Cornell Law Review

Volume 35
Issue 1 *Fall 1949*

Article 5

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THE VALIDITY OF ACTS OF ENEMY OCCUPATION AUTHORITIES AFFECTING PROPERTY RIGHTS

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WHEN a property owner is advised of the legal supposition that acts of enemy occupation authorities may be valid although the acts have deprived him of his property without compensation, he may be inclined to agree with Mr. Bumble.

> . . . 'If the law supposes that', said Mr. Bumble, . . . the law is a ass, a idiot.'[1]

Every lawyer knows that Mr. Bumble must be wrong, but it is sometimes difficult to prove that he is.

Pre-War Account in Philippine Bank

Take the case of Mr. B, an American national with a pre-war account in a Philippine bank. Unless the bank has voluntarily reinstated his account,[2] it is quite likely that Mr. B has been advised that his account was transferred to a Japanese agency, the Bank of Taiwan, during the occupation of the Philippines, by order of the Japanese military authorities. Should Mr. B assert that the order is invalid, he will be advised that the Supreme Court of the Philippines disagrees with him.[3]

Mr. B may discover that the bank used depreciated Japanese occupation currency in paying the amount of his account to the Japanese occupation authorities. He may be familiar with the popular nickname for Japanese military notes in the Philippines, "Mickey Mouse" money. Should he assert that the transfer of such currency is of no effect, he will be advised that the Supreme Court of the Philippines has decided expressly to the contrary.[4]

Of course, the Philippine Supreme Court decisions do not have the legal effect of throwing Mr. B's passbook out the window. He has become, by virtue of the decisions, a depositor in the Bank of Taiwan. By reading the Federal Register, he will discover that the United States Office of

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1 DICKENS, OLIVER TWIST, chap. 51.

2 15 DEP'T STATE BULL. 271 (1946).

3 Philippines: Everett Steamship Corporation v. Bank of the Philippine Islands, Supreme Court, July 23, 1949, no citation available.

4 Philippines: Haw Pia v. China Banking Corporation, Supreme Court, April 9, 1948, 23 PHIL. L. J. 575 (Phil. 1948), 4 DECISION LAW JOURNAL 274 (Phil. 1948), 13 THE LAWYERS JOURNAL 173 (Phil. 1948).

Alien Property vested all of the assets of the Bank of Taiwan in the Philippines shortly after the occupation ended.[5] He will also learn that, on January 7, 1947, the President, by executive order, transferred all property vested in the Philippines to the Philippine Alien Property Administration.[6]

If Mr. B asks the Philippine Alien Property Administrator about the fate of his account, he is told that no determination has yet been made of the value of the assets of the Bank of Taiwan, nor of the amount of debt claims which are to be paid out of such assets. He may be alarmed, however, by noting in Appendix G of the Annual Report of the Philippine Alien Property Administration, as of June 30, 1947, that a number of debt claims have been filed for the "Payment of bank deposit." He may doubt whether the Administrator will recognize him as a creditor of the Bank of Taiwan. He may fear that the vested assets of the Bank consist largely of occupation currency, now worthless.

The decisions of the Philippine Supreme Court, of course, do not preclude Mr. B from making claim against the Japanese Government for his loss, along with all the other persons who suffered war losses of property in the Far East. The United States Congress, acting on the belief that the rehabilitation of the Philippines should go forward, whether or not Japan was ever able to pay for the destruction which occurred, authorized in 1946 the appropriation of $400,000,000 for distribution among persons who suffered certain types of war losses of property in the Philippines.[7] The Congress, however, did not consider it necessary to "rehabilitate" Mr. B.

Mr. B cannot feel much encouraged by the thought that he has a claim against Japan. It is true that the proceeds obtained from the liquidation of Japanese and German assets in the United States are to be paid into a War Claims Fund.[8] The Congress has already authorized the War Claims Commission to distribute sizeable portions of this Fund among certain classes of persons with war claims. But the persons benefited do not include persons like Mr. B.

There remains a possibility that Mr. B's claim against Japan may still receive consideration, for the Congress has directed the War Claims Commission to prepare a report, for submission to the Congress on or before March 31, 1950, containing recommendations for the disposition of war claims other than those authorized to be paid under existing

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5 11 FED. REG. 850 (1946).

6 12 FED. REG. 133 (1947).

7 60 STAT. 128, 50 U. S. C. §§ 1751-1763 (Supp. 1949).

8 War Claims Act of 1948, 62 STAT. 1240, 50 U. S. C. §§ 2001-2013 (Supp. 1949).

legislation.[9] But the Congress is not promising Mr. B anything.

> Nothing shall be deemed to imply that the Congress will enact legislation—
> (1) adopting any recommendations made under this section with respect to the consideration or payment of any type of claim; or
> (2) making any moneys, including moneys remaining in the war claims fund after the making of payments from such fund provided for by this Act, available for the payment of such claims.[10]

The outlook for additions to the War Claims Fund in the form of reparations from Japan is not promising. On May 12, 1949, the United States Government announced that it had no intention of taking further unilateral action under its interim directive powers to make possible additional reparations removals from Japan. The reason for this announcement was stated to be:

> The evidence contained in these reports [reports on the Japanese economy made available to the Far Eastern Commission in 1948] and the common knowledge of all Far Eastern Commission countries, leads to the inescapable conclusion that the Japanese economy can be made to bear additional economic burdens, beyond those directly related to meeting its own requirements, only by prolonging or increasing the staggering costs borne by the American taxpayer.[11]

Mr. B concludes, not unreasonably, that acts of enemy occupation authorities in the Philippines have deprived him of his pre-war bank account. "Why should not the bank which transferred my account to the occupant be the one obliged to recover the amount paid, and to suffer any loss if recovery is impossible?" "If the law supposes," says Mr. B, "that acts of enemy occupation authorities depriving me of my property are valid, . . ."

