RECENT CASES

Actions—Attachment of Frozen Funds as Conferring Jurisdiction in Rem—A New York corporation commenced an action against a Rumanian bank for conversion of gold bullion [1] by securing and levying a warrant of attachment against funds of the defendant that are on deposit with various New York banks. Defendant appeared specially and moved to vacate said attachment on the grounds that the Executive Order freezing property of Rumanian nationals in this country [2] so far immobilized its deposits with the New York banks as to make them unattachable in the absence of a lifting license from the Secretary of the Treasury. *Held,* (three judges dissenting) motion denied. The "seizure subject to license" was sufficient for the purpose of conferring jurisdiction over the deposits in question. *Commission for Polish Relief, Ltd. v. Banca Nationala a Rumanici,*[3] 288 N. Y. 332, 43 N. E. (2d) 345 (1942).

The device of foreign attachment is a provisional remedy designed to offer relief in various situations.[4] In the instant case it was employed as a substitute for personal service in an action against a non-resident defendant. A prerequisite to such procedure *in rem* is the presence within the particular jurisdiction of property that is subject to attachment.[5] The attachment

1. The gist of plaintiff's complaint is as follows: In October, 1939, a Polish bank placed gold bars worth some three million dollars in the defendant bank for safekeeping. In April, 1940, the Polish bank assigned its rights to the Polish Food Commission. The latter demanded delivery of the gold, which was refused, in May, 1940. Subsequently the Food Commission assigned it cause of action to the plaintiff, and this suit was instituted in December, 1940.

2. Ex. Order No. 8389, April 10, 1940, 5 FED. REG. 1400 (1940), as amended, Ex. Order No. 8565, Oct. 10, 1940, 5 FED. REG. 4062 (1940), 12 U. S. C. A. § 95 note (App. 1941). A more current revision of the freezing orders appears in 6 FED. REG. 2897 (1941). For helpful discussions of the mechanics of the orders see Binder, *Practical Aspects of Foreign Property Control* (1941) 19 N. Y. U. L. Q. REV. 1 and Note (1941) 41 COL. L. REV. 1039. Their international ramifications are discussed by Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws* (1942) 56 HARV. L. REV. 30.

3. The decisions of the lower courts are reported in 262 App. Div. 543, 30 N. Y. S. (2d) 690 (2d Dep't, 1941) and 176 Misc. 1071, 29 N. Y. S. (2d) 189 (Sup. Ct. 1941). A motion to vacate the warrant of attachment on other grounds was denied in 176 Misc. 1064, 27 N. Y. S. (2d) 377 (Sup. Ct. 1941). Dicta in these lower court opinions were modified by the instant case. See note 9 *infra.*

4. In New York, if a plaintiff states a cause of action for the recovery of a sum of money only, he is entitled to a warrant of attachment against property of the defendant within the state where the defendant: (1) is a non-resident or a foreign corporation; (2) is about to or has departed from the state, or is concealing himself therein, with intent to defraud creditors or avoid service; (3) has removed or is about to remove property from the state for a like purpose; (4) has made a false statement as to his financial condition for the purpose of procuring credit; (5) is being sued for damages to property sustained because of reliance on such false statement; (6) has been guilty of a fraud in making an express or implied contract; or (7) is an adult absent from the state for six months without designating an agent to receive service. N. Y. CIV. PRAC. ACT (Thompson, Supp. 1942) §§ 902, 903.

5. Pennoyer v. Neff, 95 U. S. 714 (1877); Douglass v. Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938 (1893).

At least three general tests have been applied to determine whether attachable property exists: (1) Is there a *res* subject to levy and sale on execution? Goode v. Longmire, 35 Ala. 668 (1860); (2) Is there a *res* which the owner himself might sell? Lanahan v. Bailey, 53 S. C. 489, 31 S. E. 332 (1898); (3) Has the court secured any dispositive dominion over any *res* by virtue of the levy? Pennoyer *v.* Neff, *supra.*

In fairness to the dissenters in the instant case, it should be pointed out that none of these tests are complied with; absent a license, no transfer of any kind may be made. See note 8 *infra.* Moreover, there is a strong analogy between frozen property

serves two purposes: one is jurisdictional; and the second, security.[6] Though at no place articulately stated in either opinion, the conflict between the majority of the court and those who dissented from the instant holding presents itself in their answers to the question of whether an attachment can be made for the jurisdictional purpose, even though it be ineffective to give any present lien.[7] It is conceded that no interest, not even that of lienor,[8] can be acquired in the property of a blocked national without license from the Treasury. However, the prohibitions of the Executive Order are designed to prevent completed transfers of property and interests therein without governmental supervision—mainly to keep the property from the grasp of an enemy power.[9] In this light the position of the majority seems sound. By permitting the attachment to confer jurisdiction, the issue as to the alleged conversion is left to the state court[10] and does not fall to the

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and property in *custodia legis*, which is universally immune from attachment. Morris v. Penniman, 14 Gray 220 (Mass. 1859) (money taken from a prisoner); Pugh v. Jones, 134 Iowa 746, 112 N. W. 225 (1907) (money in hands of a guardian).

