

# THE EFFECT OF WARTIME PRICE CONTROL ON CONTRACTS FOR THE SALE OF GOODS \*

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“ . . . To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices . . . to eliminate and prevent profiteering, hoarding, manipulation, speculation . . . ”<sup>1</sup> These, among others, are the express purposes of the Emergency Price Control Act of 1942.

Since the statute itself limits the sphere of control,<sup>2</sup> the accomplishment of the Price Administrator may fall short of full realization of the prescribed purposes. To achieve these purposes complete control of the price economy is probably required,<sup>3</sup> and the recent amendment to the Act is a step in this direction.<sup>4</sup>

Complete control may, however, permit some deviations and exceptions. Sometimes contracts made prior to the effective date of the

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1. Section 1(a) of the Emergency Price Control Act of 1942, Pub. L. No. 421, c. 26, 77th Cong., 2d Sess. (Jan. 30, 1942), as amended by Pub. L. No. 729, 77th Cong., 2d Sess. (Oct. 2, 1942) (hereinafter referred to by the initial letters EPCA). In this article, the constitutionality of the EPCA will be assumed. For discussion of the constitutional problems involved, see Freund, *The Emergency Price Control Act of 1942: Constitutional Issues* (1942) 9 LAW & CONTEMP. PROB. 77; Aidlin, *The Constitutionality of the 1942 Price Control Act* (1942) 30 CALIF. L. REV. 648; Comment (1942) 55 HARV. L. REV. 427, 486.

2. Primarily, the EPCA is designed to control the price of commodities. But while “commodity” has a broad definition under § 302(c), some matters are entirely free from control, and others are subject to limited control. For example, neither rates charged for professional services nor rates charged by public utilities may be regulated under the EPCA, as amended. § 302(c). Services are subject to price control only if rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity. *Ibid.* Cf. Max. Price Reg. No. 165 (services), C.F.R., tit. 32, c. 11, pt. 1499.101 *et seq.* (The Code of Federal Regulations is cited throughout as C.F.R.).

3. Message from The President of the United States, September 7, 1942, H. R. Doc. No. 834, 77th Cong., 2d Sess.; JACOBSTEIN AND MOULTON, *EFFECTS OF THE DEFENSE PROGRAM ON PRICES, WAGES AND PROFITS* (1941); Comment, *Legal and Economic Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 821-824; Earley, *Economic Problems of Price Control and the Emergency Price Act of 1942* [1942] WIS. L. REV. 334.

4. Pub. L. No. 729, 77th Cong., 2d Sess. (Oct. 2, 1942). The amendment has been implemented by Executive Order No. 9250, Oct. 3, 1942. 7 FED. REG. 7871 (1942).

maximum price regulation are excluded.<sup>5</sup> Purchasers may be treated differently from sellers.<sup>6</sup> Exceptions may be made for particular contracts.<sup>7</sup> In such cases complete control is not lacking since the effect on the price level of such deviations and exceptions is within the grasp of OPA.<sup>8</sup> But whenever the *effect* of the economic activity of buying and selling commodities is not the concern of an OPA regulation, a gap in OPA's control occurs.

Potentially any contract for the sale of goods may afford an illustration of this situation. A price schedule or regulation fixes a maximum price.<sup>9</sup> The provisions of the EPCA make it unlawful, regardless of any contract between buyer and seller, to sell or deliver, or in the course of trade or business to buy or receive commodities at a price in excess of the maximum, if such activity is prohibited by the schedule or regulation.<sup>10</sup> Contractual deviations are thus condemned as unlawful. A

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5. *E.g.*, Rev. Price Schedule No. 47 (old rags), C.F.R., tit. 32, c. 11, pt. 1347.101; Rev. Price Schedule No. 51 (cocoa beans and cocoa butter), C.F.R., tit. 32, c. 11, pt. 1351.51; Max. Price Reg. No. 145 (pickled sheepskins), C.F.R., tit. 32, c. 11, pt. 1314.151.

6. *E.g.*, Max. Price Reg. No. 110 (resale of new household mechanical refrigerators), C.F.R., tit. 32, c. 11, pt. 1380.101; Max. Price Reg. No. 139 (used household mechanical refrigerators), C.F.R., tit. 32, c. 11, pt. 1380.201. These regulations prohibit only sales and deliveries at prices in excess of the maximum, but not purchases nor acceptance of delivery. See note 10 *infra*.

7. *E.g.*, Procedural Reg. No. 6, C.F.R., tit. 32, c. 11, pt. 1300.401 *et seq.* (providing for adjustment of maximum prices for commodities or services under government contracts or subcontracts); Max. Export Price Reg., C.F.R., tit. 32, c. 11, pt. 1375.0 (provisions not applicable to certain exports outside of continental United States pursuant to contract of sale entered into prior to April 30, 1942).

8. The reference is to Office of Price Administration and will be used throughout this article.

9. Maximum prices established under the Executive Order No. 8734, April 11, 1941, creating the Office of Price Administration and Civilian Supply, are found in price schedules. Maximum prices established since February 11, 1942, the date upon which the Administrator took office under the EPCA, are found in price regulations issued under § 2 of the EPCA. Under § 206 of the EPCA, price schedules, from February 11, 1942, have the same effect as price regulations. In this article, price schedule and price regulation will be used interchangeably unless the context requires differentiation.

10. Section 4(a) of the EPCA provides in part: "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity . . . or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206 . . . or to offer, solicit, attempt, or agree to do any of the foregoing."

The schedules and regulations are not uniform with respect to the activities prohibited. Some schedules and regulations prohibit sales, deliveries, purchases, and acceptance of delivery, at prices in excess of the maximum. *E.g.*, Rev. Price Schedule No. 9 (hides, kips, and calfskins), C.F.R., tit. 32, c. 11, pt. 1314.1; Max. Price Reg. No. 150

statutory declaration of unlawfulness, however, does not amount to the exercise of economic control by OPA. The effect of the unlawfulness will be determined by the courts rather than the OPA.

In this article we consider some of the consequences of the impact of statute and price regulation on private contracts for the sale of goods.

## ORDINARY SALES TRANSACTIONS

### I. *Sales Contracts Entered Into Before Price Ceilings In Effect*

When the performance of a sales contract has been completely executed<sup>11</sup> before the issuance of the relevant price regulation, the contract

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(milled rice), C.F.R., tit. 32, c. 11, pt. 1351.451; Gen. Max. Price Reg., C.F.R., tit. 32, c. 11, pt. 1499.1. Others prohibit sales, deliveries, and acceptance of delivery, at prices in excess of the maximum, but not purchases. *E.g.*, Rev. Price Schedule No. 6 (iron and steel products), C.F.R., tit. 32, c. 11, pt. 1306.1. Still others prohibit only sales and deliveries at prices in excess of the maximum, but not purchases nor acceptance of delivery. *E.g.*, Max. Price Reg., No. 110 (resale of new household mechanical refrigerators), C.F.R., tit. 32, c. 11, pt. 1380.101; Max. Price Reg. No. 139 (used household mechanical refrigerators), C.F.R., tit. 32, c. 11, pt. 1380.201. Where the schedule or regulation prohibits the activity, violations are subject to statutory sanctions: § 205(a) (violations may be enjoined by the Price Administrator); § 205(b) (willful violations are subject to criminal penalties); § 205(c) (treble damage actions against sellers who violate).

11. Whether or not a contract is executed is not always easy to determine. Thus, under state fair-trade laws, payment and delivery may be completed, but the buyer may have a contractual duty not to resell below a price fixed in the contract. In such a situation the OPA maximum may be lower than the contractual minimum resale price. Opinion has been expressed that in case of such a conflict the OPA price governs, and the buyer may not be enjoined by the seller under a state fair-trade law from reselling at this price. *Helena Rubinstein, Inc. v. Charline's Cut Rate, Inc.*, 4 Pike & Fischer, OPA Serv. ¶ 620:13 (N. J. Ch. 1942); *Bissell Carpet Sweeper Co. v. Berg*, N. Y. L. J., Nov. 4, 1942, p. 1314, col. 5 (Sup. Ct.); *cf. Williams v. Yasner*, N. Y. L. J., Sept. 26, 1942, p. 759, col. 4 (Sup. Ct.). On the other hand it has been held that the retailer will be enjoined from selling at any price. "Thus he will be safeguarded from prosecution at the hands of the Federal authorities for violating the United States Emergency Price Control Act of 1942." *Schreier v. Siegel*, 37 N. Y. S. (2d) 624 (App. Div. 1st Dep't 1942). Where the price regulation "freezes" prices, such a result means that violations of the state fair-trade laws have been frozen, a view not taken by the OPA in every situation. C.C.H. War Law Serv. ¶ 49,613, ¶ 49,677 (1942); *cf. Williams v. Yasner*, N. Y. L. J., Sept. 26, 1942, p. 759, col. 4 (Sup. Ct.). Gen. Max. Price Reg., C.F.R., tit. 32, c. 11, pt. 1499.18(d), sets forth a procedure for adjustment of a maximum price in certain cases of conflict between a Fair Trade Act of any state and the General Maximum Price Regulation. Assuming a transaction which is completely executed prior to the price regulation, it is arguable that it may be regulated in order to prevent circumvention or evasion of the Act. See EPCA § 2(g). Otherwise, sellers and buyers might hasten to complete transactions at prices higher than the ceiling prior to the issuance of a regulation, and this would have an inflationary effect. *Cf. Max. Price Reg. No. 174* (freight car materials), C.F.R., tit. 32, c. 11, pt. 1390.51, issued and effective July 2, 1942, which requires that "the price at which any sale, delivery or offer to sell was made

remains free of control.<sup>12</sup> But if the time for any part of the performance has not fallen due and the contract has not been wholly executed on the effective date of a regulation,<sup>13</sup> inquiry should be made as to what control, if any, is placed upon the executory portion of the contract. A number of different situations may arise.

If payment of the price by the purchaser is the only remaining unexecuted portion of the contract—the seller having fully performed and title having passed—it seems clear that the payment is not subject to control. Selling, delivering, buying and receiving are expressly prohibited by the Act, but not payment,<sup>14</sup> and indeed regulations seem

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between May 26, 1942, and July 2, 1942, shall be adjusted so as not to exceed the maximum price herein permitted." But such a regulation might, where the contract is completely executed, present serious constitutional problems.

12. And this is true even though the prices are usually set as of some date prior to the issuance of the regulation. *E.g.*, Gen. Max. Price Reg., C.F.R., tit. 32, c. 11, pt. 1499.1 (issued on April 28, 1942, and using for most purposes the month of March 1942 as the base period). Under the EPCA, "so far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the price prevailing between October 1 and October 15, 1941. . . ." §2(a). Under the recent amendment to the EPCA, the President is authorized to stabilize prices, wages and salaries, affecting the cost of living, on the basis of September 15, 1942 levels so far as practicable and unless otherwise provided in the amendment. Pub. L. No. 729, 77th Cong., 2d Sess. (Oct. 2, 1942).

13. The typical regulation prohibits sellers from selling or delivering, and buyers in the course of trade or business from purchasing, a commodity on and after a specified date at prices higher than the maximum. *E.g.*, Max. Price Reg. No. 36 (acetone), C.F.R., tit. 32, c. 11, pt. 1412.51; Max. Price Reg. No. 120 (bituminous coal delivered from mine or preparation plant), C.F.R., tit. 32, c. 11, pt. 1340.201; Gen. Max. Price Reg., C.F.R., tit. 32, c. 11, pt. 1499. It is this date, rather than the date upon which a regulation is issued, which will be termed "the effective date" of a regulation in this article. Usually, the effective date is subsequent to the date upon which the regulation is issued. *E.g.*, Max. Price Reg. No. 113 (iron ore produced in Minnesota, Wisconsin and Michigan), C.F.R., tit. 32, c. 11, pt. 1369 (issued April 7, 1942, effective April 10, 1942); Max. Price Reg. No. 121 (solid fuels delivered from producing facilities), C.F.R., tit. 32, c. 11, pt. 1340 (issued April 29, 1942, effective May 18, 1942); Max. Price Reg. No. 161 (softwood lumber—West Coast logs), C.F.R., tit. 32, c. 11, pt. 1351 (issued June 10, 1942, effective June 20, 1942).

14. Section 4(a) of the EPCA, note 10 *supra*, is directed to transfers of possession and title, rather than to the act of payment. Brief for Administrator, pp. 4, 5, Galban Lobo Co., S. A. v. Henderson, 4 Pike & Fischer, OPA Serv. ¶610 (U. S. Emergency Ct. of App. 1942). The distinction between a sale and payment is a customary one. Under the Uniform Sales Act, apart from agreement to the contrary, a sale may take place in the sense of the property in the goods passing at the time the contract is made, even though the time of payment is postponed. *Cf.* UNIFORM SALES ACT §§1 19; 1 WILLISTON, SALES (2d ed. 1924) 3.

