 290, 132 N. E. 93 (1921). In both cases the manufacturer defendant was excused from performing a civilian contract with the plaintiff on the ground that the seller was pre-empted with other governmental orders. It may well be that the manufacturer had ordered raw materials from others to fabricate the plaintiff's product.

Similar situations growing out of current regulations are likely to occur. A manufacturer's operations may be curtailed by government regulations. E. g., *Limitation Order L-6 to Restrict the Production of Domestic Laundry Equipment*, 6 FED. REG. 5533, tit. 32, c. IX, subc. B, part 992 (Oct. 30, 1941), or *Limitation Order L-7 to Restrict the Production of Domestic Ice Refrigerators*, 6 FED. REG. 5534, tit. 32, c. IX, subc. B, part 993 (Oct. 30, 1941). The raw materials needed by the manufacturer in such case will be diminished. The manufacturer-buyer may seek to be relieved of purchase contract obligations.

In some cases the manufacturer has been ordered to limit the consumption of raw materials. E. g., *General Limitation Order L-15 to Restrict the Consumption of Waste Paper by Paper Board and Roofing Mill Plants in the East*, 6 FED. REG. 5487, tit. 32, c. IX, subc. B, part 1007 (Oct. 28, 1941). In other cases the manufacturer has been prevented from using materials for certain purposes. E. g., *Copper Conservation Order M-9-c*, 6 FED. REG. 5394, tit. 32, c. IX, subc. B, part 933 (Oct. 22, 1941). In such cases as these the manufacturer will seek to be relieved of purchase contract obligations.

114. Commercial practice almost always requires the seller, in furthering his sales, to know the products made by the buyer and the use the buyer intends to make of the

tion of questionable value to *B* and the basic reason for his obtaining the goods has vanished. As so stated, the doctrine of frustration appears applicable. Some decisions have adopted the view that where the "whole value of the performance of one of the parties at least, and the basic reason recognized as such by both parties, for entering into the contract has been destroyed by a supervening and unforeseen event" a defense is created.¹¹⁵

That the buyer would thus claim a defense which is strictly not one of impossibility ought not preclude serious legal consideration of its merits. The seller's frequently granted defense is itself not strictly one of impossibility. Moreover, freedom of the buyer from liability, if that be the solution, would be occasioned by the pre-emption in exactly the same way as the seller's excuse and for the same fundamental reason, that is, furtherance of the war program by assisting those whose effort is directed toward the program by putting the risk of loss on others. Thirdly, the "no damage statute" might be construed to cover the situation, insofar as it provides that "no person shall be held liable for damages for any default under any . . . *purchase order* . . ." Or, fourthly, the buyer might claim that the default results "indirectly from his compliance with" a "rule, regulation or order", and hence is excusable under the "no damage statute". Of course, if such excuse is created in favor of the buyer it should be subject to the limitations that the breach did not occur before the pre-emption, that the breach was not due to voluntary act of the buyer, and that the defense must be alleged and proved by the buyer.

Indirect Pre-emption as a Seller's Defense

Thus far, we have discussed the legal relations between buyer and seller due to direct pre-emption of either of them. In commercial practice the interdependence of buyers and sellers upon each other is complex. It depends not solely upon performances between themselves but upon performances by others, for the buyer cannot get his goods from the seller if the seller's source of supply is cut off. That the seller's source of supply may be cut off by pre-emption is amply illustrated by priorities regulations.¹¹⁶ Thus performance may be rendered impossible by pre-emption not directly imposed upon the seller.

particular product purchased. Sometimes buyers volunteer this information as a matter of business practice.

115. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) 5419. As to frustration as a defense, reference should be made to authorities cited in note 71 *supra*.

116. All of the "M" Orders (note 33 *supra*), curtail distribution of various materials. Many other regulations likewise curtail distribution of materials.