Validity To Be Determined by Restored Government

Payments to enemy agencies of debts owed to Allied nationals by residents of enemy countries do not present so acute a problem as payments by residents of enemy-occupied countries. The government of the enemy country may be obliged by peace treaty provision either to nullify payments made by residents of enemy countries, in which case the debtors remain liable, or to compensate the creditors for their losses in local currency.[12] It is not important to determine whether the collection of

9 62 STAT. 1240, as amended by Pub. L. No. 75, 81st Cong., 1st Sess., 50 U. S. C. § 2007 (Supp. 1949).

10 *Ibid.*

11 20 DEP'T STATE BULL. 668 (1949).

12 See, for example, Treaty of Peace with Italy, art. 78, TIAS 1648 (Dep't State 1947)

the debts was authorized by the laws of war.

But the government of the enemy country cannot be obliged to nullify payments made in an occupied country for the obvious reason that its control over the occupied country has ended. Nor, apparently, can the government of the enemy country be obliged to compensate creditors in local currency, currency of the liberated country, because it is unable to earn foreign exchange.

It is the restored government of the occupied country which must determine the validity of a payment to the enemy occupant. The restored government must decide whether it is the creditor or the debtor who bears the risk of loss in the event that the enemy government cannot pay back the amount it has received.

It has long been recognized that, in the interests of the population of the occupied country, all of the acts of the occupant should not be invalidated by the returning sovereign.

> [S]ocial life would be paralyzed if people knew that the end of hostilities would mean a fatal dissolution of all results of the occupation, and it is in the interest of the "unfortunate" populations that a returning sovereign should refrain from upsetting all measures taken by an occupant . . . no one would enter into any legal relations during an occupation if such legal relations were to be nullified the moment the occupation ceased, . . . such nullification would be unjust to the individual inhabitants and "impolitic as regards the community at large".
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> Rescission measures of returning sovereigns will be bound to involve inhabitants more frequently and more directly than they will involve the former occupant. Going to extremes in such a policy will invariably do more harm to the sovereign's own population than to the enemy.[13]

With reference to acts of the enemy occupation authorities in the Philippines during World War II, it has been said:

> It would . . . seem unjust to visit upon the Filipinos the inconveniences which would arise out of invalidating all the acts of those governments [occupation governments] which without any consent on their part, were imposed upon them.[14]

It would seem equally unjust, however, to "visit upon" American na-

and Memorandum of Understanding between the United States and Italy, August 14, 1947, art. 4, TIAS 1757 (Dep't State 1947).

[13] FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION, ¶ 497, 502 (1942), referring in part to opinions expressed by Pillet and Spaight.

[14] Agbayani, Gancayco and Zaballero, *The Validity of Acts of the Government during the Japanese Occupation,* 22 PHIL. L. J. 32 (Phil. 1947).

tionals all the "inconveniences" of validating acts of enemy occupants. The question is not one of relative "inconveniences". It is a question of the authority of enemy occupants to collect debts owed to residents of Allied-held territory.

The Enemy Occupant—Belligerent or Aggressor?

It is now, unfortunately, necessary to refer to a legal supposition which may serve only to confirm Mr. B's suspicions about the law. The law supposes that Germans and Japanese may be sentenced to death for waging an aggressive war, but that the validity of their actions affecting property in occupied countries is to be determined by the same rules as are applied to actions of a belligerent fighting a defensive war.

The Governments of the United States, France, the United Kingdom and the Soviet Union in the Charter of the International Military Tribunal established for the trial of the major war criminals of the European Axis defined the following acts as criminal:

> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, . . . [15]

The same acts were defined as crimes by the Supreme Commander for the Allied Powers in the Proclamation which established an International Military Tribunal for the Far East.[16]

The doctrine that a war of aggression is a violation of international law is a new doctrine. Its implications with respect to the validity of acts of an aggressor affecting property are stated in the *Draft Convention on Rights and Duties of States in Case of Aggression,* prepared by the Harvard Research in International Law in 1939, with Philip C. Jessup acting as Reporter.[17]

Under the terms of the *Draft Convention on Aggression,* an aggressor does not have any of the rights which it would have if it were a belligerent, except such rights as are conferred upon belligerents for humanitarian purposes.[18] Titles to property are not affected by an aggressor's purported exercise of such rights.[19] Although the aggressor is deprived of some of the rights of a belligerent, it is not, of course, relieved from any of the duties of a belligerent.[20]

If the doctrine that aggressive war is illegal were fully recognized in

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15 EAS 472, art. 6 (Dep't State 1946).
16 TIAS 1589, art. 5 (Dep't State 1947).
17 33 AM. J. INT'L L. Supp. 827 (1939).
18 *Id.* arts. 3(1) and 14.
19 *Id.* art. 3(1).
20 *Id.* art. 3(2).

international law, it is believed that the validity of actions of an aggressor occupant should be determined by rules such as those stated in the *Draft Convention,* rather than by rules applicable to the actions of a belligerent occupant. The United States and the United Kingdom recognize that the enemy was an aggressor, and that an aggressive war is a violation of international law, and, presumably, the implications of both propositions. Are those propositions and their implications recognized by Belgium, Burma, China, Czechoslovakia, Denmark, Greece, Hong Kong, Indochina, Indonesia, Luxembourg, the Federation of Malaya, the Netherlands, Norway, the Philippines, Poland, Singapore, or Yugoslavia?