The typical maximum price regulation reads:

" . . . On and after . . . , 194 . . . , regardless of any contract, agreement, lease, or other obligation, no person shall sell or deliver . . . , and no person shall buy or receive . . . in the course of trade or business, at prices higher than

generally not to affect the payment of the price in such a situation.<sup>15</sup>

Conversely, if payment of the price occurs prior to, but delivery is to take place subsequent to the effective date of an applicable regulation, the seller's performance is frequently controlled.<sup>16</sup> On the authority of Section 4(a) of the Act, most regulations provide that it is unlawful to deliver or to receive a commodity on and after a specified date "at prices higher than the maximum prices."<sup>17</sup> But a declaration making

the maximum prices . . . , and no person shall agree, offer, solicit or attempt to do any of the foregoing. The provisions of this Section shall not be applicable to sales or deliveries of . . . to a purchaser if prior to . . . , 194. . such . . . had been received by a carrier, other than a carrier owned or controlled by the seller, for shipment to such purchaser." The last sentence indicates an intent not to include a sales transaction in which only payment is to take place after the effective date of the regulation. If payment were prohibited, the result would be to permit delivery after the effective date by the independent carrier, of goods received by it prior to the effective date, but to preclude payment by the buyer for such goods. If, on the other hand, payment is permitted in this situation, then it is *a fortiori* permissible where the buyer has received the goods prior to the effective date.

Whether a price regulation may specifically prohibit such payment is not clear. Cf. Max. Price Reg. No. 174 (freight car materials), C.F.R., tit. 32, c. 11, pt. 1390.51; see note 11 *supra*. There would seem to be no constitutional objection to a regulation which makes payment of a price in excess of the ceiling illegal even though delivery under the contract has taken place prior to the regulation. *Louisville & N. R.R. v. Mottley*, 219 U. S. 467 (1911); *Calhoun v. Massie*, 253 U. S. 170 (1920); *Norman v. Baltimore & Ohio R.R.*, 294 U. S. 240 (1935); but cf. *Perry v. United States*, 294 U. S. 330 (1935) (casting doubt as to the validity of such a regulation where a government contract is involved). From the standpoint of statutory authority, the validity of such a regulation could be premised on §2(g) of the EPCA, and it would not run counter to any legislative history. *Hearings before House Banking and Currency Committee on H.R. 5479*, 77th Cong., 1st Sess. (1941) 342; *Hearings before Senate Banking and Currency Committee on H.R. 5990*, 77th Cong., 1st Sess. (1941) 72; SEN. REP. No. 931, 77th Cong., 2d Sess. (1942) 19. The theory would be that, without such a regulation, sellers and buyers could circumvent the purposes of the EPCA by arranging for the sale, delivery, purchase, and receipt to take place in anticipation of a price regulation, but delaying payment until after its effective date. The seller thereby receives more than those who sell after the effective date of the price regulation, and thus brings a greater purchasing power to a market with a limited supply. See *Hearings before House Banking and Currency Committee on H.R. 5479*, 77th Cong., 1st Sess. (1941) 780, 1128; SEN. REP. No. 931, 77th Cong., 2d Sess. (1941) 1, 2; Comment, *Legal and Economic Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 820.

15. But cf. Max. Price Reg. No. 174 (freight car materials), C.F.R., tit. 32, c. 11, pt. 1390.51; see note 11 *supra*.

16. *E.g.*, Rev. Price Schedule No. 9 (hides, kips, and calfskins), C.F.R., tit. 32, c. 1, pt. 1314.1; Max. Price Reg. No. 150 (milled rice), C.F.R., tit. 32, c. 11, pt. 1351451.

17. See note 14 *supra*. The above phraseology, if not the happiest available, is at least an elliptical way of providing that delivery or receipt of a commodity after the effective date of a regulation is prohibited if a price in excess of the maximum has been received, is received upon delivery, or will be paid at some future time.

the delivery or receipt of goods unlawful is not a determination, for practical purposes, of the rights between buyer and seller. The seller has the purchase price and the buyer has no goods and no "lawful" prospect of receiving the goods. Since no solution appears either in the Act or the regulations,<sup>18</sup> the rights of the parties must be judicially determined. It might be held that the parties should be left where they are; but such a point of view seems both an undue hardship upon the buyer and an undue benefit to the seller.<sup>19</sup> Or it might be held that the seller is under a duty to return the purchase price to the buyer.<sup>20</sup> Under neither view is the transfer of goods consummated. Lawful transfer of the goods could occur if the seller returned to the buyer the excess amount of the price. Yet neither the Act nor the regulations require such partial payment back, and customary principles of contract law negative the likelihood that such a partial payment back can be compelled.<sup>21</sup>

18. The "no damage" clause of the EPCA does not cover this situation. "No person shall be held liable for damages or penalties in any Federal, State, or Territorial Court, on any grounds for or in respect of anything done or omitted to be 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." § 205(d).

19. Until the recent case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All Eng. R. 122 (H.L.), 56 HARV. L. REV. 307, this was the English view. No quasi-contractual obligation on the part of the seller to return the money was implied in fact or law. *Court Line, Ltd. v. Dant and Russell, Inc.*, 161 L. T. 35 (K. B. Div. 1939); *Chandler v. Webster*, [1904] 1 K. B. 493; *French Marine v. Compagnie Napolitaine*, [1921] 2 A. C. 494. But cf. WEBBER, EFFECT OF WAR ON CONTRACTS (1940) 118. The rule, however, was invoked in England in cases where the impossibility had no relationship to the consideration received by the seller. It seems both unnecessary and undesirable to apply the same rule in cases arising by reason of price control, where it is the excessive consideration received by the seller which excuses performance by making it illegal.

20. There is ample authority to support this rule. *Export Syndicate of Steel Producers, Inc. v. Dilsizian, Inc.*, 36 N. Y. S. (2d) 868 (Sup. Ct. 1942) (plaintiff buyer entitled to recover back deposit made pursuant to contract entered into prior to the issuance date of price schedule); *Manhattan Life Ins. Co. v. Buck*, 93 U. S. 24 (1876); *Louisville & N. R.R. v. Crowe*, 156 Ky. 27, 160 S. W. 759 (1913); *Von Waldheim v. Englewood Heights Estates*, 115 N. J. L. 220, 179 Atl. 18 (1935); *McCammen v. Peck*, 9 Ohio Circ. Ct. 589 (1895); 6 WILLISTON, CONTRACTS (rev. ed. 1938) §§ 1972, 1974; RESTATEMENT, CONTRACTS (1932) § 468. *Contra*: *Cowley v. Northern Pac. Ry.*, 68 Wash. 558, 123 Pac. 998 (1912).

21. Such a result would mean that contrary to settled doctrine the court would be making a new or different contract for the parties. See *Foley v. Eules*, 214 Cal. 505, 511, 6 P. (2d) 956, 958 (1931); *Englestein v. Mintz*, 345 Ill. 48, 60, 177 N. E. 746, 751 (1931); *Rosenthal v. American Bonding Co.*, 207 N. Y. 162, 168, 100 N. E. 716, 718 (1912); *Elliott v. Crutchley*, [1906] A. C. 7. But if the buyer accepted delivery without judicial, legislative or administrative direction that the seller refund so much of the price as exceeded the ceiling, he might be held in *pari delicto* with the seller and not entitled to a refund. *Infra*, p. 88 *et seq.*

In other situations, the performances of both buyer and seller may be unexecuted at the effective date of an applicable regulation. The regulations usually make it unlawful for the buyer in the course of trade or business to obtain the goods.<sup>22</sup> Receipt of goods would in such event

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22. See note 10 *supra*. But regulations may permit the performance of some contracts which are unexecuted on the effective date. *E.g.*, Max. Price Reg. No. 118 (cotton products), C.F.R., tit. 32, c. 11, pt. 1400.101: "The provisions of this section shall not be applicable to sales or deliveries of cotton products if within the terms of the Worth Street Rules title to such cotton products has passed to the purchaser prior to May 4, 1942." In addition, there are a number of miscellaneous situations in which transfer of possession is apparently permitted although payment and delivery may take place after the effective date of the price schedule or regulation. Usually, these exclude from the schedule or regulation performance under contracts entered into prior to the effective date of the schedule or regulation. *E.g.*, Rev. Price Schedule No. 47 (old rags), C.F.R., tit. 32, c. 11, pt. 1347.101; Rev. Price Schedule No. 51 (cocoa beans and cocoa butter), C.F.R., tit. 32, c. 11, pt. 1351.51; Max. Price Reg. No. 145 (pickled sheepskins), C.F.R., tit. 32, c. 11, pt. 1314.151; *cf.* Max. Price Reg. No. 123 (raw and processed wool waste materials), C.F.R., tit. 32, c. 11, pt. 1410.71 (contracts entered into prior to effective date at prices in compliance with Revised Price Schedule No. 58, as amended, may be carried out at contract price).

Further, the typical regulation does not interdict delivery to the buyer where, prior to the effective date, the goods have been received by a carrier, other than a carrier owned or controlled by the seller for shipment to the buyer. *E.g.*, Max. Price Reg. No. 109 (aircraft spruce), C.F.R., tit. 32, c. 11, pt. 1312.351; Max. Price Reg. No. 164 (red cedar shingles), C.F.R., tit. 32, c. 11, pt. 1381.1(d). The clause, however, does not usually appear in price schedules, and is not included in all of the price regulations. *E.g.*, 7 FED. REG. 1201 (1942) (reprinting all price schedules); Max. Price Reg. No. 125 (nonferrous foundry products), C.F.R., tit. 32, c. 11, pt. 1395. Even where used, the exception presents some problems. May a captious buyer contend that it cannot receive the goods even though the independent carrier may? When is a carrier independent in the sense that it is not owned or controlled by the seller? Does this mean stock ownership? Does this mean control in the sense that the seller has the power to recall the goods? If so, whether the exception is applicable may depend on the nature of the bill of lading used, or on a court's ruling that a seller never loses control of the carrier as long as he retains title or has the potential right of stoppage in transitu. See 1 WILLISTON, SALES (2d ed. 1924) 632 *et seq.*, 1325 *et seq.*; *Wilson v. International Ry.*, 160 N. Y. Supp. 367 (County Ct. 1916); *cf.* Rev. Price Schedule No. 101 (citric acid), C.F.R., tit. 32, c. 11, pt. 1335 (providing that the effect of the exception shall not be changed merely because the bill of lading, in order to secure the seller, names a person other than the buyer as the person entitled to receive delivery). Why, in any event, the distinction between an independent carrier and one owned or controlled by the seller? *Cf.* Gen. Max. Price Reg., C.F.R., tit. 32, c. 11, pt. 1499.20 (where the maximum price is based on the highest price charged for a commodity delivered during March, 1942, a commodity is deemed to have been "delivered" if during such month it was received by purchaser or carrier, including carrier owned or controlled by the seller, for shipment to the purchaser). Probably the explanation is that circumvention of the price regulation could be too easily plotted if delivery to a carrier "controlled" by the seller prior to the effective date of the price regulation removed the transaction from the regulation. Who has the burden of proving whether or not the carrier is independent? Is it the defendant on the theory that he

be unlawful even though the seller defaulted in performance prior to the effective date of the regulation.<sup>23</sup> In such case the buyer's remedy is an action for damages for breach of contract.<sup>24</sup> However, where the seller's performance is not due until after the effective date of the regulation, the fact that performance in violation of the regulation is unlawful may afford the seller, on orthodox principles of contract law, a valid excuse.<sup>25</sup> Since the EPCA provides that exclusive jurisdiction

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is asserting the defense of impossibility of performance? See *Bernhardt Lumber Co. v. Metzloff*, 113 Misc. 288, 184 N. Y. Supp. 289 (Sup. Ct. 1920); *Commonwealth v. Neff*, 271 Pa. 312, 114 Atl. 267 (1921); *Taylor & Co. v. Landauer & Co.*, 85 SOL. J. 119 (K. B. 1940); cf. *Schreier v. Siegel*, 36 N. Y. S. (2d) 97 (Sup. Ct. 1942), *rev'd on other grounds*, 37 N. Y. S. (2d) 624 (App. Div. 1st Dep't 1942); *Williams v. Yasner*, N. Y. L. J. Sept. 26, 1942, p. 759, col. 4 (Sup. Ct.) (both cases involving burden of proving "good faith" compliance under § 205(d), the "no damage" provision of EPCA). Where the seller is the defendant this presents no great problem because the seller can prove he owns or controls the carrier. But where the buyer is the defendant, it would mean that he must assume the burden of proving that the carrier is not independent or is controlled by the seller, facts usually within the peculiar knowledge and control of the seller. For cases holding that such burden should not be placed on the buyer, see *Price v. Haney*, 174 Miss. 176, 164 So. 590 (1935); *Besecker v. General Acceptance Corp.*, 143 Pa. Super. 367, 370, 17 A. (2d) 916, 918 (1941); see *Farrall v. State*, 32 Ala. 557, 559 (1858); 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2486.

Finally, a court might hold, apart from any provision in the regulation, that the delivery which a regulation made unlawful did not refer to the physical act, but rather that it occurred when the seller at some date prior to the effective date relinquished "legal control" over the commodities. Cf. *Swanee Fabrics, Inc. v. American Bleached Goods Co.*, 36 N. Y. S. (2d) 456 (N. Y. City Cts. 1942). Yet there may be judicial reluctance to hold that either delivery or a sale takes place prior to receipt by the buyer. For example, in a Bow Street Police Court case, between the date of the price order and its effective date, a company obtained one hundred and eighty-one orders for coffee at a price above the maximum price upon an understanding that the coffee would be held by the seller for each buyer and delivered as the buyer required it. The magistrate held that the agreement for sale was not complete prior to the effective date of the price order because the coffee had not been unconditionally appropriated. 4 *Butterworth Emergency Legislation Serv.* (1942) § 38, p. 39 (it is stated therein that this case may be appealed).