6. *See* Prashker, *New York's Attachment Statutes—The Revision of 1941* (1941) 16 ST. JOHN'S L. REV. 53, 55.

7. Said the majority: "For all we know, payment . . . to the credit of this action can be permitted. . . . The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction. . . ." Instant case, 288 N. Y. at 338, 43 N. E. (2d) at 347.

Compare the following language of the dissent: "What the plaintiff is seeking here is a res sufficiently illusory not to fall within the all-inclusive prohibition of the Executive Order and at the same time to be sufficiently substantial to afford a basis for jurisdiction. In our opinion such inconsistency seeks the impossible." Instant case, 288 N. Y. at 341, 43 N. E. (2d) at 349.

8. Section 1 of the Executive Order provides in part: ". . . the following transactions are prohibited . . . if . . . (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has . . . any interest . . . E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidence of ownership of property by any person within the United States. . . ." 5 FED. REG. 1400 (1940), as amended by 5 FED. REG. 1677 (1940) and 6 FED. REG. 2897 (1941).

Treasury Department General Ruling No. 12 provides in part: ". . . (1) The term 'transfer' shall mean . . . the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; . . ." 7 FED. REG. 2991 (1942).

General Ruling No. 12 was before the court in the instant case, though not mentioned in either opinion. See Freutel, *loc. cit. supra* note 2, at 67. The ruling, though issued as recently as April 21, 1942, was intended to apply to "any transfer after the effective date of the Order".

9. See debate on the act passed to retroactively invalidate the Order, reported 86 CONG. REC. 5007 (1940). There are other reasons: *e. g.*, to facilitate the use of the blocked assets in the war effort, to protect American creditors, to preserve our bargaining position in post-war negotiations, to keep "refugee capital" intact for its owners in conquered nations. See Binder, *loc. cit. supra* note 2, at 1-5; Freutel, *loc. cit. supra* note 2, at 30-36.

There were dicta in the lower court opinions to the effect that assignments could be made that would carry the title to these funds regardless of Treasury approval. Because this might open the way to foreign assignments that would operate counter to the purposes of the Order, the Treasury filed a brief as *amicus curiae* in the instant appeal, and these dicta were disapproved. For a discussion of this aspect of the case, see Freutel, *loc. cit. supra* note 2, at 64-71.

10. *Cf.* Bollack v. Societe Generale *etc.*, 177 Misc. 136, 30 N. Y. S. (2d) 83 (Sup. Ct. 1941), *reversed*, 263 App. Div. 601, 33 N. Y. S. (2d) 986 (1st Dep't, 1942) (The holding below was that where title to certain frozen securities is at issue, it is a good defense to plead the Executive Order. In reversing, the Appellate Division pointed out that a license would be a prerequisite to execution on any judgment that might be given, but was not a requirement for instituting suit.); see also Brown v. Morgan & Co., Inc., 177 Misc. 626, 31 N. Y. S. (2d) 323 (Sup. Ct. 1941) (action in aid of attachment: Executive Order no defense where levy made prior to freezing but no attempt made to comply therewith).

Treasury as it would to some extent were a license required as a prerequisite to suit.[11] Moreover, since Treasury officials determine whether any lien is to be afforded a particular plaintiff by granting or refusing him a license after judgment,[12] the mandate of the recent *Pink* case[13] is obeyed and the determination of our foreign policy is left with the Federal government.

Contracts—Recovery of Money Paid on Contract Where Performance Impossible—Plaintiff contracted with defendant in July, 1939, for delivery c. i. f. of certain machinery to Glydnia, partial payment accompanying the order. In September, 1939, Germany occupied Glydnia, so delivery could not take place. Plaintiff seeks return of the money paid down, and appeals from an adverse judgment in the Court of Appeal.[1] *Held*, judgment reversed. The money paid down is recoverable on the common count of indebitatus as money had and received, since there was a total lack of consideration. *Fibrosa Spolka Akeyjna v. Fairbairn, Lawson, Combe, Barbour, Ltd.*, 194 L. T. 5 (1942).[2]

Frustration in English law means absolute impossibility of performance, rather than impractically or hardship.[3] The general rule has been, in England, that in cases of frustration the loss lies where it falls. The reason for this rule is the impossibility of adjusting or ascertaining the rights of the parties with exactitude. Therefore, the law treats everything already done in pursuance of the contract as validly done, but relieves the

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11. At an earlier stage of the instant suit applications for licenses to transfer the attached deposits to the name of the sheriff for the account of the action were denied. See 262 App. Div. 543, 546, 30 N. Y. S. (2d) 690, 693 (2d Dep't, 1941). If this is indicative of a general Treasury policy, its practical effect is either (1) to deny all action *in rem* where the *res* is frozen property, or (2) to deny such actions whenever the Treasury feels the claim is of questionable merit or the claimant is a person whose success would be in conflict with the national interest. Yet, in war time, *in rem* actions are in most instances the only practical means by which relief can be obtained in cases of claims against foreigners, enemy or otherwise. And the existence of war seems no reason for denying our own citizens acesss to our own courts.