As a general rule, "where a promise is absolute in terms to furnish goods . . . the mere fact that the promisor alone contemplated a certain means of performance and had no other means will not excuse him from liability when this means is accidentally destroyed."¹¹⁷ But if that means is "destroyed" by pre-emption the seller will argue excusable impossibility by virtue of governmental regulation.¹¹⁸ It has been held that although pre-emption increases the difficulty and expense of securing materials, performance is not excused.¹¹⁹ But where the material is no longer available due to governmental control, the impossibility is excusable,¹²⁰ except under the doctrine of foreseeability, which is illustrated by *Crown Embroidery Works v. Gordon*.¹²¹ The plaintiff purchased dress cloth from the defendant. The defendant was to manufacture the cloth from yarn purchased elsewhere. At the time of the contract and for a reasonable time thereafter the seller could have procured the yarn, but at a later date and before performance was due, a lawful regulation of the government made it impossible for the seller to obtain the yarn. The court held the seller liable for failure to perform. At the time when the contract was made Congress had already enacted the National Defense Act and the President had created the War Industries Board. It was, therefore, foreseeable at the time when the contract was made that regulations of the government might make it impossible to procure yarn. Under such circumstances the obligation of procuring yarn before actual need for it arises is imposed upon the seller.¹²² To

117. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) 5473.

118. The "no damage statute" affords no excuse. The statutory excuse is limited to default occasioned by the promisor's compliance with the regulations.

119. *Town of North Hempstead v. Public Service Corporation of Long Island*, 107 Misc. 19, 176 N. Y. Supp. 621 (Sup. Ct. 1919), *aff'd*, 192 App. Div. 924, 182 N. Y. Supp. 954 (2d Dep't 1920), *aff'd without opinion*, 235 N. Y. 607, 139 N. E. 754 (1923).

120. *Nitro Powder Co. v. Agency of Canadian Car and Foundry Company*, 233 N. Y. 294, 135 N. E. 507 (1922); *cf. Jersey Ice Cream Co. v. Banner Cone Co.*, 204 Ala. 532, 86 So. 382 (1920). The plaintiff was unable, because of government restrictions to obtain ingredients to manufacture ice cream cones for the buyer. The seller was excused, although the buyer was able to procure cones on the open market from others.

If the impossibility is due to war there is no excuse. In *Coal District Powder Company v. Katy Coal Company*, 141 Ark. 337, 217 S. W. 449 (1919), the defendant, having agreed to furnish electric power service, failed to do so. The testimony showed that the failure to furnish service was due to breaking down of certain insulators which were made of ingredients made in Germany. There was testimony that it was "impracticable, if not impossible," to get the insulators due to war. Held, no excuse.

If a government embargo makes shipment impossible the seller is excused. *Lippman v. Rice Millers' Distributing Co., Inc.*, 156 La. 471, 100 So. 685 (1924).

121. 190 App. Div. 472, 180 N. Y. Supp. 158 (1st Dep't 1920).

122. *The London & Lancashire Indemnity Co. of America v. Board of Commissioners of Columbia County et al.*, 107 Ohio St. 51, 140 N. E. 672 (1923), *cert. denied*, 262 U. S. 755 (1923); *cf. Herrmann v. Bower Chemical Manufacturing Co.*, 242 Fed. 59 (C. C. A. 3d, 1917); *Richards & Co., Inc. v. Wreschner et al.*, 174 App. Div. 484, 156 N. Y. Supp. 1054 (Trial Term, 1915); *see Atlantic Steel Co. v. Campbell Coal Co.*, 262 Fed. 555, 559 (N. D. Ga. 1919); *Salembier, Levin & Co., Inc. v. North Adams*

the extent then, that purchases must be prematurely made, hoarding is encouraged by the decision. But such hoarding, since it is for a particular contract already in existence, is not harmful.¹²³ The decision can be grounded upon the principle that it was not the pre-emption that was the cause of the failure to perform but rather the promisor's lack of diligence, and hence the "no damage statute" affords no excuse.