23. *Export Syndicate of Steel Producers, Inc. v. Dilsizian, Inc.*, 36 N. Y. S. (2d) 868 (Sup. Ct. 1942). "Where a contract calls for delivery before the effective date of the Regulation and the seller is unable to deliver because of a default by the buyer (e.g., buyer agrees to supply tank cars before effective date of Regulation and fails to do so) there is no delivery, and the maximum price must be observed. However, it may be that as a matter of private contract law the buyer is liable to the seller for the loss suffered by the seller as a result of the default by the buyer. Payment of judgment on any such claim or settlement of any valid claim will not constitute a violation of the Regulation." OPA Price Interpretation No. 13, Sept. 20, 1942.

24. Even if the receipt of the goods were lawful, ordinarily the buyer cannot obtain specific performance of a contract for the sale of goods. 2 WILLISTON, SALES (2d ed. 1924) § 602.

25. See 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1938; RESTATEMENT, CONTRACTS (1932) § 458; *In re Kramer & Uchitelle, Inc.*, 288 N. Y. 467, 43 N. E. (2d) 493 (1942);



to consider the validity of a maximum price regulation rests initially in the specially created Emergency Court of Appeals,<sup>26</sup> it becomes a jurisdictional inquiry whether the buyer, in his civil action, may test the validity of the regulation which the seller claims as a defense.<sup>27</sup>

*In re Kahn & Feldman, Inc.*, C. C. H. War Law Serv. ¶ 50,911 (N. Y. Sup. Ct., App. Div., 1st Dep't 1942); *cf.* *Edward Maurer Co. v. Tubeless Tire Co.*, 272 Fed. 990 (N. D. Ohio 1921), *aff'd*, 285 Fed. 713 (C. C. A. 6th, 1922); Comment, *Legal and Economic Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 840, n. 100. The burden of proving the excuse rests on the party asserting it. For cases involving burden of proof arising out of the General Maximum Price Regulation, see *Williams v. Yasner*, N. Y. L. J., Sept. 26, 1942, p. 759, col. 4 (Sup. Ct.); *Schreier v. Siegel*, 36 N. Y. S. (2d) 97 (Sup. Ct. 1942), *rev'd on other grounds*, 37 N. Y. S. (2d) 624 (App. Div. 1st Dep't 1942). For additional cases see note 22 *supra*.

A special situation is presented where a maximum price is fixed by a voluntary agreement between a seller and the Administrator pursuant to Section 5 of the EPCA. For purposes of affording the seller an excuse from performing a pre-existing contract, such agreement might be viewed as being equivalent to a statute or price regulation, even though no statutory sanctions attend its violation. *Cf.* *Dodd, Impossibility of Performance of Contracts Due to War-time Regulations* (1919) 32 HARV. L. REV. 789, 796 *et seq.* For examples of these agreements, some of which exclude from their scope preexisting contracts entered into in good faith, see 4 Pike & Fischer, OPA Serv. ¶ 61:101. In such cases the fact that the promisor was instrumental in bringing about the change in law which caused the impossibility is generally not viewed as a material factor. 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1938. Or the agreement might be viewed as analogous to a private act, or executive or administrative order, sought by the seller. In this connection it has been suggested that the promisor's activity in obtaining the change in law might prevent excuse of his performance. *Ibid.* Or the agreement might simply be viewed as a contract between seller and Administrator. *Cf.* *Fryns v. Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 Atl. 862 (Ch. 1933) (reemployment agreement with President of United States under N.I.R.A.). In such a case, even if the subsequent agreement with the Administrator does not expressly permit the performance of the preexisting contract with the buyer, nevertheless on contract law principles the seller's performance should not be excused. *Cf.* *Crist v. Armour*, 34 Barb. 378 (N. Y. 1861); 3 WILLISTON, CONTRACTS (rev. ed. 1936) § 677. But *cf.* *Mawhinney v. Millbrook Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921).

26. EPCA, § 204(d). Compare *Hatter v. Kittrell*, C. C. H. War Law Serv. ¶ 49,647 (S. D. Ala. 1942), with *Hatter v. Kittrell*, Circ. Ct., Mobile County, Ala., Aug. 21, 1942.

27. The same jurisdictional difficulty would beset the seller where he is the plaintiff in an action in which the buyer asserts the price regulation as a defense. *Vecchio v. Kelly*, 4 Pike & Fischer, OPA Serv. ¶ 622:5 (Circ. Ct., Wayne County, Mich., 1942) (rent regulation under EPCA). Apart from the exclusive jurisdiction provisions of the EPCA, the party defendant might contend that the "no damage" clause prevents either the validity of the regulation or its administrative interpretation from being put in issue in the civil action; for a person is not to be held liable for damages or penalties where he does or omits to do anything in good faith pursuant to a regulation, even if the regulation is subsequently held invalid. See note 18 *supra*. But where there has been no administrative interpretation of the regulation, the EPCA contains no limitation on the jurisdiction of a court in the civil action to determine whether the regulation is applicable to a given transaction.

But the application of these customary principles of contract law to maximum price control is not clear cut. Performance at or below the maximum is still possible factually.<sup>28</sup> If there be any justification for the seller's non-performance, it is the increased financial hardship on the seller, since a sale at the ceiling will gross the seller a smaller total sum, or he will have to sell more units to obtain the total contract price. Financial hardship, however, has, except in extreme cases, been held no excuse for failure to perform.<sup>29</sup>

Since a method is provided by OPA procedure to obtain administrative change of prices to higher levels,<sup>30</sup> the conclusion might be reached that the seller's excuse should be conditioned upon bona fide instigation and pursuance of this procedure.<sup>31</sup> Such a result would unduly encourage protest of the maximum price and serve little useful purpose in the effort of OPA to curb inflation. Furthermore, it might well be assumed that regardless of the existence of prior contracts, sellers will endeavor to obtain, through OPA channels, increased prices. Of course, if the price level is increased by OPA before performance by the seller is due, so that the contract price is not excessive, then performance is lawful, and non-performance in most cases is not excusable. This is true

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28. Even performance at a price in excess of the ceiling is factually possible, but only if the performer is willing to violate the law. RESTATEMENT, CONTRACTS (1932) § 458(c).

29. 5 PAGE, CONTRACTS (2d ed. 1921) § 2706; 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1963. Held not excusable in: *Columbus Railway, Power & Light Co. v. Columbus*, 249 U. S. 399 (1919) (increased cost due to fifty per cent increase in wages by action of War Labor Board); *Moorhead v. Union Light, Heat & Power Co.*, 255 Fed. 920 (D. Minn. 1918) (increased costs due to war conditions). 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 (1919).

30. Procedural Regulation No. 1, providing for protests to price regulations and schedules, petitions for amendment, and petitions for adjustment or exception; Procedural Regulation No. 2, providing for adjustment of retail prices of commodities and services; OPA-1065, Nov. 3, 1942, C.C.H. War Law Serv. ¶ 49,683 (1942) (individual price adjustments limited); see Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review* (1942) 9 LAW & CONTEMP. PROB. 60, 63; Rava, *Procedure in Emergency Price Fixing* (1942) 40 MICH. L. REV. 937, 962-964.

31. The argument would be that a method of performance remained available until an adverse administrative ruling. See *Williams v. Yasner*, N. Y. L. J., Sept. 26, 1942, p. 759, col. 4 (Sup. Ct.); *Brown, The Effect of Conscription of Industry on Contracts for the Sale of Goods* (1942) 90 U. OF PA. L. REV. 533, 549, n. 93; Comment (1942) 41 MICH. L. REV. 109, 147. But see *Schreier v. Siegel*, 36 N. Y. S. (2d) 97 (Sup. Ct. 1942), *rev'd on other grounds*, 37 N. Y. S. (2d) 624 (App. Div. 1st Dep't 1942). If such a burden were imposed on the seller, the additional question would arise whether he would have to pursue his remedy beyond the administrative level to the Emergency Court of appeals, the tribunal created by the act to review OPA rulings on protests. EPCA § 204.

whether the increase is occasioned by administrative relief given at the request of the seller or the buyer,<sup>32</sup> or otherwise.<sup>33</sup>

Occasionally the seller might desire to perform prematurely. Since regulations are frequently issued before the date when they are to become effective,<sup>34</sup> the parties will have advance notice of "legal" prices. A seller, under a contract providing for an excessive price with a fixed and definite delivery date after the effective date of the regulation, may desire to perform before the crucial date in order to command the higher price. The buyer need not accept premature performance,<sup>35</sup> although he may do so and become liable for the contract price.<sup>36</sup> Since the regulations may be regarded as discharging the contract and thus the seller's duty to deliver, it is to be expected that some buyers will welcome the receipt of goods even at the higher price. There would seem to be no obligation on the part of the seller to tender performance prematurely, even though it is foreseeable that performance will be illegal on the due date.

Certainty that performance will be unlawful on the due date can be ascertained only on the due date.<sup>37</sup> Yet sellers must frequently

32. Section 203(a) of the EPCA authorizes any person subject to any provision of a regulation to file a protest. Rule 9 of Procedural Regulation No. 1 provides that "A person is, for the purposes of this Regulation subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him." Ordinarily, it will be difficult for either a buyer in the course of trade or business or a consumer at retail to show that the regulation has caused him injury by prohibiting him from purchasing or accepting delivery at a price above the maximum. However, it would appear that buyers may seek amendments of regulations under Rule 35 of Procedural Regulation No. 1 as persons "affected" by a maximum price regulation, but not "subject" to it. See Nathanson, *supra* note 30, at 62, n. 14.

33. Short of discriminatory and arbitrary practices, there would seem to be no restrictions on the power of OPA to revise an entire regulation upward, or to make reasonable differentials raising the price ceiling in individual cases. EPCA §2(a) states: "Any regulation or order under this section . . . may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act." See Nathanson, *loc. cit. supra* note 32; Comment (1942) 41 MICH. L. REV. 109, 117.

34. See note 13 *supra*.

35. *Carolina Portland Cement Co. v. Roper-Strauss-Ferst Co.*, 33 Ga. App. 511, 126 S. E. 860 (1925); *Arons v. Cummings*, 107 Me. 19, 78 Atl. 98 (1910); *cf.* *National Importing & Trading Co. v. Bear & Co.*, 324 Ill. 346, 352, 155 N. E. 343, 345 (1927).

36. *Leigh v. Cornelius*, 65 Ga. App. 419, 15 S. E. (2d) 827 (1941); *Sole-Leather Over Mfg. Co. v. Bangs*, 43 Minn. 23, 44 N. W. 671 (1890).

37. There is always the possibility that the regulation may be held invalid or may be rescinded or modified prior to the date on which performance is due. *Neuberg v. Avery F. Payne Co.*, 37 N. Y. S. (2d) 366 (Sup. Ct. 1942) (price schedule amended prior to last date on which performance could take place under terms of contract). By its terms the "no damage" provision of the EPCA (note 18 *supra*) does not protect a person who fails to perform on the due date when the regulation does

prepare in advance of the due date; and, since the certainty of the legal obligation has vanished, practical difficulties for the seller are created.<sup>38</sup> To fail to prepare for performance may result in a failure to perform with a consequent claim for damages. Completion of preparation may result in expenditures pursuant to a contract that may become legally discharged.

The seller might at some time prior to the performance date announce his unwillingness to proceed. Anticipatory repudiation by the seller will serve only to raise the perplexing question regarding the buyer's right to maintain an action prior to the date when performance is actually due.<sup>39</sup> Even more perplexing is the situation in which a price ceiling, though in effect when performance is due, has not even been issued when the anticipatory repudiation occurs.<sup>40</sup>

Excusable impossibility grounded on the EPCA may be of no more lasting effect than the regulations issued pursuant to the Act.<sup>41</sup> Temporary impossibility is regarded as affording a temporary excuse for non-performance.<sup>42</sup> Under the EPCA, price regulations with respect to

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not prohibit such performance on that date, even though at some earlier date performance would have been forbidden under the regulation. But where a party breaches the contract on the due date because of compliance with a regulation, and the regulation is thereafter held invalid, the "no damage" provision may immunize such party from liability for damages, even though the regulation may be considered void *ab initio*. Cf. FIELD, *THE EFFECT OF AN UNCONSTITUTIONAL STATUTE* (1935) 3-S; *J. A. Dougherty's Sons v. Comm'r*, 121 F. (2d) 700, 702 (C. C. A. 3d, 1941).

38. Likewise, the buyer may have to prepare for performance by making financial arrangements or making himself ready to accept delivery on the due date. See, *e.g.*, *Arons v. Cummings*, 107 Me. 19, 78 Atl. 98 (1910). See also the language of Justice Bailhache, in *Anglo-Northern Trading Co., Ltd., v. Emlyn Jones & Williams*, [1917] 2 K. B. 78, 84: "Now there is nothing more repugnant to business men who have to look ahead and make their arrangements in advance than uncertainty as to their engagements already made."

39. See 6 WILLISTON, *CONTRACTS* (rev. ed. 1938) 4996, 4997. Where the contract has been entered into after the enactment of the EPCA, and the anticipatory repudiation occurs after the regulation has been issued, the repudiator may seek to justify his action on the rather untenable ground that the other party's promise is now illusory. Cf. *Topken, Loring & Schwartz, Inc. v. Schwartz*, 249 N. Y. 206, 163 N. E. 735 (1928), criticized in (1929) 42 HARV. L. REV. 829.