The last-named countries, all of which were occupied by the enemy, did not participate in the establishment of the International Military Tribunals for the trial of war criminals, nor did they participate in the agreement declaring aggressive war to be a violation of international law. They are, therefore, still free to refuse to recognize the implications of that declaration.

The available evidence indicates that the restored governments of occupied countries have determined the authority of enemy occupants by rules applicable to any belligerent occupant, not by rules applicable to an aggressor occupant. Rules of international law prescribing the authority of a belligerent occupant are discussed in the opinions of their courts.[21] The same rules are reported to be the foundation for their legislation dealing with acts of enemy occupants.[22] Even writers discussing the propriety of determinations made by restored governments have assumed that enemy occupants were authorized to exercise the same rights as Allied occupants.[23]

The Authority of a Belligerent Occupant

The fifteen articles of Section III of the 1907 Hague Convention Relating to the Laws and Customs of War on Land prescribe the authority of a belligerent occupant in broad terms. Provisions pertinent to the authority of an occupant in dealing with private property are as follows:

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21 See quotations from Philippine and Belgian courts in subsequent sections of this article.

22 Leivestad and Peter Stabell, *Enemy Legislation and Judgement in Norway;* Per Helweg, *A Short Survey of the Measures Taken by the Royal Norwegian Government with regard to Restitution of Property, Confiscated during the German Occupation, to its Legitimate Owners.* But see M. Knap, *The Law of Redress of Rights* [Netherlands]; papers presented at the Second Conference of the International Bar Association at the Hague, August 16-21, 1948.

23 Hyde, *Concerning the Haw Pia Case,* 24 PHIL. L. J. 141 (Phil. 1949); Hagad, *Effect of Payment of Pre-War Debts to the Liquidator Bank of Taiwan During the Occupation,* 22 PHIL. L. J. 159 (Phil. 1947); *The Effect of Enemy Occupation on Pre-War Debts,* 4 FAR EASTERN ECONOMIC REVIEW 447 (Hong Kong 1948).

> [The occupant] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.
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> [P]rivate property . . . must be respected. Private property cannot be confiscated.
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> All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, . . . depots of arms and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.[24]

In the preamble to these rules, which are known as the Hague Regulations, it is recognized that cases may arise, not specifically covered by the rules. In such cases,

> the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[25]

Duty of Restored Government To Validate Authorized Acts of Occupant

Writers on international law have declared that a restored government must recognize the validity of acts of an occupant which were within the recognized limits of its authority.[26] They have said that:

> acts done by an invader in pursuance of his rights of administrative control and of enjoyment of the resources of the state cannot be nullified in so far as they have produced their effects during his occupation. . .[27]

and

> Postliminium has no effect upon such acts of a former military occupant connected with the occupied territory and with the individuals and property thereon, as he was, according to International Law, competent to perform; these acts are legitimate acts. Indeed, the State into whose possession such territory has reverted must recognize these legitimate acts. . .[28]

and further

> If by any process the occupant is ousted from a possession and

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24 2 TREATIES (Malloy) 2269, arts. 43, 46, and 53.

25 *Id.* at 2272.

26 In addition to the authorities quoted, see FEILCHENFELD, *op. cit. supra* note 13, ¶ 496 and 498; Gordon Ireland, *The Jus Postliminii and the Coming Peace,* TULANE L. REV. 591 (1944); and Woolsey, *The Forced Transfer of Property in Enemy Occupied Territories,* 37 AM. J. INT'L L. 282 (1943).

27 HALL, TREATISE ON INTERNATIONAL LAW § 163 (8th ed. 1924).

28 2 OPPENHEIM, INTERNATIONAL LAW § 282 (6th ed., LAUTERPACHT, 1944).

control which is resumed by the territorial sovereign, it is highly undesirable to permit the latter to ignore the consequences of what the occupant lawfully did while it remained in power . . . lawful acts or transactions by the occupant, such as were in harmony with the requirements of the Hague Regulations of 1907, should be respected for the benefit of all concerned.[29]

and finally

[T]he occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognized by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realization of the legitimate purpose of his occupation, his acts, whether legislative, executive, or judicial, so long as he does not overstep these limits, will be recognized by the British Government and by British Courts of law—during and after the war if Great Britain is neutral, after it if Great Britain is belligerent.[30]

Duty of Restored Government to Invalidate Unauthorized Acts of Occupant

Some writers assume that the return of a sovereign establishes the nullity of unauthorized acts of an occupant. Hall states:

When an invader exceeds his legal powers, . . his acts are null as against the legitimate government. Such acts are usually done by an invader who intends to effect a conquest, and supposes himself to have succeeded. Whether therefore they are valid or invalid in a given instance depends solely upon the strength of the evidence for and against his success.[31]

While in Oppenheim's opinion:

If the occupant has performed acts which, according to International Law, he was not competent to perform, postliminium makes the invalidity of these illegitimate acts apparent.[32]

And Agbayani says:

From the standpoint of their validity . . . there may be three classes of acts of the *de facto* governments established by the military occupant. The first class refers to those which under the laws of war are made in excess of its authority or pursuant to an unlawful alteration of the municipal laws of the territory occupied. Such acts are void *ab initio*.[33]

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29 3 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 1885 (2d rev. ed. 1945).

30 MCNAIR, LEGAL EFFECTS OF WAR 337 (3d ed. 1948).

31 HALL, TREATISE ON INTERNATIONAL LAW § 164 (8th ed. 1924).

32 2 OPPENHEIM, *op. cit. supra* note 28, § 283.