The doctrine that impossibility can be prevented by diligent foresight and hence is not excusable appears as another exception to the general rule of excusable impossibility due to pre-emption. Its application, however, should be restricted to cases wherein the pre-emption is not directly imposed on the seller's performance. In the cases of direct pre-emption the impossibility was held excusable even though, we may suppose, the seller could have foreseen that an order of the government would render impossible the performance of a contract, as, for example, by prohibiting delivery. Nevertheless, the doctrine of foreseeability should not be applicable in cases of direct pre-emption. To hold that foreseeability vitiates the excuse in cases of direct pre-emption would require that the seller's performance be completed prior to the time contracted for—an obligation which finds no legal justification. But in the *Crown* case, performance of the seller, that is, manufacture and delivery of the cloth to the buyer is not prematurely required even though one of the steps in the manufacture, that is, the procurement of the yarn, may be required earlier than normal circumstances would demand. The difference is between performance and preparation for performance,¹²⁴ with the consequent result that preparation may be prematurely required but performance may not be.

Another type of impossibility attributable to pre-emption not directly imposed upon the seller is one in which the seller, in order to perform, has purchased from another (sub-seller) who is pre-empted. The preparation of the seller, *S*, for performance of his contract with the buyer, *B*, may necessitate *S*'s procurement of materials from a sub-seller or sub-contractor, *ss*. Since the seller is in a dual position of seller to *B* and buyer from the sub-seller, *ss*, the designation, *Sb*, better illustrates his position. In some cases the failure of *Sb* to perform his contract with *B* may be due to the failure of *ss* to perform. However, the failure of a seller's source of supply to perform is no

Mfg. Co., 178 N. Y. Supp. 607, 611 (Sup. Ct., Spec. Term, 1919), *aff'd without opinion*, 180 N. Y. Supp. 951 (App. Div., 1st Dep't 1920).

123. Although the sale to the buyer may be fictitious, i. e., for the purpose of affording an excuse to the seller to hoard, such a possibility is remote.

124. 3 WILLISTON, CONTRACTS (Rev. ed. 1938) § 874.

excuse¹²⁵ unless a special group of circumstances appears.¹²⁶ Whether pre-emption of the seller's seller is such a circumstance is not clear. In *Primos Chemical Co. v. Fulton Steel Corporation*,¹²⁷ the seller's failure to perform was attributable to default of the American Bridge Company, from whom the seller purchased a certain girder and fittings. The court said:

"Concededly the delay was occasioned by the failure of the American Bridge Company to deliver the girder. Whether the American Bridge Company was delayed in furnishing the girder by orders from the Government does not appear to me to be at all material."¹²⁸

The correctness of the conclusion, for which no authority was cited, may well be doubted. The failure of *ss* to perform his contract with *Sb*, since due to pre-emption, may be excusable. The burden thus placed on *Sb*, unless excused, would seem to create a special circumstance as strong as the cases mentioned by Judge Cardozo in *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*¹²⁹

"We may assume, in the defendant's favor, that there would have been a discharge of its duty to deliver if the refinery had been destroyed,¹³⁰ or if the output had been curtailed by the failure of the sugar crop,¹³¹ or by the ravages of war,¹³² or conceivably in some circumstances by unavoidable strikes."¹³³

Yet, since the failure of *Sb*'s performance is due to remote pre-emption, the limitations upon the excuse imposed in other cases of

125. *Canadian Industrial Alcohol Co. v. Dunbar Molasses Co.*, 258 N. Y. 194, 179 N. E. 383 (1932); 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 5413.

The "no damage statute" affords no excuse. The statute is worded to afford the promisor an excuse where default arises "from *his* compliance" with the regulations. Nothing in the statute gives the promisor a defense where default occurs by virtue of another's compliance with the regulations. It is interesting to observe that an earlier English statute was worded to cover the situation. Defense of Realm (Amendment), No. 2, Act 1915, section 1, subsection 2, provided, in part, "where the fulfillment by any person of any contract is interfered with by the necessity on the part of himself or any other person complying with any requirement . . . that necessity is a good defense . . ." (italics supplied).

126. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1952; compare *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377 (1918).

127. 266 Fed. 945 (N. D. N. Y. 1920).

128. *Id.* at 947.