40. See 6 WILLISTON, *loc. cit. supra* note 39.

41. By its terms the EPCA, "and all regulations, orders, price schedules, and requirements thereunder," are to terminate on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution by Congress. EPCA § 1(b), as amended by Pub. L. No. 729, 77th Cong., 2d Sess. (Oct. 2, 1942) § 7. Actually, price control may remain in effect for some time after the war is ended. *Hearings before House Committee on Banking and Currency on H.R. 5479*, 77th Cong., 1st Sess. (1941) 776, 777. In part, the purpose of the EPCA is to prevent inflation resulting from demands of an increased purchasing power on a limited civilian supply. This purpose is not spent *eo instanti* the war ends.

42. RESTATEMENT, *CONTRACTS* (1932) § 452.

their duration may be either "temporary" or "permanent."<sup>43</sup> This distinction is subject to the possibility that temporary ceilings usually become permanent,<sup>44</sup> and permanent ceilings are subject to constant revision,<sup>45</sup> and even to premature death at the hands of the Administrator.<sup>46</sup> From the point of view of the individual buyer or seller it may be unfortunate that the law has no categorical rule of thumb by which to determine whether the impossibility affords a temporary or permanent excuse. The common denominator suggested is that the decision in each case be based on a determination as to whether the applicable regulation has persisted for a time sufficient to go to the essence of the contract.<sup>47</sup> Whenever it can be said that the performance after termination of the regulation would impose a burden on the seller substantially greater than would have been imposed on him had there been no regulation, the seller is permanently excused.<sup>48</sup>

Even if a price regulation does affect the essence of the contract so as to impose burdens on the contracting parties substantially greater than if there had been no regulation, the question still remains as to when

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43. Under § 2(a) of the EPCA permanent maximum price regulations must be generally fair and equitable, use as their basis, so far as practicable, the prices prevailing between October 1 and 15, 1941, subject to permitted departures, are to be accompanied by a statement of considerations, and are usually issued after consultation between the Price Administrator and representative members of the industry. Temporary maximum price regulations, on the other hand, are not affected by the foregoing considerations. They may be issued for sixty days only, and must establish as the maximum price the price prevailing within five days prior to the date of issuance of the temporary regulation.

44. *E.g.*, Temporary Max. Price Reg. No. 1 (mixed fertilizer, superphosphates, and potash), C.F.R., tit. 32, c. 11, pt. 1367, and Max. Price Reg. No. 135, C.F.R., tit. 32, c. 11, pt. 1367; Temporary Max. Price Reg. No. 7 (silk waste), C.F.R., tit. 32, c. 11, pt. 1338, and Max. Price Reg. No. 115, C.F.R., tit. 32, c. 11, pt. 1338; Temporary Max. Price Reg. No. 16 (standard newsprint paper), C.F.R., tit. 32, c. 11, pt. 1347, and Max. Price Reg. No. 130, C.F.R., tit. 32, c. 11, pt. 1347. Each of the above were temporary regulations subsequently replaced by permanent regulations.

45. *E.g.*, Max. Price Reg. No. 120 (bituminous coal delivered from mine or preparation plant), C.F.R., tit. 32, c. 11, pt. 1340, had been amended twenty-four times by October 14, 1942. 7 FED. REG. 8354 (1942).

46. Compare EPCA § 204(a): ". . . the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time" notwithstanding the pendency of a complaint in the Emergency Court of Appeals. Prior to the enactment of the EPCA, in at least one case the Administrator revoked a price schedule. Price Schedule No. 5 and Supplement No. 1 thereto (bituminous coal), C. C. H. War Law Serv. ¶ 43,205 (1942).

47. See Brown, *supra* note 31, at 551. But this test may become difficult to apply where an installment contract is for a term substantially longer than the expected duration of price control. And the additional problem is presented whether the long-term contract should be discharged, or abated as long as the price ceiling is in effect, or so abated and extended for the period of abatement. *Id.* at 549, n.101.

48. *Id.* at 550.

this determination should be made. Commercial practice might prefer that the obligation of the contract or its discharge be determinable immediately upon the issuance of a maximum price regulation. Satisfaction of such commercial desires may run counter to administrative procedures.<sup>49</sup> The regulation might be amended,<sup>50</sup> or an adjustment or exception might be granted.<sup>51</sup> The impossibility may thus be short lived. Commercial desires should stand by for a time pending the possible employment of these administrative devices.<sup>52</sup> Further, unaided by the lapse of time, courts would find it difficult to determine whether temporary impossibility would cause substantially more burdensome performance. Thus it would seem that the parties must at the outset regard the issuance of either a temporary or permanent regulation as merely postponing the time for performance.<sup>53</sup>

## II. *Sales Contracts Entered Into After Price Ceilings In Effect*

It is unlikely that all sales contracts entered into after a price regulation is in effect will call for the payment of a price equal to or less than the maximum. Buyers and sellers may, wittingly<sup>54</sup> or unwittingly, contract for the sale and purchase of goods at a price in excess of the ceiling fixed in the regulation. Others may seek what appear to be avenues of escape in the regulations from the full force of their impact.<sup>55</sup>

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49. See note 30 *supra*.

50. See note 30 *supra*. Although EPCA §204(a) provides for amendments to price regulations and schedules somewhat inferentially, amendments are frequent. Rules 35 to 37, inclusive, of Procedural Regulation No. 1 set out at length an amendment procedure. The value of this procedure might be lessened considerably if seller and buyer were permitted to consider performance of their contract excused as soon as a price regulation was issued.

51. See note 30 *supra*. EPCA §2(c) contemplates adjustments and exceptions, and Rules 38 to 41, inclusive, of Procedural Regulation No. 1 set out the procedure with respect to petitions for adjustment or exception.

52. *Neuberg v. Avery F. Payne Co.*, 37 N. Y. S. (2d) 366 (Sup. Ct. 1942); see RESTATEMENT, CONTRACTS (1932) §286.

53. See note 47 *supra*.

54. Willful violations of regulations are criminal and subject a violator to a maximum of \$5,000 fine and one year of imprisonment. EPCA §205(b). The typical regulation provides that violators "are subject to criminal penalties, civil enforcement actions, and suits for treble damages," provided for by the EPCA. *E.g.*, Max. Price Reg. No. 120 (bituminous coal delivery from mine or preparation plant), C.F.R., tit. 32, c. 11, pt. 1340.206.

55. Many regulations now permit the making of a contract to sell at a price not exceeding the maximum price in effect at the time of delivery. *E.g.*, Max. Price Reg. No. 120 (bituminous coal delivered from mine or preparation plant), C.F.R., tit. 32, c. 11, pt. 1340.203; Max. Price Reg. No. 122 (solid fuels dealers), C.F.R., tit. 32, c. 11, pt. 1340.253; Max. Price Reg. No. 145 (pickled sheepskins), C.F.R., tit. 32, c. 11, pt. 1314.156. The regulations generally provide that, where a petition for amend-

In addition, contracts may be entered into containing provisions effective upon the termination of the price regulation. Not only is the lawfulness or unlawfulness of such contracts subject to judicial inquiry, but, here again, controversy between buyer and seller is not ended by labelling the transaction "unlawful".

When it is judicially determined that a contract is unlawful, certain legal consequences usually follow. Generally, the illegal agreement will not be specifically enforced;<sup>56</sup> recovery of damages for its breach will not be allowed;<sup>57</sup> nor will a party to such a bargain be permitted to rescind and recover the performance he has rendered or its value.<sup>58</sup> The parties are in *pari delicto*. Implicit in these rules is the belief that any different result would encourage illegal transactions.<sup>59</sup>

The EPCA contains statutory exceptions to the principle of *pari delicto*; but since an agreement is unlawful only if it violates a regulation issued pursuant to the EPCA, the exceptions must be read in the light of the applicable regulation. For this purpose regulations are of two kinds: those directed at both the seller and buyer, and those directed at the seller only.<sup>60</sup>

When a regulation makes it unlawful for the seller to sell or deliver and as well for the buyer in the course of trade or business to buy or receive, the EPCA subjects the seller to suit for damages<sup>61</sup> if the

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ment or a petition for adjustment or exception requires extended consideration, the Administrator may permit the making of contracts "adjustable upon the granting of the petition." *E.g.*, Max. Price Reg. 116 (china and pottery), C.F.R., tit. 32, c. 11, pt. 1362.53; Max. Price Reg. No. 140 (sanitary napkins), C.F.R., tit. 32, c. 11, pt. 1347.153. *Cf.* Max. Price Reg. No. 121 (miscellaneous solid fuels delivered from producing facilities), C.F.R., tit. 32, c. 11, pt. 1340.243 (Administrator may permit adjustment of prices "upon deliveries made during the pendency of the petition in accordance with" its disposition).

56. 5 WILLISTON, CONTRACTS (rev. ed. 1937) § 1630; Comment (1913) 26 HARV. L. REV. 738; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420 (1897) (action for wages on Sunday contracts); *Case v. Smith*, 107 Mich. 416, 65 N. W. 279 (1895). See also *Lewis v. Ferrari*, 34 Cal. App. (2d) 767, 772, 90 P. (2d) 384, 386 (Super. Ct., App. Dep't 1939).

57. 5 WILLISTON, CONTRACTS (rev. ed. 1937) § 1630; RESTATEMENT, CONTRACTS (1932) § 598.

58. *Ibid.*

59. 5 WILLISTON, CONTRACTS (rev. ed. 1937) § 1630; Comment (1913) 26 HARV. L. REV. 738; (1938) 36 MICH. L. REV. 837, 838.

60. See note 10 *supra*.

61. EPCA § 205(e) provides: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater. . . . If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to

contract price exceeds the ceiling. The buyer, being in *pari delicto*, would seem to have no cause of action, but the Act provides that the Administrator may bring an action for treble damages on behalf of the United States. Thus the EPCA achieves the result of imposing liability on the wrongdoing seller without lending aid to the equally wrongdoing buyer.

The Act does not prohibit a "consumer buyer" from purchasing, although the seller is prohibited from selling. Numerous regulations follow this pattern of one-sided unlawfulness. The consumer buyer is given a cause of action against the seller "either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater, plus reasonable attorney's fees and costs as determined by the court."<sup>62</sup>

Some regulations, however, leave all buyers free of control and prohibit only sales or deliveries by the seller at a price in excess of the maximum.<sup>63</sup> Suppose that a seller, *S*, and *B*, a buyer, enter into a contract at an excess price. Breach by either will very likely be followed by a claim for legal remedy by the other. But on breach by *S*, *B* can hardly show damages since presumably his purchase was at a price higher than that at which he is able to get comparable goods elsewhere. On breach by *B*, *S* will be unable to maintain an action since his making of the contract was an unlawful act. The contract may, however, be performed rather than breached. *B* may make payment in excess of the maximum and seek a refund of such excess. The provisions of the EPCA do not prevent recovery. Neither by entering into the contract nor by making payment did *B* violate any express provision of this statute or the regulation. Nevertheless, on the principle of *pari delicto*, in one case arising in connection with the Lever Act,<sup>64</sup> recovery was denied to *B* in a similar situation. In *Mancourt-Winters Coal Company v. Ohio and Michigan Coal Company*,<sup>65</sup> *S* and *B* contracted for a year's delivery of coal, from April 1, 1917 to March 30, 1918. The contract was executed prior to the Presidential order under the Lever Act fixing the maximum price for coal at \$2 per ton. This maximum was below the contract price of \$2.75 per ton, but since the Lever Act did not apply retroactively, the contract was not affected by the order. Subsequently another order raised the ceiling 45 cents per ton, but still left the maximum price below the contract price. Nevertheless the parties thereafter attempted to tack this price increase to the contract price and in

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bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection . . . shall be instituted within one year after delivery is completed . . ."

62. *Ibid.*

63. For reference to illustrative regulations, see note 10 *supra*.

64. 40 STAT. 276 (1917).

65. 217 Mich. 449, 187 N. W. 408 (1922).



addition to extend the contract for another month — the month of April, 1918. When *S* sued *B* for failure to pay the increased price for deliveries during March and April, 1918, *B* sought to set off the increased price of 45 cents paid to *S* for the months prior to April under the amended contract. With seeming inconsistency the court refused to permit *B* to set this amount off,<sup>66</sup> although *S* was allowed to recover for the coal delivered during the extra month at the old contract rate of \$2.75 per ton rather than at the increased rate of \$3.20 per ton. That statute was aimed only at *S*, but the court found the parties in *pari delicto*<sup>67</sup> in entering into a contract which the law forbade one of them to make.<sup>68</sup>

The difference in treatment afforded plaintiff and defendant in the *Mancourt* case, difficult as it may be to justify in view of the court's

66. *Accord*: Detroit Edison Co. v. Wyatt Coal Co., 293 Fed. 489 (C. C. A. 4th, 1923); New York & Pennsylvania Co. v. Cunard Coal Co., 286 Pa. 72, 132 Atl. 828 (1926). *Cf.* Badger Coal & Coke Co. v. Sterling Midland Coal Co., 180 Wis. 79, 192 N. W. 461 (1923). *But cf.* Comp. Gen. Dec. B-25739, C. C. H. War Law Serv. ¶49,578 (1942), where the Comptroller General held that the Mervis Iron and Metal Company was entitled to a refund of payments in excess of the ceiling price made to the Veterans Administration for deliveries taking place after the enactment of the EPCA but pursuant to a contract entered into prior to the passage of the Act.