Of course, where the property in question has been placed in the hands of the Alien Property Custodian (Ex. Order No. 9142, April 21, 1942, 7 FED. REG. 2985) it is subject to the rules laid down in the Trading with the Enemy Act. 40 STAT. 411 (1917), 50 U. S. C. A. app. § 1 *et seq.* (1928). In this connection the subsequent history of Brown v. Morgan & Co., Inc., cited note 11 *supra*, is interesting. See *id.*, 177 Misc. 763, 31 N. Y. S. (2d) 815 (Sup. Ct. 1941) (judgment on former hearing modified due to declaration of war on Italy).

12. Evidently such licenses will be granted when it will not offend national policy to do so. See instant case, 288 N. Y. at 338, 43 N. E. (2d) at 348, where it is stated: ". . . the government . . . informs us . . . that the levies . . . do not offend any national policy . . ." (indicating that the court was under the impression that a license would issue).

13. United States v. Pink, 315 U. S. 203 (1942), 90 U. OF PA. L. REV. 741.

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1. (1941) 57 T. L. R. 547. For critical discussions of the decision in the lower court, see (1941) 15 AUST. L. J. 187, 53 JURID. REV. 272, 57 L. Q. REV. 439, 57 SCOT. L. REV. 134.

2. A clause in the contract provided for a reasonable extension of time if "despatch be hindered or delayed by . . . any cause beyond our reasonable control including . . . war". The court dismissed the argument that this clause contemplated the war and provided for suspension of the contract, thus preventing frustration, because of its limited ambit.

3. Metropolitan Water Board v. Dick, Kerr & Co., [1918] A. C. 119; Horlock v. Beal, [1916] 1 A. C. 486; Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397; Hall v. Wright (1859) E. B. & E. 746. Wade, *The Principle of Impossibility in Contract* (1940) 56 L. Q. REV. 519; McNair, *Frustration of Contract by War* (1940) 56 L. Q. REV. 173; McNair, *War-Time Impossibility of Performance of Contract* (1919) 35 L. Q. REV. 84.

parties of further responsibility.[4] Underlying this are the various concepts of the interdependence of conditions in contracts. These concepts gradually developed from *Pordage v. Cole*.[5] Later cases modified this rule, and conditions in contracts came to be considered mutually interdependent.[6] In applying these concepts to those cases where frustration enters, the courts applied the strict rule to all already accomplished before the impossibility became apparent, excusing any further performance.[7] In cases where money, time and labor has been expended in furtherance of the contract obligations, the impracticality of adjusting these expenses prevents any restitution, justifying the general rule. But where, as here, money has been paid in part payment for the articles which are excused from delivery, the reason for the rule falls, and hence the rule should not govern. There is now no difficulty in measuring the amount. A condition of the payment should be implied that it is final only on delivery of the goods.[8] This is the view taken by the court in the instant case, in reversing the earlier decisions, and seems far more equitable in result than the older view. The basis of the decision as pointed out by court, was for money had and received. Since there was a total failure of consideration, a restitutionary right arises in the plaintiff to recover the money paid down. The instant decision brings English law in accord with American law on this point, although the English rule for frustration is still more strict than the American.[9]

Contracts—Retailer Protected Where O. P. A. Order Froze His Prices Below Level Fixed by Resale Price Maintenance Contract— Plaintiff, a retail druggist, seeks an injunction *pendente lite* to restrain the sale of merchandise at prices below the minimum level set in a price-fixing agreement made pursuant to the Fair Trade Law of New York.[1] The defendant, a competing retail druggist, alleges that his prices have been "frozen", under the Federal Emergency Price Control Act of 1942,[2] below the minimum level prescribed by the price-fixing agreement and that he is therefore unable to raise his prices to that minimum level. An O. P. A. release provides that a person in such a dilemma may apply for an adjust-

4. Chandler v. Webster, [1904] 1 K. B. 493 (overruled by the instant case), wherein plaintiff had hired a room on the route of the coronation, having paid the price therefor in advance, and was denied a return of the money paid on the subsequent abandonment of the coronation due to the King's illness. Appleby v. Myers, [1877] L. R. 2 C. P. 651. McNair, *War-Time Impossibility of Performance of Contract* (1919) 35 L. Q. Rev. 84, 86.

5. (1607) 1 Wms. Saunders 319 (1), as cited in (1941) 56 L. Q. Rev. 540. This case established the strict presumption that all promises were independent and not each conditional on the other. Serjeant Williams later revived this old presumption, and it has borne much weight throughout the history of both English and American contract law. See 3 Williston, Contracts (rev. ed. 1936) § 819.

6. See Williston, *id.*, §§ 813 to 838, especially §§ 819 to 831.

7. See cases cited note 4 *supra*.

8. See Williston, *op. cit. supra* note 5, at § 835.

9. See footnote 3. Restatement, Contracts (1932) § 454. See also Williston, *op. cit. supra* note 5, at §§ 813 to 838; McNair, *loc. cit. supra* note 4.

1. 19 N. Y. Cons. Laws (McKinney, 1941) § 369 (a) and (b). Price-fixing of certain commodities is permitted, and injunctive relief is authorized for benefit of injured competitors of a violator.