129. 258 N. Y. 194, 198, 179 N. E. 383, 384 (1932).

130. Citing: *Nitro Powder Co. v. Agency of C. C. & F. Co.*, 233 N. Y. 294, 135 N. E. 507 (1922); *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595 (1891). *Dexter v. Norton*, 47 N. Y. 62 (1871).

131. Citing: *Pearson v. McKinney*, 160 Cal. 649, 117 Pac. 919 (1911); *Howell v. Coupland*, (1876) 1 Q. B. D.; 3 WILLISTON, CONTRACTS (1st ed. 1920) § 1949.

132. Citing: *Matter of Badische Co.*, (1921) 2 Ch. 331; *Horlock v. Beal*, (1916) 1 A. C. 486.

133. Citing: *American Union Line v. Oriental Navigation Corp.*, 239 N. Y. 207, 219, 146 N. E. 338 (1924); *Normandie Shirt Co. v. Eagle, Inc.*, 238 N. Y. 218, 229, 144 N. E. 507, 511 (1924); *Delaware, L. & W. Co. v. Bowns*, 58 N. Y. 573 (1874); and *cf. Blackstock v. New York & Erie R. Co.*, 20 N. Y. 48 (1859); also 2 WILLISTON, CONTRACTS (1st ed. 1920) §§ 1099, 2045, 2046.

remote pre-emption ought to be applicable here. Thus if the seller, *Sb*, can elsewhere procure the materials even though at an increased price¹³⁴ or if by due diligence he could have foreseen that his particular source of supply would be pre-empted,¹³⁵ then the impossibility should not be excusable. But if the performance of *ss* to *Sb* is excusable due to the regulation or order, and if the impossibility is not otherwise non-excusable, then the statement in the *Primos* case would seem incorrect. The result reached is that in some cases the seller, *Sb*, may, in an action by *B* against him, take advantage of the same defense as would be applicable in an action by *Sb* against *ss*.

Indirect Pre-emption as a Buyer's Defense

The buyer, *B*, may also stand in a dual position. He is buyer from *S* but may also be seller to a sub-buyer, *bb*. The dual position of *B* can be illustrated by the designation *sB*. The defense arising out of pre-emption of a buyer, *bb*, on a purchase contract from his seller, *Sb*, has been discussed. In a suit by *S* against *sB*, may *sB* avail himself of the same defense as would be applicable in an action by *sB* against *bb*?

The excuse of a buyer necessitates his showing, inter alia, that his need for the goods purchased is no longer present due to pre-emption. Examples of the lack of need by *sB* due to pre-emption of *bb* are not readily available and the occurrence in commerce is probably rare. But such a situation is conceivable in terms of the prior example of the sale to *B* by *SY* and *SX*.¹³⁶ If, for purposes of illustration *SX* and *SY* become, not only sellers to *B* but buyers from another, then *B* in the prior example becomes a sub-buyer in this illustration. If the goods involved are unique (cut to size or of special design) and if *sB* is a jobber or factor who sells goods in the same condition in which he receives them, then, on the sub-buyer's, *bb*'s, failure to take goods from *sB* (which may be excusable) *sB* will desire to refuse the goods from *S*. The goods are of as questionable value to *sB* as they are to *bb*. Since performance by *sB* is both factually and legally possible, only the doctrine of frustration can come to his aid. If, as illustrated in the prior situation, the facts can support the doctrine, it might be applicable. But a difference does exist between the examples in terms of the national war program. Neither *sB* nor *S* are, in this case, engaged in the war effort with respect to the goods in question. Only the sub-buyer, *bb*, is so engaged. The

134. Cf. *Town of North Hempstead v. Public Service Corporation of Long Island*, 107 Misc. 19, 176 N. Y. Supp. 621 (Sup. Ct. 1919).

135. Cf. *Crown Embroidery Works v. Gordon*, 190 App. Div. 472, 180 N. Y. Supp. 158 (1920), *aff'd*, 187 N. Y. Supp. 932 (1921).