33 Agbayani, *supra* note 14 at 34.

But it is not as simple to invalidate acts of an occupant as to validate them. If the occupation lasts for a number of years, unauthorized acts of the occupant, authorized acts of the occupant, and actions taken by inhabitants of the occupied country in good faith may become so interwoven as to make invalidation of some acts a practical impossibility, and of other acts, a measure more harsh than that of the occupant.[34]

On January 5, 1943, at London, eighteen Allied Governments, including a number of Governments-in-exile, issued the following Declaration regarding forced transfers of property in enemy-controlled territory:

> [The participating Governments] . . . reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.[35]

A Note on the Meaning, Scope and Application of the Inter-Allied Declaration, which was published by the British Government as an official interpretation of the Declaration, reads in part as follows:

> It is obviously impossible for a general declaration of this nature to define exactly the action which will require to be taken when victory has been won and the occupation or control of foreign territory by the enemy has been brought to an end. Dispossession has taken many forms and all will require consideration in the light of circumstances which may well vary from country to country.
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> The expression of solidarity between the parties also means that they are agreed so far as possible to follow in this matter similar lines of policy, without derogation to their national sovereignty and having regard to the differences prevailing in the various countries.[36]

The Declaration is so cautiously worded as to make it doubtful whether the participating Governments recognized an obligation to invalidate unauthorized acts of enemy occupants, to the extent that invalidation proved to be practicable.

The difficulties of invalidating some unauthorized acts of enemy occupants should not excuse restored governments from invalidating other

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34 See DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II, 9 (1943).

35 DEP'T STATE BULL., Jan. 9, 1943, p. 21.

36 GREAT BRITAIN COMMAND PAPERS, Cmd. 6418 (Misc. No. 1, 1943) London, H. M. Stationery Office.

unauthorized acts of enemy occupants. In a case where a debtor has paid to an occupant the amount of a debt owed to an Allied creditor, there is no practical difficulty in invalidating the transaction. It is no more difficult for the debtor, than for the creditor, to recover the amount paid to the occupant. In dealing with transfers of occupation currency, however, it is admitted that practical difficulties may play a decisive role.

Sequestration of Allied Property by Enemy Occupants

In the countries occupied by Germany and Japan, measures were taken for the control and custody of property owned by residents of Allied-held territory. The enemy measures were an extension to occupied territory of regulations for the administration of Allied-owned property which Germany and Japan had previously put into effect within their national domain.[37]

The German occupants appointed administrators for Allied business enterprises with the authority to collect debts owed to such enterprises by residents of the occupied country.[38] Payments of debts to individual Allied nationals were blocked.[39] In at least one country the German enemy property administrators were authorized to collect debts owed to individual Allied nationals.[40]

The pattern of Japanese sequestration measures is revealed in decisions of Philippine courts after liberation. The Japanese also placed Allied business enterprises under custodianship. They appointed liquidators for seven Allied banks in the Philippines, including the Manila branch of the National City Bank of New York.[41]

The Office of Enemy Property Custody, established by the Japanese in the Philippines, proceeded to collect debts owing to residents of Allied-held territory, and to cancel mortgages held by the creditors as security.[42] On October 4, 1943, the Director of the Department of General Affairs of the Japanese Military Administration in the Philippines promulgated "Zai" No. 257, which ordered all banks in the Philippines to transfer to the Bank of Taiwan, Ltd., on the depositary of the Bureau

37 DOMKE, *op. cit. supra* note 34 at 5.

38 See collection of decrees on enemy property in German-occupied countries, CCH WAR LAW SERVICE, FOREIGN SUPP. ¶ 65,680, 65,767, 65,870.

39 *Ibid.*

40 Denmark (Occupied): Proclamation of July 16, 1940, CCH WAR LAW SERVICE, FOREIGN SUPP., ¶ 65,944; Proclamation of March 20, 1941, CCH WAR LAW SERVICE, FOREIGN SUPP., ¶ 65,955.

41 See note 4 *supra.*

42 Philippines: Hodges v. Lacson, Court of Appeals, 3d Div., July 12, 1948, 13 THE LAWYERS JOURNAL 603 (1948).

of Enemy Property Custody, the deposit accounts of individuals residing in Allied-held territory.[43]

In collecting debts, the enemy occupants did not limit themselves to debts which had matured prior to the occupation or which matured during the occupation. They asserted authority, in certain cases at least, to accelerate the maturity of debts.[44] They also provided that foreign currency debts might be discharged by payments in local currency.[45]

The measures taken by the German occupants do not, on their face, reveal an intention to confiscate Allied property. They purport, at most, to establish a custodianship for the property with continued recognition of Allied ownership. They cannot, therefore, be condemned as violations of the prohibition against confiscation in the Hague Regulations.[46]

Since the texts of Japanese measures are not readily available, it is necessary to accept the conclusion of the Supreme Court of the Philippines concerning the character of the measures.

> Taking into consideration the acts of the Japanese Military Administration in treating the private properties of the so-called enemy banks, it appears evident that Japan did not intend to confiscate or appropriate the assets of said banks or the debts due them from their debtors, and thus violate art. 46 or any other article of the Hague Regnlations.[47]

> This Court having ruled . . . that the collection by the Bank of Taiwan of the China Banking Corporation's credit from the latter's debtor, by order of the Japanese Military Administration, was not a confiscation, but a mere sequestration of enemy's private personal property, . . . it follows that the transfer or payment by the defendant bank to the Bank of Taiwan of plaintiff's deposit, by order of the Japanese Military Administration. . . [was also a mere sequestration].[48]

Validation of Sequestration Measures of Enemy Occupants

Restored governments have generally enacted legislation authorizing owners of sequestered tangible property to recover the property if it can be found, even if the property is found in the hands of a purchaser.[49]

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43 See note 3, *supra.*

44 Singapore: REPORT OF A SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL ON THE DEBTOR AND CREDITOR (OCCUPATION PERIOD) BILL, No. 31 of 1948, August 30, 1948, ¶ 16.