2. 56 Stat. 23, 50 U. S. C. A. § 901 *et seq.* (Supp. 1942). Pursuant to Section 2 (a) of the Act, the Administrator, on April 18, 1942, issued a General Maximum Price Regulation Bulletin, to be effective May 18, 1942, which, in substance, enjoined retailers from selling merchandise at prices higher than those obtained in the month of March, 1942. The defendant during March had been selling at prices below the level of the price-fixing agreement and the price regulation froze him at those lower prices.

ment of his ceiling price.[3] The defendant had not done this. *Held*, that the injunction *pendente lite* should not issue. *Schreier et al. v. Siegel*, 36 N. Y. S. (2d) 97 (Sup Ct., 1942).

Where performance of a contract is prevented or prohibited by a statute passed after the formation of the contract, the situation is treated by the courts as a problem of impossibility.[4] The instant court interpreted Section 205 (d) of the Emergency Price Control Act [5] to protect those who in good faith abide by the statute and regulations promulgated thereunder.[6] Under this interpretation the general law of impossibility is not applicable—the problem is one of the meaning of "good faith" compliance. And the instant court concluded that it was not necessary for the defendant to apply for an adjustment of his ceiling for his compliance to be in good faith.[7] A better interpretation of Section 205 (d) would seem to be that it affords protection only to persons complying with those provisions, regulations, etc. which are subsequently modified, rescinded, or determined to be invalid; that the phrase beginning "notwithstanding" restricts the application of the preceding clause. Assuming this latter interpretation, the problem then resolves into one of the general doctrine of impossibility.[8] It is apparent, however, that the Federal Act does not render impossible, nor does it prohibit, compliance with the price-fixing agreement. The alternative remains to the defendant to sell none of the affected merchandise. The case might arise in which, for the retailer to sell none of the merchandise might cause such loss as to make that course an "impossibility".[9] The

3. O. P. A. Release of May 22, 1942: "Where a retailer is 'frozen' at a maximum price which forces him to sell below the minimum price set in a fair trade agreement that was in effect in March, he may apply under Section 18 (a) of the Regulation for an adjustment of his ceiling on the ground that it is abnormally low in relation to the maximum prices of the same or similar commodities established . . . for other sellers at retail."

4. 6 WILLISTON, CONTRACTS (Rev. ed. 1938) § 1938, p. 5427; RESTATEMENT, CONTRACTS (1932) § 458; *cf. id.*, § 608. See cases cited in 6 WILLISTON, CONTRACTS § 1938, n. 1.

5. "No person shall be held liable for damages or penalties . . . for or in respect of anything done . . . in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder . . . notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid."

6. Instant case at 102, 103.

7. Instant case at 104. This conclusion would seem open to considerable question. The effect of the decision is that the exculpatory clause operates to protect defendant's subsequent violations of the price maintenance contract if he elects not to apply for an adjustment. Such a result should be avoided if possible and here that could easily be done. "Good faith compliance" is an extremely elastic concept and could well be construed to require a bona fide effort to remove the restraint of the low-price ceiling—i. e., to impose the same requirement as exists under the law of impossibility (see note 11 *infra*).

8. The writer is unable to find any cases concerning impossibility as an excuse for the breach of negative covenants. The principles applied to positive covenants would for the most part be equally applicable to negative covenants. Concerning impossibility due to change in law, see RESTATEMENT, CONTRACTS (1932) § 458; 6 WILLISTON, CONTRACTS §§ 1938, 1939.

9. RESTATEMENT, CONTRACTS (1932) § 454: "In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.' See 6 WILLISTON, CONTRACTS § 1963. It should be observed that the only direct loss or injury here involved would be the failure to realize unanticipated profits from the sale of the merchandise. It is extremely questionable whether such a "loss" is contemplated as within this definition. The resulting loss of other business (where, for example, the merchandise involved was used as a loss leader) would be a failure to realize anticipated profits and also an indirect loss at best, which would make such loss doubly questionable. This problem illustrates a difficulty in the fact of the negative covenant in this case. The cases on the subject have dealt with loss or difficulty involved in an affirmative

problem would then arise whether the fact that defendant's prior breach of the contract contributed to the impossibility, should prevent the impossibility from being an excuse.[10] Even assuming that defendant's inability to sell at the contract price without violating the O. P. A. regulation would constitute impossibility and that that excuse were available to the defendant, he should be required to apply for an adjustment of his ceiling before being excused on grounds of impossibility. Authority requires that the contracting party make a diligent effort to avoid the prohibition or impossibility.[11]

Labor Law—Enforcement of Contract Providing That State Agency Arbitrate Dispute Between Union and Company Manufacturing War Materials—On April 16, 1942, the defendant, a company manufacturing war materials, and the petitioning union entered into an agreement for future arbitration by the New York Board of Mediation of unsettled differences arising from a wage-hour dispute. The defendant company refused to proceed with the arbitration, asserting that the National War Labor Board[1] has jurisdiction over the dispute. *Held*, petition for an order of compliance with the contract to arbitrate denied. The war policy of the federal government conflicts with and supersedes state procedure for the enforcement of the arbitration contract. *International Association of Machinists v. E. C. Stearns & Co.*, 36 N. Y. S. (2d) 156 (Sup. Ct. 1942).