136. See page 552 *supra*.

pre-emption is solely upon the sub-buyer. No conflict exists between civilian and defense needs. It is immaterial to the war program whether the loss falls on *S* or *sB*. Customary principles of contract law would make the loss fall on the party who failed by contract to insulate himself from the risk.¹³⁷

CONTRACTS MADE SUBSEQUENT TO PRE-EMPTION REGULATIONS

All the situations thus far discussed had one element in common, *viz.*, the contract involved was made prior to the effective date of the government pre-emption. *Anglo-Russian Merchant Traders v. Batt*¹³⁸ illustrates some of the problems raised where a contract is made after the regulations are "enacted", and while they are in force. A contract for the sale of aluminum for export was made. Both parties knew that export was prohibited without a license. The promise of the seller was absolute in its terms, and although he diligently endeavored to secure a license he was unable to do so. The buyer sued for breach of contract. The buyer's contention that the promise to ship the aluminum was absolute and therefore the seller was liable, was rejected by the court. The law does not "imply an absolute obligation to do that which the law forbids. A shipment contrary to the prohibition would be illegal, and an absolute obligation to ship could not be enforced."¹³⁹ Accordingly, the contract was construed as an obligation to do the only thing that was legally permissive, that is, to use one's best efforts to secure a license.¹⁴⁰ The seller, having done so, is fully discharged of his contract obligations.¹⁴¹

137. *Dougherty Co. v. 2471 Tons of Coal Ex. Barge Annapolis*, 278 Fed. 799 (D. Mass. 1922); *cf. Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167 (1896); *Philadelphia Boiler Works v. Foundation Co.*, 190 N. Y. Supp. 696 (1921).

138. (1917) 2 K. B. 679.

139. *Id.* at 686.

140. *Taylor & Co. v. Landauer & Co.*, (1940) 4 All Eng. Rep. 335 (K. B.). A contract was made before the outbreak of war to deliver butter beans in Oct./Nov. 1939. A government regulation went into effect September, 1939, requiring a license before shipment could be made. *Held*, that the seller had the duty to apply for the license to enable it to perform the contract. There is dictum to the effect that if the seller had tendered the documents of title to the buyer, the duty of the seller to apply for the license would be discharged. "I think that counsel for the respondents was right in saying that the onus upon the buyers of getting a licence did not arise at least, until the documents were tendered to them."

The contract between the parties may require one of them to procure the license. *Jaslow v. Waterbury Co.*, 9 F. (2d) 232 (C. C. A. 2d, 1925).

141. *Empire Lumber Company v. Parshelsky Brothers, Inc.*, 201 App. Div. 764, 194 N. Y. Supp. 670 (1922) (The defendant, having agreed to secure a permit and having failed to do so was held liable); *cf. Mertens v. Home Freeholds Co.*, (1921) 2 K. B. 526; *Washington Manufacturing Co. v. Midland Lumber Co.*, 113 Wash. 593, 194 Pac. 777 (1921); *see United States Trading Corporation v. Newmark Grain Co.*, 56 Cal. App. 176, 205 Pac. 29 (1922); BLAIR, *BREACH OF CONTRACT DUE TO WAR* (1940) 33-5.

The procurement of a permit may be regarded as a condition precedent. *The Malcolm Baxter, Jr.*, 253 Fed. 486 (S. D. N. Y. 1918).

If one party is proceeding with due diligence to procure a license, the other party may not cancel the contract. *Meyer Brothers Drug Company v. I. P. Callison*, 120 Wash. 378, 207 Pac. 683 (1922).

The principle that contracts which require performances contrary to the regulations are invalid is consistent with the general view that contracts against public policy,¹⁴² such as contracts made to aid the enemy or frustrate the war effort,¹⁴³ are invalid. A fortiori, contracts, the making of which is expressly prohibited by the regulations, would be unenforceable by either party.¹⁴⁴ Thus, any contract provision which might by its terms seek to avoid the regulations, as by promising to deliver goods contrary to certain prohibitions, would be invalid.