67. "To say the least, defendant in knowingly entering into an illegal contract would be aiding and abetting a violation of the law." *Mancourt-Winters Coal Co. v. Ohio & Michigan Coal Co.*, 217 Mich. 449, 453, 187 N. W. 408, 409 (1922). But it is doubtful whether in a criminal sense a buyer who is not expressly included within the scope of a price regulation is ipso facto an aider or abetter of or conspirator with the seller. See *United States v. Katz*, 271 U. S. 354 (1926); *United States v. Farrar*, 38 F. (2d) 515 (D. Mass. 1930), *aff'd*, 281 U. S. 624, (1930); Note (1930) 68 A. L. R. 895.

68. There is, however, authority for the view that when the actions of only one party to the contract are made unlawful, the doctrine of *pari delicto* does not preclude the other party from recovering moneys paid. *McDuffee v. Hayden-Coeur D'Alene Irrig. Co.*, 25 Idaho 370, 138 Pac. 503 (1913); *Penn-Allen Cement Co. v. Phillips & Sutherland*, 182 N. C. 437, 109 S. E. 257 (1921); Comment (1940) 26 VA. L. REV. 362, 365; *cf.* WEBBER, EFFECT OF WAR ON CONTRACTS (1940) 118. And, while the buyer may be in *pari delicto* even though criminal guilt on his part is absent, the mere fact that he is to some extent involved in the illegality does not mean that he may not repudiate the bargain and recover the value of his performance. *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14 (1920); 3 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) §§ 940-942; RESTATEMENT, CONTRACTS (1932) § 604.

Section 10 of the English Price of Goods Act, 1939, spells out the rights of the buyer against the seller where the latter has been convicted of selling price regulated goods at an excessive price and the buyer has not aided or abetted the violation. Where rights of third parties will not be prejudiced, a buyer, who does not permit an unreasonable time to elapse, may, upon tendering goods substantially in the same state as when acquired, avoid the sale and recover the price paid. Or he may affirm the sale and recover any loss taking into account any consideration to be received on a resale or agreement to resell. WEBBER, *supra* at 117. Butterworth, Emergency Legislation Serv. Statutes Supp. No. 2 (1942) 48.

reasoning that both parties were in *pari delicto*,<sup>69</sup> may cause little harm even if applied to similar fact situations arising by reason of the EPCA. If a buyer is not allowed to recover back the excessive price, it will make him less eager to enter into agreements with a seller who may be violating a price regulation. Nor would it always be necessary to permit the buyer to recover in order to advance public policy.<sup>70</sup> In addition to criminal sanctions<sup>71</sup> and the remedy of injunction against a seller,<sup>72</sup> where a buyer is not entitled to sue the seller, the Administrator may bring an action against *S* for either \$50 or treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater.<sup>73</sup> Further, this provision in the EPCA should mitigate against the vice of the *Mancourt* decision in permitting *S* to recover at the original contract rate of \$2.75 for deliveries made during April, 1918. If a seller under an excessive price agreement is granted recovery of the "lawful" price, he will not shy away from entering into such agreements.<sup>74</sup> But the "treble damage" provisions should prove a useful deterrent.<sup>75</sup>

Unlawfulness may occur in ways other than excess sales price. The EPCA provides that the Administrator may require a license as a condi-

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69. Strictly viewed, the rule of the *Mancourt* case would deny recovery to a buyer not covered by the regulation only where he "knowingly" entered into the agreement with the violator. See note 67 *supra*. Cf. *Detroit Edison Co. v. Wyatt Coal Co.*, 293 Fed. 489, 495 (C. C. A. 4th, 1923); *Badger Coal & Coke Co. v. Sterling Midland Coal Co.*, 180 Wis. 79, 192 N. W. 461 (1923).

70. Cf. 3 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) § 941.

71. EPCA § 205(b). Most violations of the EPCA must be "willful" for the criminal penalties to attach.

72. EPCA § 205(a). It has been held that an injunction is available under this section, although only a single violation of Section 4 is alleged. See *Henderson v. Glosser*, 46 F. Supp. 458 (W. D. Pa. 1942); *Henderson v. Glosser*, 46 F. Supp. 460 (W. D. Pa. 1942).

73. EPCA § 205(e). See note 61 *supra*. The advantage to the seller in having the action brought by the Administrator under Section 205(e), rather than by the buyer independently of this section, is that the EPCA statute of limitations for the action by the Administrator is much shorter than the usual statute applicable to contract or quasi-contract actions. Under the EPCA the action must be brought within one year after delivery is completed.

74. If sellers were assured that agreements for excessive prices would at worst result in recovery of the "lawful" price, they might be willing to assume the risk of a suit for an injunction, which will cause them no out-of-pocket loss other than court costs, and of a criminal action where the prosecution has the burden of proving a "willful" violation. As to when a violation is "willful," see *United States v. Illinois Cent. R.R.*, 303 U. S. 239, 243 (1937); *California v. Latimer*, 305 U. S. 255, 261 (1938); *American Surety Co. v. Sullivan*, 7 F. (2d) 605, 606 (C. C. A. 2d, 1925); *Arrow Distilleries v. Alexander*, 109 F. (2d) 397, 406 (C. C. A. 7th, 1940), *cert. denied*, 310 U. S. 646 (1940); Comment, *Legal and Economic Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 843-844.

75. Cf. Comment (1942) 55 HARV. L. REV. 429, 497.

tion of selling<sup>76</sup> and that under certain circumstances the license may be suspended.<sup>77</sup> Some but not all regulations require a license as a condition of selling.<sup>78</sup> Although neither the EPCA nor any regulation provides that the vendor whose license has been suspended may not recover the price of goods sold without a license, recovery will probably be denied.<sup>79</sup>

The EPCA limits the period during which a license may be suspended to twelve months.<sup>80</sup> It would seem that the seller will be denied recovery of the price of any goods sold during the suspended period even though a license is reissued.<sup>81</sup> However, the suspension of a seller's license ought not to be a valid defense to an action brought on a cause of action that accrued prior to the time of suspension.

Other regulations require that the seller file certain records and reports,<sup>82</sup> give certain information to purchasers,<sup>83</sup> and perform other duties. Violations of regulations requiring the seller to make reports, furnish information or perform other similar duties, although they may lead to suspension of licenses,<sup>84</sup> are only collaterally connected with the sales contract and hence should not in themselves bar recovery on contracts made while such violations are extant.<sup>85</sup>

#### SALES TRANSACTIONS IN WHICH SELLER OR THIRD PARTY HAS SECURITY TITLE

Reservation of a security title in the seller or a third person is not an uncommon incident of either the simple or more complex sales trans-

76. EPCA § 205(f) (1).

77. EPCA § 205(f) (2).

78. *E.g.*, no license; Max. Price Reg. No. 164 (red cedar shingles), C.F.R., tit. 32, c. 11, pt. 1381; license: Max. Price Reg. No. 211 (cotton ginning services), C.F.R., tit. 32, c. 11, pt. 1499.562.

79. *Ayulo v. Mollen, Thompson & James Co.*, 283 Fed. 863 (N. D. Ohio 1922); *Morris Adler & Co. v. J. E. Jones & Co.*, 208 Ala. 481, 94 So. 816 (1922); *Segal v. Chemical Importing & Mfg. Co.*, 205 App. Div. 220, 199 N. Y. Supp. 250 (1st Dep't 1923). But *cf.* *Bell v. Lamborn*, 2 F. (2d) 205 (C. C. A. 4th, 1924); *W. H. Goff Co. v. Lamborn & Co.*, 281 Fed. 613 (C. C. A. 5th, 1922), *cert. denied*, 260 U. S. 734 (1922). However, where the buyer has paid the unlicensed seller, the buyer may be precluded from recovering back the amounts paid. *McShane v. Quillan*, 47 Idaho 542, 547, 277 Pac. 554, 559 (1929) (unlicensed broker permitted to retain commissions paid).

80. EPCA § 205(f) (2).

81. *Morris Adler & Co. v. J. E. Jones & Co.*, 208 Ala. 481, 94 So. 816 (1922).

82. *E.g.*, Max. Price Reg. No. 212 (frozen fruits, berries and vegetables at wholesale and retail), C.F.R., tit. 32, c. 11, pt. 1341.260.

83. *E.g.*, Gen. Max. Price Reg. (requiring posting of maximum prices of cost-of-living commodities), C.F.R., tit. 32, c. 11, pt. 1499.13.

84. EPCA § 205(f) (2).

85. *W. H. Goff Co. v. Lamborn & Co.*, 281 Fed. 613 (C. C. A. 5th, 1922), *cert. denied*, 260 U. S. 734 (1922); 6 WILLISTON, CONTRACTS (rev. ed. 1938) § 1752.

action. Typical are conditional sales, the trust receipt device, and letter of credit transactions. The combination of a price ceiling and such a security transaction poses problems whose ready solution is difficult in some instances.

Suppose that, prior to the effective date of a price regulation, *S* delivers a commodity to *B*, a buyer in the course of trade or business, but reserves title to himself until *B* makes full payment. Prior to the date upon which final payment falls due, a price regulation is issued establishing a ceiling below the contract rate. It could be argued that the transfer of the security title from *S* to *B* upon payment is not a significant factor, and that neither the EPCA nor the usual price regulation prohibits payments alone.<sup>86</sup> Or it could be argued that by definition sale includes transfer<sup>87</sup> and a transfer of a commodity is not complete until the buyer obtains the seller's security interest.<sup>88</sup> But such a contention creates so many problems as almost to preclude its judicial acceptance.<sup>89</sup> Shall the court compel *S* to accept only the maximum price? Judicial action of this sort could hardly be reconciled with the dogma that courts do not write or rewrite contracts for the parties.<sup>90</sup> Shall the court permit *S* to obtain the goods from *B*?<sup>91</sup> In most cases this would simply permit *S* to choose another purchaser at a price no higher than the maximum.<sup>92</sup> In some cases the result would be more serious than satisfaction of the whims of *S*. For example, by compelling *B* to return the goods to *S*, the position of *B*'s creditors might be impaired.<sup>93</sup> Or *B* might be deprived of the goods even though he had

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86. See notes 13 and 14 *supra*.

87. EPCA § 302(a): "The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers . . . ."

88. With reference to conditional sales, Williston writes: "These cases present a typical . . . case of a sale to take effect in the future by force of its own terms, without further expression of assent by the seller." 1 WILLISTON, SALES (2d ed. 1924) § 7.

89. *Cf. Swanee Fabrics, Inc. v. American Bleached Goods Co.*, 36 N. Y. S. (2d) 456, 458 (N. Y. City Cts. 1942). "The Price Administrator could not concern himself with technical questions of reservation of title or of the right to possession or of symbolic delivery without at the same time opening up the question of intention between buyer and seller in every transaction, making enforcement difficult and introducing the possibility of easy evasion."

90. See note 21 *supra*.

91. Where the contract is illegal at the time it is entered into, *S* may not recover even though *B* breaks the condition. 2 WILLISTON, SALES (2d ed. 1924) § 677.

92. *Cf. In re Kramer & Uchitelle, Inc.*, 288 N. Y. 467, 43 N. E. (2d) 493 (1942).

93. *Cf. UNIFORM CONDITIONAL SALES LAW* § 9. Under the Uniform Conditional Sales Act, where the conditional buyer has the seller's consent to resell, purchasers for value in the ordinary course of business are protected even though the original contract was recorded. And purchasers from or lien creditors of the buyer are protected where the contract is not recorded pursuant to the requirements of the Uniform Conditional Sales Act. *UNIFORM CONDITIONAL SALES LAW* § 5.

already made installment payments to *S* under the contract equal to or in excess of the maximum price.<sup>94</sup>

The security interest in the goods may be held by a third party rather than by the seller, as in the letter of credit transaction. A seller, unwilling to rely on the buyer's credit, may insist that the buyer obtain a letter of credit in favor of the seller from a bank.<sup>95</sup> Bank and buyer then agree that the bank will issue a letter of credit, and the buyer will reimburse the bank for payments made to the seller, pursuant to the letter of credit, or provide the bank with funds sufficient to meet the seller's demands. Usually this agreement requires that the bank honor the letter of credit only if certain documents, such as bills of lading or dock receipts, are delivered to it by the seller.<sup>96</sup> In the letter of credit the issuing bank promises the seller to make funds available to him upon relinquishment to the bank of these documents of title.<sup>97</sup> The bank's security interest in the goods prior to reimbursement by the purchaser may be evidenced by provisions in the agreement between purchaser

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94. If *S* were permitted to retake the goods, *B* should be entitled to the installment payments already made. Cf. Soldiers' and Sailors' Civil Relief Act of 1940, 54 STAT. 1181 (1940), 50 U. S. C. § 531(3) (1940). Otherwise *B* might even be in a worse position than a conditional buyer who had actually defaulted under a contract not calling for a price in excess of the maximum, for under the Uniform Conditional Sales Act such buyer may compel the seller to resell the goods and credit the money to his account. UNIFORM CONDITIONAL SALES LAW §§ 19-21. But if the payments are returned to *B*, should not *S* be allowed a sum for the use of the goods by *B*? Cf. 2 WILLISTON, SALES (2d. ed. 1924) § 579. Yet if this result is reached would not *S* if he sells the goods again at the maximum price in effect have realized a sum greater than the maximum, that is, his selling price plus the payments received for temporary use? Similar practices have been condemned by OPA. See OPA Release No. 205, C. C. H. War Law Serv. ¶ 49,605 (1942) (warning dealers who charge exorbitant rentals for used refrigerators and compel purchasers to pay ceiling prices in addition to these rentals).