That section of the New York Civil Practice Act providing for the enforcement of contracts for arbitration permits such defenses as exist at law or in equity for the revocation of any contract.[2] The court in the instant case has found the jurisdiction of the National War Labor Board over this dispute to be a valid equitable defense[3] to an action brought under that Act.[4] This result was reached despite the fact that the Exec-

act of performance, and the Restatement was clearly drawn up with that situation in mind. See RESTATEMENT, CONTRACTS (1932) § 454, comments *a*, *b*; *id.*, EXPLANATORY NOTES (Proposed Final Draft No. 11, 1932) § 454.

10. *Cf.* Moha v. Hudson Boxing Club, 164 Wis. 425, 160 N. W. 266 (1916); RESTATEMENT, CONTRACTS (1932) § 458, illus. 5.

11. Murphy v. North American Co. *et al.*, 24 F. Supp. 571 (S. D. N. Y. 1938); Cheatham v. Wheeling & L. E. Ry., 37 F. (2d) 593 (S. D. N. Y. 1930); Peckham v. Industrial Securities Co., 31 Del. 200, 113 Atl. 799 (Super. Ct. 1921); Brown v. J. P. Morgan & Co., 177 N. Y. Misc. 626, 31 N. Y. S. (2d) 323 (Sup. Ct. 1941); RESTATEMENT, CONTRACTS (1932) § 458, illus. 3.

1. Note that the National War Labor Board had been in existence three months at the time of the agreement to arbitrate was made. It was established by the President by Executive Order 9017, dated January 12, 1942. 7 FED. REG. 237 (1942).

2. "Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . ." N. Y. CIV. PRAC. ACT (Thompson, Supp. 1941) Art. 84, § 1448.

3. Under the relevant section of the Civil Practice Act, quoted note 2 *supra*, only such defenses as concern *revocation* of a contract are allowed. But it is difficult to see why the court talks in terms of a defense of *revocation*, for it would seem that if the court's reasoning is followed to its logical conclusion the contract was *void* in the first instance. This would result from the fact that the contract was made *after* the establishment of the National War Labor Board, not before.

4. Section 1450 of the Civil Practice Act provides that in the absence of a substantial issue as to the making or failure to comply with the contract, an order shall be made directing the parties to proceed to the arbitration provided for in the contract. N. Y. CIV. PRAC. ACT (Thompson, Supp. 1941) Art. 84, § 1450.

utive Order establishing the National War Labor Board provides that one of the prerequisites to the Board's taking jurisdiction is that the parties shall first resort to procedures provided in a collective bargaining agreement.[5] A reasonable application of that requirement to the instant case would seem to demand that the parties first resort to arbitration by the New York Board of Mediation.[6] The instant court, however, intimates that the Department of Labor has power to intervene and that the War Labor Board may take jurisdiction on its own motion even while the arbitration is pending, and that to deny arbitration is the more practical solution.[7] But the court rests most strongly on the war policy argument. To deny arbitration allegedly saves valuable time and allows for a co-ordinated national economic policy. However, although there is no direct holding on this matter by the Board itself, its attitude as revealed by its holdings would seem to be that those objectives are *not* best obtained in this manner.[8]

5. EXEC. ORDER 9017, § 3, January 12, 1942, 7 FED. REG. 237: "The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) *If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute.* (c) *If not promptly settled by conciliation,* the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board."

6. Although the instant court intimated some doubt on the question, the instant agreement would seem to be a "collective bargaining agreement" within the Executive Order quoted note 5 *supra*. 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940) 476: "The collective bargaining agreement has been variously interpreted, but its essential nature is the subject of general understanding. It may be broadly defined as an agreement between a single employer or an association of employers on the one hand and a labor union upon the other, which regulate the terms and conditions of employment." Shelley v. Portland Tug and Barge Co., 158 Ore. 377, 385-386, 76 P. (2d) 477, 480-481 (1938), in which the decision in Rentscher v. Missouri P. R. Co., 126 Neb. 493, 253 N. W. 694, is quoted: "The Court defined the terms 'collective labor agreement' and 'trade agreement' as 'a term used to describe a bargaining agreement entered into by a group of employees, usually organized into a brotherhood or union, on one side, and a group of employers, or a corporation, as a railroad company, on the other side.' The court then stated that such agreement may be a brief statement of hours of labor and wages or, on the other hand, it may regulate, in the greatest minuteness, every condition under which labor is to be performed. . . ."

Although most authorities so limit the definition, a contract for *future* arbitration of *future* disputes, such as existed in *In re* General Motors Corp. and United Automobile Workers of America, 10 LAB. REL. REP. 67 (1942) and *In re* New Orleans Laundrymen's Club and Amalgamated Clothing Workers of America, 10 LAB. REL. REP. 43 (1942), is generally considered a "collective bargaining agreement". Although the instant case differs in that here there is a contract for *future* arbitration of an *existing* dispute, it is doubtful that any court would argue that such a contract would not be included within the meaning of that term.

7. "More practical" in the sense that arbitration would *probably* be a useless gesture because of probable intervention by the Labor Conciliators or the Board.