Such contracts should not be confused with agreements to do the impossible, generally considered to be valid.¹⁴⁵ "Factual" impossibility must be distinguished from "legal" impossibility. In the latter case, the policy of the particular law creating the impossibility prevails. Not so with factual impossibility; no legal prohibition prevents the performance.

EFFECT OF TERMINATION OF PRE-EMPTIVE REGULATIONS

Thus, while contracts entered into for the sale of goods during this national war era should not overlook the presence of these regulations, it also seems vital to consider the effect of the termination of these regulations. It is important to note that many of the regulations contain their own termination date¹⁴⁶ and become of no force on that date unless renewed. Some regulations may terminate in this way while others may be specifically terminated even prior to their announced termination date.¹⁴⁷ But even more important is the eventual termination of the emergency and the cessation of all such regulations.¹⁴⁸

142. RESTATEMENT, CONTRACTS (1932) § 512.

143. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) §§ 1747, 1748; RESTATEMENT, CONTRACTS (1932) § 594; 5 PAGE, CONTRACTS (1921) § 2725; cf. *Driver v. Smith*, 89 N. J. Eq. 339, 104 Atl. 717 (1918).

144. *Segal v. Chemical Importing & Mfg. Co.*, 205 App. Div. 220, 199 N. Y. Supp. 250 (1923).

145. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1934; RESTATEMENT, CONTRACTS (1932) §§ 456, 457; cf. 5 PAGE, CONTRACTS (1921) §§ 2669, 2670, 2671; *contra*: Corbin, *Discharge of Contracts* (1913) 22 YALE L. J. 513, 519, "If the defendant makes a promise that is at that time legally or physically impossible of fulfillment, no legal obligation arises"; Wade, *The Principle of Impossibility in Contract* (1940) 56 L. Q. REV. 519, 522, "In the first place, there can be no duty to do something impossible."

146. E. g., General Preference Order No. M-46 to Conserve the Supply and Direct the Distribution of Chlorinated Rubber. 6 FED. REG. 5534, tit. 32, c. IX, subc. B, § 1013 (f) (Oct. 30, 1941). O. P. M. Release No. PM-1455, Oct. 29, 1941, provides, "This order shall take effect on the 1st day of November and unless sooner revoked, shall expire on the 31st day of July, 1942."

147. E. g., Limitation Order L-8 to Limit the Distribution of Motor Fuel in the Atlantic Coast Area, issued Sept. 30, 1941, 6 FED. REG. 5009, was terminated October 18, 1941, 6 FED. REG. 5536, and October 24, 1941, 6 FED. REG. 5487.

148. *But see* Burnham, *Coming Rulers of the U. S.* (Nov., 1941) 24 FORTUNE No. 5, p. 100.

Termination clearly will have the effect of reviving suspended contracts except where the conditions at that time are so different from anything the parties could reasonably have contemplated that the courts will consider the contract discharged.¹⁴⁹

Since performance of contracts made during a business-as-usual era is excused during a national war era, what of the effect upon contracts now made of the termination of the defense era? Any abrupt termination will likely result in cancellation of a number of government orders. Cancellation can be affected by the government in accordance with statutory¹⁵⁰ or contract provisions¹⁵¹ upon the payment of "just compensation" the measure for which has been judicially determined.¹⁵² Cancellation by the government of a prime contract does not, of itself, justify cancellation by the prime contractor of sub-contracts entered into.¹⁵³ The prime contractor is liable for breach, damages for which may be greater than the amount recoverable as "just compensation."¹⁵⁴ The prime contractor may avoid the risk by incorporating his government contract in the sub-contract.¹⁵⁵ At this point priority certificates accompanying the purchase order may perform an important function. The priority certificate indicates the original source of the order, whether government or otherwise,¹⁵⁶ and may, therefore, be considered as sufficient indication to the sub-contractor of the government's connection with the order so as to relieve the prime contractor of the risk.¹⁵⁷

Upon the expiration of the war program cancellation other than governmental would seem unjustified in the absence of a contract provision to that effect. The termination of regulations seems not to be regarded as the kind of change of law that constitutes impossibility; nor does it seem correct to conclude that contracts now made are conditioned upon the existence of the war program (unless accom-

149. See page 550 *supra*.

150. E. g., 40 STAT. 182 (1917).

151. Prentice-Hall, National Defense and Government Contract Service, ¶ 12,011.9, ¶ 4505, Art. 14; 2 DEFENSE AND BUSINESS COORDINATOR 15,491, ¶ H. 764.