95. See Thayer, *Irrevocable Credits in International Commerce: Their Legal Effects* (1937) 37 COL. L. REV. 1326.

96. *E.g.*, Anglo-South American Trust Co. v. Uhe, 261 N. Y. 150, 184 N. E. 741 (1933); Brown v. C. Rosenstein Co., 120 Misc. 787, 200 N. Y. Supp. 491 (Sup. Ct. 1923), *aff'd*, 208 App. Div. 799, 203 N. Y. Supp. 922 (1st Dep't 1924).

97. The issuing bank is considered the purchaser of these documents rather than the goods. See International Banking Corp. v. Irving Nat. Bank, 274 Fed. 122 (S. D. N. Y. 1921), *aff'd*, 283 Fed. 103 (C. C. A. 2d, 1922); Crocker First Nat. Bank of San Francisco v. De Sousa, 27 F. (2d) 462, 464 (C. C. A. 9th, 1928); Camp v. Corn Exchange Nat. Bank, 285 Pa. 337, 132 Atl. 189 (1926); 6 MICHIE, BANKS AND BANKING (1931) c. 10, § 28. Actually, the seller may not seek payment from the issuing bank. Instead he may draw a draft against the latter payable to a "negotiating" bank which will pay the seller the face amount of the draft, less a discount, and obtain the necessary documents of title from the seller. See Thayer, *supra* note 95.

and bank,<sup>98</sup> or bills of lading received by the bank indorsed in blank or to its order,<sup>99</sup> or a trust receipt obtained from the buyer.<sup>100</sup>

Price regulations do not seem to be directed specifically against issuing banks.<sup>101</sup> The existence of a price ceiling lower than that in the underlying contract between the seller and the buyer, and a letter of credit calling for payment to the seller of an amount in excess of the maximum, will find the issuing bank in many cases beset by conflicting demands of buyer and seller. The seller could urge that once it delivered the proper documents of title to the bank, the latter must make payment pursuant to the letter of credit, regardless of any illegality which might

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98. *In re Richeimer*, 221 Fed. 16, 19 (C. C. A. 7th, 1915); *Anglo-South American Trust Co. v. Uhe*, 261 N. Y. 150, 184 N. E. 741 (1933); *Benecke v. Haebler*, 33 App. Div. 344, 58 N. Y. Supp. 16 (1st Dep't 1899), *aff'd*, 100 N. Y. 631, 69 N. E. 1107 (1901).

99. *E.g.*, *International Banking Corp. v. Irving Nat. Bank*, 274 Fed. 122 (S. D. N. Y. 1921), *aff'd*, 283 Fed. 103 (C. C. A. 2d, 1922); *Lamborn v. Lake Shore Banking & Trust Co.*, 196 App. Div. 504, 188 N. Y. Supp. 162 (1st Dep't 1921), *aff'd*, 231 N. Y. 6161, 132 N. E. 911 (1921); see Brown, *Documentary Conditions of Payment in Commercial Letters of Credit* (1939) 13 *TUL. L. REV.* 495.

100. See, *e.g.*, *In re Bettman-Johnson Co.*, 250 Fed. 657 (C. C. A. 6th, 1918).

101. Even though a regulation does not expressly include the issuing bank within its scope, it is possible to argue that the bank receives a commodity in the course of trade or business within the meaning of a regulation, when it obtains the bill of lading endorsed in blank or drawn to its order. Such a bill of lading gives the bank rights of ownership, control, and possession of the commodity. 1 *WILLISTON, SALES* (2d ed. 1924) § 282; *Pollard v. Vinton*, 105 U. S. 7 (1881); *Moors v. Kidder*, 106 N. Y. 32 (1887); *W. T. Wilson Grain Co. v. Central Nat. Bank*, 139 S. W. 996 (Tex. Civ. App. 1911). Realistically, however, title to the commodities is in the bank only for security purposes. And the bank is no more a receiver of a commodity in the course of trade or business than any other third party who advances funds to a buyer for the purchase of goods and then obtains a chattel mortgage on the goods as security. *In re Bettman-Johnson*, 250 Fed. 657 (C. C. A. 6th, 1918); 1 *WILLISTON, SALES* (2d ed. 1924) §§ 282-286. And the same reasoning should preclude a bank from being considered as a seller or deliverer of the commodity when it relinquishes the document of title to the buyer. But *cf.* *Moors v. Kidder*, 106 N. Y. 32 (1887); *In re Bettman-Johnson*, 250 Fed. 657 (C. C. A. 6th, 1918). This does not mean, however, that in a given factual situation an issuing bank, which is party to an agreement pursuant to which seller or buyer or both agree willfully to violate the EPCA, would be immune from prosecution for conspiring to defraud the United States or commit an offense against the United States. See 35 *STAT.* 1096 (1909), 18 U. S. C. § 88 (1940); *United States v. Falcone*, 311 U. S. 205, 210 (1940). Likewise, where the issuing bank makes a payment in excess of the ceiling to a seller with knowledge that seller or buyer intends to violate or is willfully violating a price regulation, or with such knowledge transfers the documents of title to a buyer barred from receiving the goods at a price in excess of the maximum, the issuing bank might be prosecuted for aiding or abetting a crime against the United States. See 35 *STAT.* 1152 (1909), 18 U. S. C. § 550 (1941); *Rosencranz v. United States*, 155 Fed. 38, 42 (C. C. A. 9th, 1907).

taint the underlying contract.<sup>102</sup> But there is increasing judicial support for the view that the buyer may enjoin payment in full by the bank, at least where the bank has knowledge that the seller seeks to violate the price regulation by obtaining the full amount called for by the letter of credit.<sup>103</sup>

If, however, when the issuing bank actually makes full payment, it has in the exercise of reasonable diligence failed to discover the seller's unlawful action, the bank may insist that in all fairness it should be able to obtain reimbursement from the buyer.<sup>104</sup> The issuing bank has violated neither its agreement with the buyer nor the provisions of the letter of credit. Yet such a result causes the buyer to receive goods at a price in excess of the maximum. Reimbursement by the buyer would thus be illegal, and it is to be expected that the buyer will refuse to make full payment to the bank. Nor would the bank be likely to prevail in an action against the buyer for reimbursement. To permit such recovery would be contrary to the "no damage" provision of the EPCA<sup>105</sup> where the buyer in good faith has attempted to comply with the price regulation by tendering to the bank an amount equal to the

102. The general rule is that the contract between bank and seller, arising by reason of the letter of credit, is independent of the underlying contract between buyer and seller. *American Steel Co. v. Irving Nat. Bank*, 266 Fed. 41, 43 (C. C. A. 2d, 1920) (impossibility of performance of underlying contract); *O'Meara Co. v. National Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925) (breach of warranty); *Urquhart Lindsay & Co. v. Eastern Bank, Ltd.* [1922] 1 K. B. 318 (issuing bank held not justified in refusing to pay seller amount of invoice though in excess of contract price); *cf. Laudisi v. American Exchange Nat. Bank*, 239 N. Y. 234, 146 N. E. 347 (1924). Actually, however, if the bank refuses to pay the seller, any attempt by him to avail himself of the foregoing rule in an action against the bank, would probably make it apparent that the seller was attempting to violate a price regulation by receiving payment of an excessive price from the issuing bank rather than the buyer.

103. *Sztejn v. Schroder Banking Corp.*, 177 Misc. 719, 31 N. Y. S. (2d) 631 (Sup. Ct. 1941) (fraudulent seller shipped worthless material); *Nadler v. Mei Loong Corp. of China*, 177 Misc. 263, 30 N. Y. S. (2d) 323 (Sup. Ct. 1941) (furs failed to arrive from China because of disruption of shipping between United States and China, and Japanese embargo). *Cf. Old Colony Trust Co. v. Lawyers' Title & Trust Co.*, 297 Fed. 152 (C. C. A. 2d, 1924), *cert. denied*, 265 U. S. 585 (1924) (illegality in underlying contract, unlike illegal price which affects only buyer, affected both buyer and bank since it concerned warehouse receipt, which represented the bank's security and the buyer's goods). See FINKELSTEIN, *LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT* (1930) 244-247; Thayer, *supra* note 95, at 1333; (1942) 55 HARV. L. REV. 878, 879, 880.

104. See *Sztejn v. Schroder Banking Corp.*, 177 Misc. 719, 722, 31 N. Y. S. (2d) 631 (Sup. Ct. 1941). The circuitry of action arising where the buyer reimburses the bank and proceeds against the seller might cause a court to hold that a bank need not pay the seller an amount in excess of the price ceiling. *Société Metallurgique D'Aubrives & Villerupt v. British Bank for Foreign Trade*, II Lloyd's List Law Rep. 168, 170 (K. B. Div. 1922).

105. EPCA § 205(d). See note 18 *supra*.

permitted maximum.<sup>106</sup> Faced with this problem, a court might permit the issuing bank to recover from the seller instead of the buyer.<sup>107</sup> Or the Administrator might by regulation determine whether the issuing bank's recourse should be against the buyer or against the seller.

Less likely to cause difficulty as a practical matter is the case where the seller demands that the bank honor the letter of credit only in an amount equal to or less than the maximum price. Usually such a payment either will be acceptable to the buyer or else will be in literal compliance with the terms of the letter of credit and the agreement between buyer and bank, for these instruments generally call for payments by the issuing bank to the seller "up to" or "not in excess of" a certain amount.<sup>108</sup> But where the letter of credit requires the bank to pay a stipulated amount,<sup>109</sup> payment of a lesser sum to the seller might permit the buyer technically to avoid its duty of reimbursing the bank, inasmuch as reimbursement is a concomitant only of strict observance of the terms of the letter of credit.<sup>110</sup> Prevention of inflation does not compel such a result. Nevertheless the bank, by paying an amount less than provided for in the letter of credit but equal to the price ceiling, is in effect forcing the buyer to rewrite its underlying contract with the seller.<sup>111</sup>

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106. If the buyer refuses to make even partial payment to the issuing bank, a court might permit the bank to be reimbursed in full on the theory that the buyer acted in bad faith and therefore could not rely upon the "no damage" clause. *Cf. Williams v. Yasner*, N. Y. L. J., Sept. 26, 1942, p. 759, col. 4 (Sup. Ct.); *Schreier v. Siegel*, 36 N. Y. S. (2d) 97 (Sup. Ct. 1942), *rev'd on other grounds*, 37 N. Y. S. (2d) 624 (App. Div. 1st Dep't 1942).

107. In the absence of provisions in the letter of credit a bank may not ordinarily seek reimbursement from the seller. See *Imbrie v. D. Nagase & Co., Ltd.*, 195 App. Div. 380, 187 N. Y. Supp. 692 (2d Dep't 1921). Even if this rule were to obtain where the seller's conduct has been illegal, the bank could protect itself in the case of letters of credit issued after a price regulation by express language in the letter. For example, during World War I in the Equitable Trust Company letter of credit the seller was required to assure the bank that the transaction did not involve trading with the enemy. Mead, *Documentary Letters of Credit* (1922) 22 Col. L. Rev. 297, 329.

108. For examples of such letters of credit, see *Old Colony Trust Co. v. Lawyers' Title & Trust Co.*, 297 Fed. 152 (C. C. A. 2d, 1924), *cert. denied*, 265 U. S. 585 (1924); *International Banking Corp. v. Irving Nat. Bank*, 274 Fed. 122 (S. D. N. Y. 1921); *Bank of Montreal v. Recknagel*, 109 N. Y. 482 (1888); *Brown v. C. Rosenstein & Co.*, 120 Misc. 787, 200 N. Y. Supp. 491 (Sup. Ct. 1923), *aff'd*, 209 App. Div. 799, 203 N. Y. Supp. 922 (1st Dep't 1924).

109. *E.g.*, *O'Meara Co. v. National Park Bank*, 239 N. Y. 386, 146 N. E. 636 (1925). *Cf. Second Nat. Bank v. Columbia Trust Co.*, 288 Fed. 17 (C. C. A. 3d, 1923).

110. *Banco Nacional Ultramarino v. First Nat. Bank*, 289 Fed. 169 (D. Mass. 1923); *Anglo-South American Trust Co. v. Uhe*, 261 N. Y. 150, 156, 184 N. E. 741, 744 (1933); *Bank of Montreal v. Recknagel*, 109 N. Y. 482 (1888); see *Brown, Documentary Conditions of Payment in Commercial Letters of Credit* (1939) 13 Tul. L. Rev. 495, 503 *et seq.*; Note (1928) 38 YALE L. J. 111, 112.

111. The issuing bank might take the position that it loses its right to reimbursement only if it fails to comply with the material conditions set forth in the letter of credit. Payment of a lesser sum to the seller, it would be argued, is not a departure from a



## CANCELLATION AND ADJUSTABLE PRICING CLAUSES

Buyers and sellers, realizing that the EPCA will be necessarily implemented by regulations, may in contracts initially free from price control attempt to stipulate the effect of regulations subsequently issued. Little difficulty is caused by provisions which merely invalidate the contract if the contract price becomes unlawful before performance by the seller. A more interesting situation arises where the parties attempt to gear their transaction to the expected price ceiling by general provisions inserted in the contract of sale.