Applicable section of the Executive Order is cited note 5 *supra*.

8. *In re* General Motors Corporation and United Automobile Workers of America, 10 LAB. REL. REP. 67 (1942), the Board refused jurisdiction: ". . . owing to the fact that by mutual agreement between the parties the swing-shift is now in operation in the General Motors plants under an agreement that whatever rate of pay is finally decided upon will be retroactive, and that in view of the union's position that the matter was covered by the terms of the existing contract, the company also took the position that it was covered by the terms of the existing contract, and in view of the further fact that the dispute has not been submitted for adjustment under the machinery set up under this contract for settlement, this matter [should] be referred back to the parties to be considered in accordance with the contract now in effect."

In re New Orleans Laundrymen's Club and Amalgamated Clothing Workers of America, 10 LAB. REL. REP. 436 (1942), a contract established a means of settling all

With the national enforcement agency supporting an antithetical view, the court's position appears unsupportable on the basis of its own reasoning.[9] In addition, there is reason to question the wisdom of the contention that what would become an over-worked national agency is the most effective way of obtaining continued, rapid war production.[10] While the national government by the exercise of its war powers can invoke the reserved rights of the states, it can seriously be questioned whether the power has been exercised in this instance.[11]

Landlord and Tenant—Discharge of Lease by Induction into Military Service—Suit by lessor for two months' rent against guarantor on a lease of store premises from 1938 to 1946. Lessee liquidated his business immediately before induction into the army; rent accrued thereafter. *Held:* Judgment for defendant. When performance of a contract is made impossible through a governmental act, the lessee is relieved of his obligation to pay rent under the lease.[1] *Jefferson Estates, Inc. v. Wilson,* 35 N. Y. S. (2d) 582 (N. Y. City Cts. 1942).

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disputes. The employers considered the contract null and void and refused to establish arbitration machinery. The union claimed that the contracts were still in force and offered to establish the arbitration tribunal and to submit all disputes to it. The Board found the contract still in effect and directed them to proceed to settle their disputes within the structure of the existing agreements, using an impartial chairman in place of a tribunal of three.

9. In view of that fact what weight does the following paragraph, at 161 of the instant case, carry: "That the Nation is now operating on a war basis is not debatable. The further deduction is inescapable that our National Economic Policy should be made to synchronize with our National War Policy, of which it is a component part. The War Labor Board has plenary power in carrying out that policy to take into consideration the essential interrelationship of military and civil requirements and priorities, government subsidy, maximum prices, profits, taxes, total cost and any and all pertinent factors that bear upon the adjustment and stabilization of wages. A process by which wages are fixed by a State agency and the price of the products of wages by a Federal agency is an administrative anachronism."

But it should be noted that the New York Mediation Board is really not serving in its "State agency" capacity here. It is simply the arbitrator in a private arbitration contract. The legal problem would have been the same had the arbitrator been a private individual.

10. *The National War Labor Board—Jurisdiction and Procedure,* 11 INT. JURID. ASS'N BULL. 29 (1942): "It is, of course, impossible for the Board to accept and finally determine any and all disputes. Its limited facilities as well as the necessity for speed in operation, require some restriction on the cases which will be accepted."

The Board's realization of such a possibility would seem to be shown by decisions in which jurisdiction is refused for various reasons; for example, *In re* Municipal Government, City of Newark and State, County and Municipal Workers of America, 10 LAB. REL. REP. 67 (1942), in which the Board held that the dispute should be settled by the Commissioners of Newark who were responsible for the administration of the city.

11. Mawhinney v. Milbrook Woolen Mills, 231 N. Y. 290, 132 N. E. 93 (1921), cited in instant case at 161. In an action to recover damages for breach of contract the defense was admitted that a War contract with the Federal Government superseded the contract and excused performance thereof.

Rosenwasser Brothers, Inc. v. Pepper *et al.,* 104 Misc. 457, 172 N. Y. Supp. 310 (1918). A strike in time of War was enjoined which the court suggested would not ordinarily have been enjoined. "It seems to me that the principles announced in cases which arose before the War cannot be applied to the relation between workers and employers in War industries, in so far as they conflict with the principles and policies of the United States government in the conduct of the War."

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1. Discharge of the lessee dissolves his guarantor's liability. Adler v. Miles, 69 Misc. 601, 126 N. Y. Supp. 135 (Sup. Ct. 1910).

To alleviate the inequity of enforcing performance of a contract which has become "impossible" [2] the courts have developed the doctrine of discharge of contract by impossibility.[3] And in wartime this doctrine has peculiar applicability.[4] In the instant case the court decided without discussion that the tenant's duty to pay rent was discharged by his induction into the army.[5] Dissolution of lease contracts is difficult to rationalize within the doctrine of impossibility since the lessee's obligation to pay rent is generally conditioned only on the continuing availability of the premises.[6] Though the old common law rule that destruction of the premises will not remove this obligation is still predominant,[7] where subsequent government action makes illegal the use to which they had been restricted the contract is discharged.[8] But where the event which caused the impossibility might have been anticipated, the doctrine of impossibility will not be applied.[9] Total, or nearly total destruction of the purpose for which the lease was intended is necessary.[10] However, even where an act of government has deprived the lessee of the beneficial use of the premises the lessee has been

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2. Impossibility is "not only strict impossibility, but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." RESTATEMENT, CONTRACTS (1932) § 454. It has been observed that the American courts have been more lenient in applying the doctrine of impossibility than the English courts, construing it as impracticability. Wade, *The Principle of Impossibility in Contracts* (1940) 56 L. Q. REV. 519, 553.