152. Russell Motor Car Co. v. United States, 261 U. S. 514 (1923); Duesenberg Motors Corp. v. U. S., 260 U. S. 115 (1922).

153. Ingram-Day Lumber Co. v. McLouth, 275 U. S. 471 (1928). The United States is not liable to the subcontractor. Buffalo Union Furnace Co. v. U. S. Ship. Board E. F. Corp., 291 Fed. 23 (C. C. A. 2d, 1923).

154. See notes 152, 153 *supra*. Cf. Regulations for Procurement of Naval Supplies, Title 34, Code of Federal Regulations, § 8.1052 (f) (6); C. C. H. War Law Serv. ¶ 21,614, "Where a contract has been canceled under the provisions of a statute authorizing such cancellation, the contractor is entitled to just compensation for damages sustained by reason of said cancellation, but is not entitled to prospective profits."

155. Todd Dry Dock v. Summer, 289 Fed. 217 (C. C. A. 9th, 1923).

156. E. g., Forms PD-2, PD-3, PD-4, PD-5; C. C. H. War Law Serv. ¶¶ 23,323-6; Prentice-Hall, National Defense and Contract Service, ¶¶ 67,013-6.

157. Cf. Philadelphia Boiler Works v. Foundation Co., 190 N. Y. Supp. 696 (1921).

panied by priority certificates as above explained or are otherwise conditioned).

CONCLUSION

Difficulties encountered in solution of the problems here presented arise fundamentally out of two separate sets of circumstances. Because we are incapable of producing enough for both civilian and war needs, civilian needs must be sacrificed to a greater or lesser extent depending upon the supply of and demand for the products in question. And since individual business units are affected by this process, private interests may conflict with public interests. Any ideally harmonious balance of "war" and "civilian" needs and "public" and "private" interests presupposes a physical capacity that would leave none of those needs and interests unsatisfied. It is not the province of law courts to satisfy these demands; it is their province to weigh and decide between them. When, as here, the conflicting demands involve vital problems of national welfare, the national law making body is in a better position than the courts to resolve them.

For our purposes Congress has stated its position in the "no damage statute." The statute forms a working tool for the solution of some cases of sellers' non-performance but leaves almost wholly untouched any excuses for buyers' non-performance. Yet from the national point of view it may be as detrimental to the war program to compel a buyer to perform a contract for goods he cannot use as it would be to compel a seller to perform both defense and civilian contracts. And from the individual's point of view it may be as financially impossible for a buyer to pay for goods he cannot use as it is for a seller to be liable for the breach of a contract he cannot perform. The statute encourages a business to seek defense work by erasing the fear of the instigation of a law suit by its customers; but the fear of suit by its suppliers is probably unabated by the statute.

The excuse need not be in such general terms that a defense order ipso facto excuses performance of a civilian contract. On principle, the excuse need go no further than to the point where the hardship of performing the civilian contract conflicts with the demands of the war program. Indeed, this principle dominates the construction that has here been placed on the "no damage statute."

The legal development of the system of pre-emption illustrates that there is a limit to wholly voluntary co-operation. To the extent that the defendant can prove no excuse unless *ordered* to do defense

work,¹⁵⁸ it is financially hazardous for him to "cooperate." The remedy, however, is not an enlargement of the excuse but a strict government enforcement of all types of pre-emption. Strict enforcement would not only insure defense production but would serve to assure the civilian plaintiff that the defendant is not using the war program as a pretext to avoid performance of his contract.

158. Cf. Note, *American Economic Mobilization: A Study in the Mechanism of War* (1942) 55 HARV. L. REV. 427, 474, n. 284.