Such a clause may provide that if the price or terms of the contract violate an applicable regulation thereafter issued, then the contract price shall be the maximum permitted by, and the terms shall be in accordance with, the regulation.<sup>112</sup> Prices set in accordance with prices to be published in a standard trade journal have been held sufficiently definite to support a contract;<sup>113</sup> prices in valid regulations are no less definite.<sup>114</sup> Although it is ordinarily the purchaser who would request such a clause, the seller is scarcely in a position to refuse the request. The seller's alternative after the effective date of a ceiling lower than the contract price is either to sell within the ceiling or to refuse to sell at all. Such a clause insures the parties that the sales contract need not be renegotiated after an applicable ceiling becomes effective.<sup>115</sup> This clause, if made applicable to regulations already issued as well as those to be issued, would likewise serve to insure the continuance of the contract, since ceilings are subject to revision downward by the Administrator. No regulation has been found preventing the use of such a contract provision reducing the price stated in the contract to lower levels, and indeed it would seem that any expressed desire of

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material condition, as far as the buyer is concerned, for it can cause the buyer no damage. Cf. *Second Nat. Bank of Toledo v. M. Samuel & Sons, Inc.*, 12 F. (2d) 963 (C. C. A. 2d, 1926); *G. Jaris & Co. v. Banque D'Athens*, 246 Mass. 546, 141 N. E. 576 (1923); *Bank of N. Y. & Trust Co. v. Atterbury Brothers, Inc.*, 226 App. Div. 117, 234 N. Y. Supp. 442 (1st Dep't 1929), *aff'd*, 253 N. Y. 569, 171 N. E. 786 (1930). But it will not always be true that the buyer will want the goods at the lower maximum price. See note 129 *infra*.

112. If the maximum is raised after the issuance of the regulation, the seller may be able to recover up to the maximum, provided that the regulation does not by its terms prohibit such increase and provided also that the contract price remains higher than the maximum. See Comment, *Legal and Economic Aspects of Wartime Price Control* (1942) 51 YALE L. J. 819, 840; *Highland v. Russell Car Co.*, 279 U. S. 253 (1929); *Bewly-Darst v. Chattanooga*, 142 Tenn. 460, 220 S. W. 1083 (1920).

113. *Boret v. Vogelstein*, 188 App. Div. 605, 177 N. Y. Supp. 402 (1st Dep't 1919).

114. See *E. I. DuPont de Nemours & Co. v. Hughes*, 50 F. (2d) 821 (C. C. A. 3d, 1931).

115. The clause may be of further benefit to the seller. A buyer might, apart from the binding effect of such clause, welcome the opportunity of avoiding a preexisting sales contract. For illustrations, see note 129 *infra*.

the parties so to conform to the price in the regulations would be encouraged.

Other clauses seeking adjustable pricing may by regulation be invalid. Some regulations permit of no provisions which, without OPA approval, adjust the price stated in the contract to levels above the ceiling; and this holds true even in the event of the declared invalidity of the regulations.<sup>116</sup> Others allow limited types of adjustable pricing,<sup>117</sup> while others are silent.<sup>118</sup> In any event it should be remembered that regulations control prices as of the time of delivery as well as of the time of sale. Apart from a saving clause in a contract a price may, though lawful at the time of making the contract, be unlawful at the time of delivery, if in the intervening period the Administrator has, without qualification, reduced the ceiling.<sup>119</sup>

Though sellers seeking higher prices upon the declared invalidity of an applicable regulation may, as a practical if not as a purely legal matter,<sup>120</sup> conform to the prohibition against adjustable pricing in the event of such declaration, no regulation contains a provision making it unlawful for a seller to make the life of his contract contingent upon the continued validity of a regulation. Thus a contract could provide that the withdrawal of an applicable regulation terminates the contract. The practical risk that a seller assumes — the loss of a particular buyer — is offset by the probability that the price of the goods will have risen. The Administrator's remedy, at that time, to be sure, is the

116. *E.g.*, Max. Price Reg. No. 110 (resale of new household mechanical refrigerators), C.F.R., tit. 32, c. 11, pt. 1380.103; Max. Price Reg. No. 150 (milled rice), C.F.R., tit. 32, c. 11, pt. 1351.454.

117. *E.g.*, Rev. Price Schedule No. 69 (primary lead), C.F.R., tit. 32, c. 11, pt. 1355.1(a): "*Conditional agreements.* Nothing contained in Revised Price Schedule No. 69 shall be deemed to invalidate any agreement merely because the price is based upon some future contingency, in types of transactions in which it has been customary to quote prices based upon future contingencies: *Provided, however,* That in no event shall such price exceed the maximum price in effect at the time of shipment." *Cf.* Max. Price Reg. No. 203 (vitamin A natural oils and concentrates), C.F.R., tit. 32, c. 11, pt. 1396.204: "*Adjustable pricing.* Any person may offer or agree to adjust or fix prices to or at prices not in excess of the maximum prices in effect at the time of delivery. In an appropriate situation where a petition for amendment or adjustment or exception requires extended consideration, the Administrator may, upon application, grant permission to agree to adjust prices upon deliveries made during the pendency of the petition in accordance with the disposition of the petition." But if payment is made without adjusting the price, the parties will be precluded from claiming an adjustment. *McFadden v. H. H. Lineweaver & Co.*, 297 Pa. 278, 146 Atl. 901 (1929).

118. *E.g.*, Max. Price Schedule No. 80 (lithopone), C.F.R., tit. 32, c. 11, pt. 1335.651 *et seq.*

119. Such a qualification is found in Max. Price Reg. No. 182 (Kraft wrapping papers and certain Kraft bag papers), C.F.R., tit. 32, c. 11, pt. 1347.301.

120. As a matter of law, judicially declared invalidity of a regulation may invalidate it *ab initio*. See note 37 *supra*. *Cf.* *Chicago, Indianapolis & Louisville Ry. v. Hackett*, 228 U. S. 559 (1913). As a practical matter, the risk of criminal and other sanctions for violations of a regulation make nonconformance unwise. EPCA §205.

immediate reenactment of a valid regulation controlling the same commodity, wherever that possibility exists.<sup>121</sup> Buyers and sellers ought not to overlook, however, the fact that neither judicial nor administrative repeal of the regulations, nor the expiration of the EPCA, will work a termination of a sales contract apart from language in the contract indicating such intent. Nor will repeal of the EPCA or regulations validate an unlawful contract.<sup>122</sup>

Termination of contracts may occur in ways extraneous to price control. Breach of contract by the buyer gives rise to an action for damages. From the point of view of controlling inflation, it would seem as dangerous in this situation to permit damages as it is to permit prices to get out of hand.<sup>123</sup> A seller who feels that OPA has depressed prices may seek financial recovery by insertion of a severe liquidated damage clause in the event of breach or voluntary termination by the buyer. Liquidated damage clauses are, at present, free of other than customary limitations on such clauses.<sup>124</sup> As a matter of general policy, it should be borne in mind that termination of the war will very probably bring about mass terminations of sales contracts, and if such mass cancellations are coupled with severe liquidated damage clauses, the anti-inflationary program of OPA may conceivably be upset.

#### CONTRACTUAL STABILITY AND WARTIME PRICE CONTROL: A SUGGESTED APPROACH

Basic in the foregoing discussion is the principle of contract law that a contract, legal when made, is excused when, due to change in domestic law, performance becomes illegal.<sup>125</sup> The theory of allowing the excuse is simply that it would be unjust to require performance or assess damages for nonperformance where a contract cannot, by virtue of legal restriction, be performed. On a purely mechanical test the principle is applicable to maximum price control. But maximum price control presents a situation which, because it is not wholly analogous to other types of change of domestic law, might well be given different treatment.

121. If the EPCA is declared unconstitutional, or if a specific regulation is declared invalid because not within the scope of the Administrator's power, then the possibility of reissuing the regulation does not exist. If, however, the regulation is declared invalid because of some less crucial defect, the defect may be cured on reissuance. Thus, the Administrator may readily remedy a regulation declared void because it is not "accompanied by a statement of the considerations involved in the issuance of such regulation or order." EPCA § 2(a).

122. See *Morris Adler & Co. v. J. E. Jones*, 208 Ala. 481, 94 So. 816 (1922); 6 WILLISTON, *CONTRACTS* (rev. ed. 1938) § 1758.

123. It might be argued that to permit damages to get out of hand is more dangerous, since there is no exchange of goods for the payment of damages whereas there is an exchange of goods for the payment of price.

124. See 3 WILLISTON, *CONTRACTS* (rev. ed. 1936) c. 28.

125. See note 25 *supra*.

Rigid application of the excuse may well be valid where, for example, the government has, pursuant to current conscription-of-industry statutes and regulations,<sup>126</sup> preempted all of the goods available with which the promisor might have performed a sales contract. Where there has been preemption, the promisor cannot both perform and obey the law; but what is more important for our purposes, no legally permissible alternative performance can be substituted.

A wholly different situation occurs in price control. The government does not take away or preempt the goods. Goods are available with which the promisor may perform. Price control determines not that performance cannot be made, nor even that performance is necessarily illegal, but rather that performance at a price in excess of the maximum is illegal. In price control there is a means by which the goods can lawfully pass from seller to buyer — by a sale not in excess of the maximum. In preemption cases there is no means by which goods can pass from the seller to the buyer save by violation of legal prohibitions.

The problem in wartime price control is, then, whether the contract price between buyer and seller can be and ought to be legally rewritten so that the permitted maximum price is adhered to — or whether, because the parties at one time bargained for and agreed on a price (which in most cases was the “market price” at the time of the contract), an administratively determined different and lesser price affords an excuse to the buyer and seller. But an excuse from what? An excuse only from performance at the contract price. The seller still retains the goods and is privileged to resell them to the same buyer or others at a price not in excess of the maximum. There is no “excuse” from selling generally. In fact, just the opposite course of action is expected of the seller. It is hoped, not that he will hoard, but that he will sell his goods in accordance with the permitted price. To afford an excuse then should, in dollars and cents, not net the seller more than the permitted maximum.<sup>127</sup> Thus, while there is no doubt that, in commercial practice, the great bulk of the buyer-seller agreements will continue to be per-

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126. See Brown, *The Effect of Conscription of Industry on Contracts for the Sale of Goods* (1942) 90 U. OF PA. L. REV. 533.

127. In *Perry v. United States*, 294 U. S. 330, 355, 357 (1935), Chief Justice Hughes, in discussing the Gold Clause Resolution said, in the opinion for the majority: “But the change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed. The question of actual loss cannot fairly be determined without considering the economic situation at the time the Government offered to pay him the \$10,000, the face of his bond, in legal tender currency. . . . Plaintiff demands the ‘equivalent’ in currency of the gold coin promised. But ‘equivalent’ cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. . . . Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever.”

formed at the maximum allowed, many sellers<sup>128</sup> or buyers<sup>129</sup> for varying reasons will demand a discharge.

Rent regulation<sup>130</sup> affords an analogy. Under wartime rent control the seller of the leasehold is not freed of his obligation to the particular buyer of the leasehold, even though the amount of rent recoverable by the lessor may be diminished.<sup>131</sup> In rent control, it is not merely that the landlord may not charge more rent for his premises than the maximum, but that the particular tenant may remain in possession and need pay no more than the maximum.<sup>132</sup> Whenever the lease price conflicts with the maximum, the sanctity of the price provision of the lease is no longer safeguarded. The result is justified economically on the ground that an opposite result would dispossess tenants and cause renegotiation of lease agreements with consequent social hardships.<sup>133</sup>

However, renegotiation and the making of new sales contracts become the order of the day when an issued regulation has the effect of discharging the preexisting contracts. But statutory unlawfulness need not result in the discharge of contracts, if proper provision is made for substituted performance. The "Gold Clause" resolution<sup>134</sup> and the "Gold

128. Sellers may welcome discharge of preexisting contracts for a variety of reasons. The preexisting sale may be for goods in large lots, whereas, after a regulation, the seller may seek to sell in smaller lots at a higher though lawfully valid unit price. See, e.g., Price Schedule No. 9 (tea), C.F.R., tit. 32, c. 11, pt. 1351.261(f). The seller may desire not to sell at all and wait for possible increases in the price ceiling. Or he may desire to favor certain customers after a ceiling is in effect; whereas that desire may not have existed in a free price economy. If some purchasers are better credit risks than others, the seller would tend to favor those with higher credit ratings.

129. Buyers will not always desire to receive goods at the ceiling even though that might be at a price less than the contract. In a rapidly changing economy, the buyer may not need goods he contracted to receive. For example, governmental requisitioning may have changed the buyer's business from a "civilian" to a "defense" business and the goods ordered are useful only for "civilian" purposes. Or the buyer may no longer want the goods because of profit motives. For example, the price for which the buyer can resell may be controlled, and he may feel that the margin between cost price and resale price is not ample to warrant his dealing in the goods.

130. EPCA § 2(b).

131. EPCA § 4(b): "It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations, the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder." Section 4(a) of the EPCA makes it unlawful, regardless of any preexisting lease, to demand or receive any rent for any defense-area housing accommodations in violation of any order issued pursuant to § 2 of the Act. For example, Mandatory Maximum Rent Regulation No. 18, C.F.R., tit. 32, c. 11, pt. 1388.861(c) provides that "The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with this Maximum Rent Regulation No. 18."

132. *Vecchio v. Kelly*, 4 Pike & Fischer, OPA Serv. ¶ 622:5 (Circ. Ct., Wayne County, Mich., 1942).