3. "The law of contract is the handmaid of commerce; and the doctrine of the discharge of contract by impossibility is a product of commercial necessity." Wade, *loc. cit. supra* note 2, at 519. Necessarily, the courts created convenient fictions to rationalize the doctrine with existing law: "the implied term" in the contract and the "fundamental assumption theory", Wade, *supra*, at 520; the "frustration of purpose" theory, Krell v. Henry, [1903] 2 K. B. 740. In general see Page, *The Development of the Doctrine of Impossibility of Performance* (1920) 18 MICH. L. REV. 589; Patterson, *Constructive Conditions in Contracts* (1942) 42 COL. L. REV. 903; Wade, *loc. cit. supra* note 2; Woodward, *Impossibility of Performance as an Excuse for Breach of Contract* (1901) 1 COL. L. REV. 529.

4. See Pedrick and Springfield, *War Measures and Contract Liability* (1942) 20 TEX. L. REV. 710; McNair, *Frustration of Contract by War* (1940) 56 L. Q. REV. 173; Blair, *Breach of Contract Due to War* (1920) 20 COL. L. REV. 413; McNair, *Wartime Impossibility of Performance of Contract* (1919) 35 L. Q. REV. 84.

5. The instant decision was based on State Realty Co. v. Greenfield, 110 Misc. 270, 181 N. Y. Supp. 511 (N. Y. City Cts. 1920), in which a lessee of store premises was discharged from his lease by induction into the army; this decision appears to be *sui generis* in the courts of the United States and England. Sole authority cited in support of the decision was Adler v. Miles, 69 Misc. 601, 126 N. Y. Supp. 135 (Sup. Ct. 1910); but that case involved impossibility because of subsequent illegality. Thus, the *Greenfield* decision was evidently dictated by "the sense of the law". *Supra* at 272, 181 N. Y. Supp. at 512. It has been held that enlistment in the army is a good defense to a suit for breach of an employment contract. Marshall v. Glanvill, [1917] 2 K. B. 87.

6. Subject, of course, to any express conditions to be performed by the lessor.

7. PHILBRICK, PROPERTY (1939) 222. But where the leased premises consist of space in a building subsequently destroyed, the lessee is released from his obligation to pay rent. Graves v. Berdan, 26 N. Y. 498 (1863). Statutes in some states have abolished the old rule of lessee's liability for rent after destruction of the premises. 6 WILLISTON, CONTRACTS (Rev. ed. 1937) § 1955, n. 9.

8. Typical are the saloon cases in which the lessee was discharged by the enactment of prohibitory legislation against the handling of liquor. Greil Bros. Co. v. Mabson, 179 Ala. 444, 60 So. 876 (1912); Doherty v. Monroe-Eckstein Brewing Co., 198 App. Div. 708, 191 N. Y. Supp. 59 (1st Dep't, 1921). In the recent case of 61-69 Pierrepont Street v. Feist, 124 N. J. L. 412, 11 A. (2d) 727 (1940) the lessee was discharged by a zoning ordinance barring opticians from practicing in that neighborhood.

9. *See* Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt, 149 U. S. 1, 14 (1893); Adler v. Miles, 69 Misc. 601, 603, 126 N. Y. Supp. 135, 137 (Sup. Ct. 1910).

10. Adler v. Miles, 69 Misc. 601, 126 N. Y. Supp. 135 (Sup. Ct. 1910); Krell v. Henry, [1903] 2 K. B. 740 (involved here was a license rather than a lease). If other uses of the premises are permitted by the lease, the lessee will not be discharged. Conklin v. Silver, 187 Iowa 819, 174 N. W. 573 (1919).

held obligated to pay rent.[11] Manifestly, the instant decision does not fall within the authority discharging a lessee when his use of the premises subsequently becomes illegal.[12] It cannot plausibly be maintained that when the lessee executed the lease in 1938 he could have anticipated his induction into the army and expressly provided against it.[13] On its facts,[14] the decision may be rationalized on the "frustration of purpose" theory:[15] that the purpose for which the premises were leased was for the operation of a store business as a proprietorship.[16] Neither in America, nor in England have emergency statutes provided expressly for discharge of leases by induction into the armed forces;[17] in the absence of legislative initiative in this

11. Yellow Cab Co. v. Stafford-Smith Co., 320 Ill. 294, 150 N. E. 670 (1926) (condemnation of part of premises); Federal Sign System v. Palmer, 176 N. Y. Supp. 565 (Sup. Ct. 1919) (order by Fuel Administrator restricting illumination of leased signs to Saturday night only); Matthey v. Curling, [1922] 2 A. C. 180 (occupation of leased premises by military authority); London & Northern Estates Co. v. Schlesinger, [1916] 1 K. B. 20 (alien tenant prevented by Defense of the Realm Act from occupying premises). But in a recent case a lessee, automobile sales company, was discharged by the O. P. A. order halting new car deliveries. Colonial Operating Corp. v. Hannon Sales & Service, 34 N. Y. S. (2d) 116 (N. Y. City Cts. 1942).