45 Philippines: Gibbs v. Rodriguez, Court of First Instance of Manila, October 18, 1946, appeal pending in Supreme Court.

46 See 3 HYDE, INTERNATIONAL LAW 1727 (2d rev. ed. 1945) for a distinction between measures of confiscation and measures of sequestration.

47 See note 4 *supra*, 23 PHIL. L. J. at 585.

48 See note 3 *supra.*

49 For collections of such legislation, see THE WIENER LIBRARY, RESTITUTION: EUROPEAN

While the enactment of such legislation might be regarded as a determination by restored governments that the sequestration of property by enemy occupants was invalid, it may indicate merely a determination that sales or other dispositions of sequestered property by enemy occupants were invalid. The return of sequestered property found in the occupant's hands is not a conclusive indication that the sequestration was invalid. For sequestration, as distinguished from confiscation, implies the return of the sequestered property after hostilities have ceased.

The effect given by restored governments to the sequestration of intangible property, on the other hand, affords a conclusive indication of their determination of the validity of the sequestration, itself. If a debtor is relieved from liability by virtue of a payment to the occupant, the sequestration has been validated. If the creditor is permitted to continue to hold the debtor liable, the sequestration has been invalidated.

Reference has already been made to decisions of the Philippine Supreme Court on the effect of payments to enemy occupants of debts owed to residents of Allied-held territory. In the *Haw Pia* case, the Court held that a debtor who makes payment of a peso debt to the Japanese liquidators of an Allied bank in the Philippines is relieved from liability. In the *Everett Steamship Corporation* case, the Court held that the transfer of a pre-occupation peso bank account to the Japanese Bank of Taiwan is effective to relieve the bank from liability to its depositor. There was pending in the Court when this article was written a case involving the effectiveness of a payment in occupation currency to the Japanese Bureau of Enemy Property in purported discharge of a dollar obligation.[50]

Netherlands legislation dealing with the question reads in part as follows:

> 1. A debtor who either with or without a condition should have paid to a creditor, and, during the enemy occupation of the Realm in Europe, had to pay according to a then existing regulation to anyone other than this creditor, remains exempt from further payment.
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> * * *
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> 3. The Council can deviate from the regulations mentioned . . . if it deems that special reasons existed for which the debtor . . . should have refused such payment. . . .[51]

LEGISLATION TO REDRESS THE CONSEQUENCES OF NAZI RULE (London, 1946) and NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS, and supps. (New York, 1944).

50 See note 45 *supra*.

51 Netherlands: Law of September 17, 1944, [1944] STAATSBLAD No. E 100, art. 33.

The following statements have been made regarding the application of Article 33 of the Netherlands law:

> The pleas for release (of exonerating or liberating payment) when life insurance policies have been paid out to an enemy agency in pursuance of an order to terminate these policies by the occupying authorities, is rejected. The assumption is that no obligation to perform payment existed towards the original creditor so that Section 33 does not apply. With regard to redeemed mortgage claims the Council does not go so far. Here it is required for the purpose of nonsuit of an appeal to Section 33 that there were special circumstances why a claim to perform payment should have been resisted. Such circumstances are supposed to have prevailed *e.g.* when no evidence is submitted of any extraordinary pressure by or on behalf of the enemy having been brought to bear so as to obtain payment.[52]

In Indonesia, the legislative provision, though more elaborate, is to the same effect.

> 1. A debtor (whether or not subject to a time limitation) who was supposed to pay a creditor and who . . . paid the money to another person than this creditor shall be discharged of his debt, provided the debtor, because of the special circumstances, was forced to make the payment to this other person. . . .
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> 4. The necessity envisaged in this Article shall be considered to have been present if the payment . . . has been made to . . . an official appointed by or on behalf of the enemy for that purpose. . . .
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> 5. The provisions of the previous paragraphs shall not be applicable if the debtor . . . was in default before the time when payment to the creditor . . . could no longer reasonably be demanded due to the unusual circumstances.[53]

The Hong Kong Government has enacted legislation which shows that it has decided the enemy occupant was authorized to collect matured debts:

> Where any payment was made during the occupation period in Hong Kong currency . . . by a debtor . . . to a custodian or a liquidator acting or purporting to act on behalf of such creditor and such payment was made in respect of a debt—
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> (a) payable by virtue of an obligation incurred prior to the commencement of the occupation period, and
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> (b) accruing due either prior to or after the commencement of

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52 M. Knap, *supra* note 22 at 8-9.

53 Indonesia: Law of May 3, 1947, [1947] STAATSBLAD VAN NEDERLANDSCH-INDIE, No. 70, art. 49.

> the occupation period, such payment shall . . . be a valid discharge of such debt—
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> (1) to the extent of the face value of such payment. . . . [54]

The Hong Kong legislation includes special provisions relating to the use of occupation currency in the payment of debts, but discussion of such provisions is reserved for a later section of this article.

Legislation applicable to the Colony of Singapore and the Federation of Malaya also contains special provisions concerning the use of occupation currency which will be subsequently discussed. The legislation recognizes the authority of an occupant to collect a debt, without distingnishing between a matured and an unmatured debt.