133. See Borders, *Emergency Rent Control* (1942) 9 LAW & CONTEMP. PROB. 107.

134. 48 STAT. 112 (1933), 31 U. S. C. § 463 (1940).

Clause Cases"<sup>135</sup> that followed illustrate a constitutionally sanctioned technique for preserving contracts where performance has become unlawful on the date called for. Contracts requiring payment in a stated amount of gold were made payable in legal tender.<sup>136</sup>

Wartime price control, where it makes payment of a preexisting contracted-for price unlawful, could achieve a similar result by providing for substituted performance of payment at the maximum. Lawful payment would be substituted for unlawful payment without renegotiation of that result by the parties. Buyers are not likely to complain since they would pay less for commodities. That the seller receives less than his original contract price would be due, not to preserving the contract on the new basis, but to the OPA ceiling. Presumably the seller could receive no more for the goods, were he to resell them on the "open" market. Yet admittedly this may not be quite true where a seller is able to "manipulate" a sale even within the price ceiling. For example, a sale of commodities in carload lots may command a smaller unit price than a sale in less than carload lots. A seller permitted freely to renegotiate a carload lot contract, entered into before a regulation was issued, will doubtless be able to sell, after the issuance of the regulation, on a less than carload basis and perhaps net a greater unit price—a manipulative practice which the OPA has already sought to control in contracts made subsequent to a ceiling.<sup>137</sup>

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135. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240 (1935) and cases in footnote therein at 240. Maximum price control has been related to monetary control. See Freund, *The Emergency Price Control Act of 1942: Constitutional Issues* (1942) 9 LAW & CONTEMP. PROB. 77, 81: "It is possible to view price control even more broadly, as a regulation of the value of money."

136. Similarly, the constitutionality of rent control legislation which deprived the landlord "in part at least of the power of profiting by the sudden influx of people . . . and thus . . . of a part of the value of his property . . ." has been upheld. *Block v. Hirsh*, 256 U. S. 135, 157 (1920).

137. OPA Price Interpretation Bull. No. 9, issued May 25, 1942, Price Interpretation (91) in reference to Price Schedule No. 70 (lead scrap materials): "The sale or delivery of antimonial lead in quantities less than requested by the buyer in order to enable the seller to obtain a higher differential is a violation of the Schedule, provided the buyer would have been willing to accept delivery in a single shipment. Furthermore the carload maximum price applies when antimonial lead is sold in carload lots even though it is shipped in less than carload lots." Statements with similar import can be found in Interpretation (30) and Interpretation (102) in the same Bulletin. Other manipulative practices have been discouraged. See OPA Price Interpretation Bull. No. 5, issued March 15, 1942, in reference to Price Schedule No. 84 (radio receiver and phonograph parts) (price of re-orders shall not exceed price of original order even though the original order covered a larger number of parts); OPA Price Interpretation Bull. No. 4, issued Feb. 16, 1942, in reference to Price Schedule No. 8 (pure nickel scrap) (price determinations—premiums—combining different grades of same type of scrap for quantity premium); OPA Price Interpretation Bull. No. 7, issued April 16, 1942, Interpretation (69) in reference to Price Schedule No. 94 (western pine lumber) (violations—unreasonably refusing to ship except in specified lengths and widths).

The EPCA authorizes the Administrator to control such manipulation along with speculative practices, hoarding,<sup>138</sup> circumvention and evasion.<sup>139</sup> The purpose of preserving contracts made prior to the issuance of a regulation is, in the terms of the EPCA, to control these practices which otherwise may occur.<sup>140</sup>

Indeed in isolated instances the Administrator has sought to control the selling price of commodities under preexisting contracts entered into at a time when such contracts were not affected by a ceiling. Coffee roasters holding old contracts at lower than maximum prices were asked to void such contracts and make voluntary payments at the higher ceiling levels.<sup>141</sup> This is, to be sure, the reverse price situation to that advocated here, but it is to be noted that the Administrator's effort was to keep alive old purchases. In Maximum Price Regulation Number 174 there is specific provision for the compulsory renegotiation of the price of preexisting contracts.<sup>142</sup>

Such compulsory renegotiation does not run counter to the provision in the EPCA that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."<sup>143</sup> The requirement that a contract already made shall not be discharged is precisely the opposite. It is not that the Administrator would require a sale; it is that the Administrator would require that a sale once made shall not fail.

Forced sales are dictated by and are in keeping with wartime economy.<sup>144</sup> Evidence of such necessity is found in English<sup>145</sup> and United States statutory law and regulation.<sup>146</sup> Priorities Regulation No. 1,<sup>147</sup> from its inception, disallowed free choice of the seller to refuse to sell defense orders. The limitation in Priorities Regulation No. 1 that the sale must be at the regularly established price,<sup>148</sup> when coupled with a

138. EPCA § 2(d).

139. EPCA § 2(g), 2(h).

140. There is some legislative history to this effect. SEN. REP. NO. 931, 77th Cong., 2d Sess. (1942) 17, 18.

141. OPA Release No. 487, Aug. 10, 1942.

142. Max. Price Reg. No. 174 [issued July 2, 1942 (freight car materials), C.F.R., tit. 32, c. 11, pt. 1390.51] provides: "The price at which any sale, delivery or offer to sell was made between May 26, 1942, and July 2, 1942, shall be adjusted so as not to exceed the maximum price herein permitted."

143. EPCA § 4(d).

144. It is interesting to note that compulsory renegotiation of certain government contracts is one of the means adopted to control wartime profits. Pub. L. No. 528, 77th Cong., 2d Sess. (April 28, 1942) (renegotiation under Sixth Supplemental National Defense Appropriations Act, 1942).

145. Goods and Services (Price Control) Act of 1941, 4 & 5 GEO. VI, c. 31, § 9.

146. See Comment (1942) 55 HARV. L. REV. 427 *et seq.*

147. C.F.R., tit. 32, c. 9, pt. 944.2.

148. C.F.R., tit. 32, c. 9, pt. 944.2(b): "Any such order need not be accepted . . . (3) if the person seeking to place such order is unwilling or unable to meet regularly

price ceiling, probably means that in the usual case the seller is bound to sell at no more than a governmentally fixed price.<sup>149</sup> Actually the OPA has already insisted on forced sales in certain situations.<sup>149</sup>

The OPA is charged with the duty of administering our wartime price economy. Whether the purposes for which the EPCA was enacted — “. . . to stabilize prices . . . prevent speculative, unwarranted, and abnormal increases in prices . . . eliminate and prevent profiteering, hoarding, manipulation, speculation . . . ”<sup>151</sup> — necessitate stability of contracts that predate ceilings is fundamentally an economic rather than a legal matter. Not only should the Administrator, rather than the courts, make the determination,<sup>152</sup> but under existing contract law it is difficult, if not impossible, for a court to reason to a result that will ensure contractual stability.<sup>153</sup> True, the Administrator's power to legislate

established prices and terms of sale or payment, but there shall be no discrimination against such orders in establishing such prices and terms . . . .”

149. But see Abels, *Price Control in War and Emergency* (1942) 90 U. OF PA. L. REV. 675, 686-688.

150. OPA Price Interpretation Bull. No. 7, issued April 16, 1942, Interpretation (69) in reference to Price Schedule No. 94 (western pine lumber): “The Schedule provides that the price limitations therein established are not to be evaded by various methods, one of which is unreasonably refusing to ship except in specified lengths or widths so as to entitle the seller to a premium. Under ordinary circumstances, a seller would be ‘unreasonably refusing to ship except in specified lengths’ if, on an order for random lengths of common grades, he shipped only 10' to 16' lengths and charged the higher price allowed for latter lengths.”

151. EPCA §1(a).

152. Commons, *Legislative and Administrative Reasoning in Economics* (1942) 24 J. OF FARM ECON. 369, 384, states: “An administrative department alone can meet promptly the ‘adjustments’ needed to ward off inflations and deflations of prices, or bring relief promptly in time of deflation.” See also Cooke, *The Legal Content of the Profit Concept* (1937) 46 YALE L. J. 436, 437.

153. The question of the legal effect of maximum price control on preexisting contracts was raised in World War I under the Lever Act. The Lever Act was held not to apply retroactively to preexisting contracts. *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 131 N. E. 566 (1921). Under §4(a) of the EPCA, note 10 *supra*, there is statutory authority for the application of price control to contracts that predate a regulation, even though the current price regulations do not expressly state that they apply to contracts entered into prior to the date of issuance. *Cf. In re Kramer & Uchitelle, Inc.*, 288 N. Y. 467, 43 N. E. (2d) 493 (1942) (price schedule, issued under Executive Order No. 8734 establishing the Office of Price Administration and Civilian Supply, was by its express terms applicable to preexisting contracts; Executive Order contained no such express provisions; performance held discharged without discussion as to whether the Executive Order authorized price schedule having such a retroactive effect). While the general rule (note 25 *supra*) is that a change in domestic law making performance invalid discharges a contract, it has been suggested that the buyer might hold the contract open by offering the lawful price. See Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions* (1942) 9 LAW & CONTEMP. PROB. 22, 51: “May the buyer, however, insist upon his contract by offering the lawful price? The answer is likely to depend upon whether the contract price has been so substantially reduced that to require performance by the seller would be to insist upon a contract which the parties never made.” But any payment less than the contract price, if permitted, would be the making of a contract upon which the parties



validly<sup>154</sup> must be found within the Act; otherwise the regulation may be subject to a charge of "*ultra vires*."<sup>155</sup> The view here taken is that the power to regulate or prohibit speculative or manipulative practices or hoarding, and the declaration that "Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof,"<sup>156</sup> are ample authority for the Administrator.

Wartime economy is geared, in part, to particular commodities. The fact that almost without exception each price regulation and each War Production Board order concerns a particular commodity or limited group of commodities amply indicates not only that different commodities have different functions in the economy but that each may need different treatment in certain respects. Economic considerations may also require different price treatment for manufacturers, wholesalers, and retailers. It may be that preexisting contracts between some types of buyers and sellers of certain goods should be discharged while other contracts for different goods between a different class of buyers and sellers should be kept alive at a newly legislated maximum. These and other considerations<sup>157</sup> are, however, economic not legal. And hence these questions should be decided by the Administrator, not the courts.

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never agreed. Further, it is doubtful that the doctrine of substantial performance is applicable where price control makes it illegal for the seller to be recompensed by the buyer who has failed to render complete performance under the terms of the contract. See 3 WILLISTON, *CONTRACTS* (rev. ed. 1936) § 805. But see *In re Kramer & Uchitelle, Inc.*, 288 N. Y. 467, 472, 43 N. E. (2d) 493, 496 (1942) (dissenting opinion of Lehman, Ch. J.).

154. See Rava, *Procedure in Emergency Price Fixing* (1942) 40 MICH. L. REV. 937, 948: "Price fixing is rule making . . ." See also Hynning, *Price Control and the Profit System* (1942) 9 U. OF CHI. L. REV. 561, 572-578.

155. See Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 YALE L. J. 538, 559-563; Cooper, *Administrative Justice and the Role of Discretion* (1938) 47 YALE L. J. 577, 589; Lee, *Legislative and Interpretive Regulations* (1940) 29 GEO. L. J. 1, 21-24; VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* (1942) § 499.

156. EPCA § 2(g).

157. It might be found wise, from an economic point of view, to allow the contract to remain open at the lawful price at the option of the buyer, or perhaps at the option of the seller. In addition, there may be circumstances in which the seller ought not be obliged to hold the contract open. For example, the seller may have been willing, in a free price economy, to take a credit risk at an abnormally high price. To compel a seller to sell to such a poor risk buyer at the market or at a ceiling price may be an unwarranted hardship.

The English price control statute, while compelling sales, makes certain exceptions if the sale

- "(a) be contrary to the normal practice of his business; or
- (b) involve a breach of some obligation lawfully binding on him; or
- (c) interfere with arrangements made by him for an orderly disposal of his stocks, amongst his regular customers."

Goods and Services (Price Control) Act of 1941, 4 & 5 GEO. VI, c. 31, § 9(2).

Though numerous commodities have already been regulated without providing for contractual stability, new regulations are currently being issued. These new regulations might well provide for contractual stability. Further, contracts made at maximum prices under existing ceilings will be discharged if the ceiling is lowered, unless the regulation itself seeks to keep the contract alive. Regulations when amended to reduce ceilings might provide that contracts theretofore made be performed at the lowered price.

#### CONCLUSION

The EPCA and the regulations go to the point of setting the formula for determining which contracts are lawful and which unlawful. Claims of private parties push inquiry beyond a determination of the "legality" of their dealings. At present, that inquiry is made in, and the formula for determining the ultimate solution rests with, the courts. When the traditional formulas of contract law are applied to cases likely to arise under wartime price control, uncertainties will result, some of which we have tried to resolve.

More important, however, is the fact that the courts in settling the rights between private parties determine either that money damages or goods will or will not pass from defendant to plaintiff. Money and credit in relation to goods are the subject matter of price control. To the extent that the courts and not the OPA determine the basis of distribution of the money in relation to goods, the courts and not the OPA are establishing price control criteria. It is hardly to be expected that the courts will always reach the result which control of inflation demands. Methods and facilities of investigation open to an administrative agency are not available to the courts.

If proper administrative regulation were adopted, the Administrator could control the economic effects of transactions in a heretofore administratively uncontrolled sphere of activity, and at the same time could avoid the uncertainties engendered by the discharge of contracts by normal operation of law.