12. The legality of the tenant's store business was unaffected by his induction into the army.

13. The court asserts that "the war" could not have been anticipated by the lessee in 1938. Instant case at 585. But this appears to be irrelevant; for not "the war", but the lessee's induction into the army was the event to be anticipated.

14. From the amount of rent stipulated in the lease terms it is surmised that the store business involved was comparatively small; hence, most suitable to a proprietorship. From the allegations in the complaint it appears that the lessee was the sole proprietor.

15. ". . . though performance of a promise by one party is still possible according to its literal terms, facts for which neither party is responsible may prevent that performance from effecting the object or purpose which the parties, when they contracted, assumed would be effected. There is frustration of this purpose. Generally, it is the object of only one of the parties that is frustrated, but it is essential in order to preclude a duty on his part, that this purpose is understood by both parties as his basic purpose in entering into the contract." RESTATEMENT, CONTRACTS (1932) § 454, comment *b*. *See* Colonial Operating Corp. v. Hannon Sales & Service, 34 N. Y. S. (2d) 116, 122 (N. Y. City Cts. 1942), cited note 11 *supra*.

16. Following the reasoning in the RESTATEMENT, *op. cit. supra* note 15, it may justifiably be concluded that both parties to the lease understood that the lessee's purpose in leasing the premises was to conduct his own store-business. To compel him to sub-lease the premises or assign his lease in order to avoid liability may work an unnecessary hardship on the lessee. This sort of facile assumption by the courts is criticized by Professor Patterson, *loc. cit. supra* note 3, at 950 *et seq.*

In the instant case the result is based on a sound policy reason: the maintenance of military morale; this is sufficient justification for the decision. Commenting on proposed amendments to the Soldiers' and Sailors' Civil Relief Act, note 17 *infra*, Major Henry W. Longfellow asserted that the War Department's interest in their enactment lay in the salutary effect upon the morale of the Army. *Hearings before Committee on Military Affairs on H. R. 7029*, 77th Cong., 2d Sess. (1942) 9. To the same effect see remarks of Major William D. Partlow, Jr., Judge Advocate General's Department, *id.* at 26.

17. See SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, 54 STAT. 1181, 50 U. S. C. A. § 530 *et seq.* (Supp. 1941); COURTS (EMERGENCY POWERS) ACT, L. REP. STAT. (1939) c. 67, AMEND., L. REP. STAT. (1940) c. 37; LIABILITIES (WAR-TIME ADJUSTMENT) ACT, L. REP. STAT. (1941) c. 24.

Covering precisely the situation here involved, a proposed amendment to the Soldiers' and Sailors' Civil Relief Act, sponsored by the War Department, was embodied in H. R. 7029. To Article III of the original Act is to be added Section 304, which provides in substance that any lease of business or residential premises, executed by or on behalf of a person who after its execution enters military service, may be terminated by written notice to the lessor any time following induction. S. 1569, which passed the Senate on July 10, 1941, contained substantially similar provisions.

Major objections levelled at the proposal were that it discarded the ability-to-pay criterion; that such relief should be given only when it has been demonstrated to the

direction the courts should be hesitant in extending the frustration of purpose doctrine, as applied to leases, beyond the factual situation presented by the instant case.[18]

court's satisfaction that the soldier is unable to meet his obligations; that, as to business leases, it "may seriously retard the financing of improvements to a factory for war purposes, for any guarantee of rent for the duration of the lease . . . could be set aside." *Hearings before Committee on Military Affairs on H. R. 7029*, 77th Cong., 2d Sess. (1942) 24, 55. Quotation from comments by Mr. Francis G. Addison, Jr., speaking on behalf of the American Bankers' Association. *Id.* at 55.

Major Partlow in defense of the measure, asserted: "The theory behind this section is that the person in military service is no longer able to enjoy the use of the property rented under the lease. In other words, he would be paying for something that he is not getting, no matter how much money he might have . . . to discharge his obligations under the lease. . . . If on account of military service he is not able to enjoy the use of the property, it seems to me equitable that he should not have to pay for it." (Citing State Realty Co. v. Greenfield, 110 Misc. 270, 181 N. Y. Supp. 511 (N. Y. City Cts. 1920), cited note 5 *supra.*) *Id.* at 25.

18. "In so far as the case-law of frustration of purpose extends this implied warranty of fitness of performances other than the sales of goods, it may fulfill a useful, gap-filling function. In so far as the excuse of frustration goes beyond this, and relieves a promisor because of fortuitous frustrations of his purpose, it should be, and generally is, a safety-valve which is moved only by the pressure of war and other catastrophic events." Patterson, *loc. cit. supra* note 3, at 954. *See* Pedrick and Springfield, *loc. cit. supra* note 4, at 740 *et seq.*