> [W]here any payment was made during the occupation period in Malayan currency . . . by a debtor . . . to the Custodian or a liquidation officer purporting to act on behalf of such creditor, and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.[55]

There is, however, a significant exception in the legislation, to which reference will subsequently be made, in a case where the debtor is a bank.

Invalidation of Sequestration Measures of Enemy Occupants

A decision of the highest court in Belgium indicates a tendency in Belgium to hold payments of debts to occupants invalid. The case is not squarely in point as it involves the payment of rent owed to a Jewish landlord. In general, however, rent payments are given greater validity than ordinary debt payments. Yet the Belgian court held that a tenant who paid rent to a German administrator during the occupation period remains liable to his Jewish landlord for the rent.

The court emphasizes the distinction between measures of racial persecution and measures taken for the administration of property of absent persons. It is possible, therefore, that ordinary sequestration measures may be upheld by Belgian courts. Yet the fact remains that the tenant paid the rent, at the request of the German administrators of Jewish goods in Belgium, into an account in the Continental Bank of Brussels, which account continued to be held in the name of the Jewish landlord.[56]

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[54] Hong Kong: Law of June 17, 1948, Debtor and Creditor (Occupation Period) Ordinance, HONG KONG GOVERNMENT GAZETTE, Supp. No. 1, June 18, 1948, § 3(1).

[55] Singapore and Malaya: Law of March 7, 1949, Debtor and Creditor (Occupation Period) Ordinance, COLONY OF SINGAPORE GOVERNMENT GAZETTE, Supp. No. 17, March 11, 1949, § 4(1).

[56] See the report of the case in a lower court, JOURNAL DES TRIBUNAUX, September 30, 1945, p. 480 (Belgium).

In Belgium, the Solicitor-General appears before the Supreme Court of Appeal in civil cases between private litigants to represent the interest of the Government in the unification of the legal system. The statement of the Solicitor-General is printed with the decision of the Court. In the case under discussion the Solicitor-General addressed the Court as follows:

> Can we consider the enemy administrator of property of an absent person as an agent who has properly administered the business of another? The affirmative could have been upheld if the enemy had conducted itself as an agent acting in the interests of the absent creditor. We should have been able to admit that the enemy who, upon occupying territory, has the duty to ensure public order and safety, may take some measures to assure the protection of the property of absent persons who had neither representatives or agents. (Regulations annexed to Hague Convention of October 18, 1907, art. 43). . . .
>
> But it is not a question in this case of measures of that type. The enemy, in reality, hatefully persecuted the Jews. Far from having the object of safeguarding their material interests, the ordinance of April 22, 1942 of the military commander for Belgium and the north of France, by virtue of which the payments were exacted from the defendant, Roba, tends without ambiguity to rob Jews of their property. This was an act of war which the court below described as an "act of spoliation."
>
> * * *
>
> I owe the sum of 1000 francs to X. The third person, Y, without right or power comes to my house and, threatening me with a revolver, obliges me to pay him the sum which I owe X and he takes it. No one will maintain that this delivery discharges me of my debt to X. . . .[57]

The Court, in its opinion made reference to the Hague Regulations, Articles 42 and 43, as well as to provisions of the Belgian Civil Code and to Belgian legislation nullifying enemy measures of dispossession. The Court also referred to the fact that the Jewish landlord had fled from Belgium to escape persecution. The collection of rent by the German administrator, said the Court, was a measure of spoliation, and not a measure of conservation taken in the interests of the landlord.

The landlord had not profited from the payments in dispute. Nor had it been established that the tenant made the payments to avoid certain loss to the landlord. Compulsion or force majeure, said the court, does not free a debtor from an obligation to pay a sum of money.[58]

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[57] Belgium: Cahen, C. Roba et consorts, Supreme Court of Appeal, March 13, 1947 [1947] PASICRISIE BELGE, Nos. 3-4, p. 109.

[58] *Id.* at 110.

Two decisions of the Luxembourg District Court, of which the writer has only a summary report, apparently hold that a debtor continues to be liable in spite of a payment to enemy occupation authorities. On December 4, 1946, the Court held that a debtor making payment to the despoiler and not to his creditor is not discharged from his debt and remains fully liable to his creditor.[59] On March 12, 1947, the Court held that the transfer by a savings bank to a German sequestration agency of the amount owed to a depositor does not relieve the bank from liability to the depositor.[60]

In Singapore and Malaya, although payments by debtors other than banks to the occupant in Malayan currency are given effect at face value, payments by banks are apparently nullified.

> A payment by a bank to a Custodian or liquidation officer of any pre-occupation credit balance or part thereof of a customer shall not be deemed to be a payment to the customer for the purposes of this Ordinance.[61]

While the significance of the qualification, "for the purposes of this Ordinance", is not clear, it is assumed that the quoted section obliges a bank to reinstate all deposits transferred to a custodian or liquidator.

Authority of Enemy Occupants to Sequester Property

The similarity between sequestration measures of enemy occupants in occupied territory and sequestration measures of the Allied powers within their national domain is obvious. The United States and a number of Allied powers did sequester property within their national domain belonging to residents of Axis-held territory.[62] There is, however, a clear distinction between the authority of a belligerent sovereign and the authority of a belligerent occupant. Some writers have relied solely on this distinction to prove that an occupant is not authorized to sequester property.[63]

The fact that a belligerent is authorized to perform an act within the national domain neither proves, nor disproves, the authority of a belligerent occupant to perform the same act within occupied territory. It is necessary to determine the authority of a belligerent occupant by refer-

59 [1944-1947] 15 PASICRISIE LUXEMBOURGEOISE 239.

60 *Ibid.*

61 See note 55 *supra*, § 7(2).

62 DOMKE, *op. cit. supra* note 34.

63 *The Effect of Enemy Occupation on Pre-War Debts*, 4 FAR EASTERN ECONOMIC REVIEW 478-479 (Hong Kong 1948). Singapore: REPORT OF A SELECT COMMITTEE OF THE LEGISLATIVE COUNCIL ON THE DEBTOR AND CREDITOR (OCCUPATION PERIOD) BILL, August 30, 1948, No. 31, 1948, ¶ 22.

ence to the Hague Regulations, as they have been interpreted and applied. Articles 43 and 53 are the Articles which have been invoked to uphold the authority of an occupant to sequester property.

In the opinion of the Solicitor-General of Belgium, Article 43, which declares that an occupant should take all measures in his power to ensure public order and safety, confers upon an occupant the authority to appoint custodians of the property of absent persons.[64] Mr. Hagad, in an article in the Philippine Law Journal, has stated with great restraint the contention that an occupant must also have the authority to appoint custodians for the property of interned persons.

> The right of the Japanese military to interne only [sic] Americans and other allied citizens found in the Philippines upon occupation has never been questioned. . . . Having interned the local managers or agents of the allied banks, the considerations necessitating the application of control measures over the property and assets of the bank became very cogent.[65]

In an Annual Report of the United States Office of Alien Property Custodian, the following is given as one of the reasons for the sequestration of enemy property in the United States:

> The national safety requires the prohibition of all unlicensed communication, direct or indirect, with enemy and enemy-occupied territories. To the extent that this prohibition is effective, the residents of such territory are prevented from exercising the rights and responsibilities of ownership over property located within the United States. Meanwhile, decisions affecting the utilization of such property must be made and carried out. Houses must be maintained and rents collected; payments of principal and interest on mortgages must be made for the account of foreign debtors and foreign creditors; stranded stocks of material and equipment must be sold; patents must be licensed, business enterprises must be operated or liquidated; and foreign interests must be represented in court actions.[66]

The Philippine Supreme Court in the *Haw Pia* case used the above quotation to justify the authority of an occupant to sequester property. In an official explanation of Indonesian legislation upholding the validity of payments to the enemy occupant, emphasis is placed upon the right of a debtor to pay off a mortgage during the occupation period.[67]

Article 43 of the Hague Regulations cannot readily be stretched to

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[64] See note 57 *supra*.

[65] Hagad, *supra* note 23 at 161-162.

[66] OAPC, ANNUAL REPORT, March 11, 1942 to June 30, 1943, p. 13.

[67] Official explanation accompanying Law of May 3, 1947 (see note 53 *supra*) ¶ 39.

cover the sequestration of a bank account. The interest of a depositor who is absent, interned, or prevented from communicating with his bank can be properly served merely by leaving the account in the bank. Is the sequestration of a bank account authorized under Article 53?

Article 53 authorizes an occupant to seize all kinds of munitions of war, even if they belong to private individuals. The seized property is to be restored and compensation fixed when peace is made—say the Regulations. It will be readily admitted that "munitions of war" have changed radically since 1907. Is a debt owed by a bank in occupied territory to a resident of territory held by the opposing belligerent a "munition of war"?

Professor Hyde, in a chapter dealing with the control of enemy property within the national domain has said:

> A belligerent may fairly endeavor to prevent enemy property of any kind within its territory (or elsewhere within its reach) from being so employed as to afford direct military aid to its foe.[68]

In the Annual Report of the United States Office of Alien Property Custodian, to which reference has already been made, the following is given as an additional reason for the sequestration of enemy property:

> In the absence of effective measures of control enemy-owned property can be used to further the interest of the enemy and to impede our own war effort. All enemy-controlled assets can be used to finance propaganda, espionage, and sabotage in this country or in countries friendly to our cause. They can be used to acquire stocks of strategic materials and supplies in our domestic markets or in markets of friendly countries. . . .[69]

The above quotation was also used by the Philippine Supreme Court to support its decision in the *Haw Pia* case.

Finally, we find the Judge Advocate General's School of the United States Army interpreting Article 53 as follows:

> Cases assimilated to seizure under paragraph 2 of Article 53, although not within its terms, arise where property is seized by the occupant in order to prevent its use to the detriment of the occupant or to prevent it from falling into the hands of the enemy state. Thus, Merignhac-Lemonon recoguize that private funds may be placed under sequestration to avoid their being loaned to the enemy state. Similarly, an occupant may assume control of private property belonging to persons whose activities are prejudicial to the safety of the occupant and who may use such property in furtherance of their activities.[70]

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68 3 HYDE, INTERNATIONAL LAW 1727 (2d rev. ed. 1945).

69 See note 66 *supra*, p. 12.

70 THE JUDGE ADVOCATE GENERAL'S SCHOOL, LAW OF BELLIGERENT OCCUPATION 171 (J. A. G. S. Text No. 11, 1944).

Acting upon this construction of Article 53, General Alexander, Commanding the Allied Forces in the occupation of Sicily and adjacent islands, issued a proclamation making provision for the sequestration of private property in Sicily in the following manner:

> The Controller of Property shall have power as directed by the Chief Civil Affairs Officer:
>
> (a) To take into his control the private property of any company, institution, corporation, body or person whose activities are deemed by the Chief Civil Affairs Officer . . . to be prejudicial to the safety of the Allied Forces or public order in the Occupied Territory and whose said property might be used or applied, without such control, in furtherance of such activities.
>
> * * *
>
> (c) To take into his control any private property whereof the owner or a representative of the owner, cannot be found present in the Occupied Territory and able to manage and protect the same.[71]

Did not this Proclamation mean, in effect, the sequestration by an Allied belligerent occupant of all property in Sicily, tangible or intangible, owned by residents of Germany?

* * * * *

Economic warfare being what it is, Mr. B, there is some basis for upholding the authority of a belligerent occupant to sequester property owned by residents of territory held by the opposing belligerent. It may be possible to justify the sequestration of a bank account as an exercise by a belligerent occupant of its right to seize "munitions of war". It is believed, however, that if the Japanese occupation authorities were to be regarded as aggressor occupants, deprived of the rights of a belligerent, their sequestration of your bank account would have been unauthorized.

The Issuance of Occupation Currency

The German occupation authorities in some countries declared German currency, i.e. reichsmarks, to be the only legal currency; in other countries, they provided for the free exchange of currency of the occupied country and German currency.[72] In Greece, the occupants, Italian and German, apparently issued additional amounts of existing types of

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71 Proclamation No. 6, July 1943, CCH WAR LAW SERVICE, FOREIGN SUPP., ¶ 65,957.06. See also: British Occupied North Africa (Tripolitania): Proclamation No. 5, December 15, 1942, issued by General Montgomery, CCH WAR LAW SERVICE, FOREIGN SUPP., ¶ 65,952; and British Occupied East Africa (Eritrea): Proclamation No. 8, 1942, ERITREAN GAZETTE, March 31, 1943, CCH WAR LAW SERVICE, FOREIGN SUPP., ¶ 65,928.

72 LEMKIN, AXIS RULE IN OCCUPIED EUROPE 51-53 (1944).

currency in such a way that the currency issued during the occupation was indistinguishable from currency issued prior to the occupation.[73]

The Japanese occupation authorities generally issued new currency in the countries subject to their control. In the Philippines, there were Japanese military pesos; in Hong Kong, Japanese military yen; in Singapore and Malaya, Japanese military dollars; and in Indonesia, Japanese military guilders. Although the Japanese occupants prescribed that the occupation currency was exchangeable at par with pre-occupation currency the Japanese-issued currency depreciated sharply, during the occupation, in relation to currency issued by the sovereign government prior to the occupation.

In some liberated countries in which the currency put into circulation by the occupant had not depreciated, the restored government permitted the occupation currency to continue to circulate, or required that it be converted, at par, into currency issued by the restored government.[74] In other liberated countries, in which the occupation currency had depreciated, provision was made for the redemption of such currency at rates reflecting its actual value.[75] If the currency had depreciated to worthlessness, it was provided, merely, that the occupation currency was no longer legal tender, and holders were given no right to redeem.[76]

In such countries as China and Greece, occupation currency and currency issued by the sovereign government had both depreciated to such an extent that currency reforms were carried out which made no distinction between the two types of currency.[77]

Validation of Payments of Pre-Occupation Debts in Depreciated Occupation Currency

Reference has already been made to the decision of the Philippine Supreme Court on the effect of payments made in occupation currency of pre-occupation debts. In the *Haw Pia* case, the Court held that a payment in depreciated occupation currency is effective at its face value to discharge a pre-occupation debt.

> [W]hatever might have been the intrinsic or extrinsic worth of the Japanese war-notes which the Bank of Taiwan has received as full satisfaction of the obligations of the appellee's debtors to it,

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[73] Law No. 18, November 9, 1944 [1944] GOVERNMENT GAZETTE No. 14, Vol. 1, art. 5.

[74] Klopstock, *Monetary Reform in Liberated Europe*, 36 AM. ECON. REV. 578 (1946).

[75] *Ibid.*

[76] Philippines: Executive Order No. 25, November 18, 1944 [1945] 41 OFFICIAL GAZETTE No. 1, p. 48.

[77] See note 73 *supra* and Tamagna, *The Financial Position of China and Japan*, 36 AM. ECON. REV. PROC. 613 (1946).

> is of no consequence in the present case. As we have already stated, the Japanese war-notes were issued as legal tender at par with the Philippine peso, and guaranteed by the Japanese Government "which takes full responsibility for their usage having the correct amount to back them up" (Proclamation of January 3, 1942). Now that the outcome of the war has turned against Japan, the enemy banks [i.e., the Allied creditors] have their right to demand from Japan, through their States or Government, payments or compensation in Philippine peso or U. S. dollars as the case may be, for the loss or damage inflicted on the property by the emergency war measure taken by the enemy. . . . And if they cannot get any or sufficient compensation either from the enemy or from their States, because of their insolvency or impossibility to pay, they have naturally to suffer, as everybody else, the losses incident to all wars.[78]

The effectiveness of payments of pre-occupation debts in depreciated occupation currency is the same whether the payments were made directly to creditors residing in the Philippines during the occupation or to Japanese custodians acting for creditors residing in Allied-held territory.[79]

In Burma, validation is accomplished by legislation:

> Notwithstanding anything contained in any other law for the time being in force, where any debt or obligation, whether contracted or incurred before or during the Japanese occupation of Burma, had been paid or discharged wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made and the payment had been accepted, such payment shall be deemed to be payment in legal currency notes of the same face values as if the Japanese currency notes were legal currency notes at the time the payment was made.[80]

The Luxembourg District Civil Court in the *Thoma-Spang-Folschette* case, decided on June 26, 1946, held that a pre-occupation debt in Luxembourg francs was completely discharged by a payment during the occupation of reichmarks at the rate of exchange established by the Germans, 1 reichsmark for 10 francs.[81] It may be assumed that the rate did not reflect the actual value of the reichsmark since, by a Grand Ducal Decree of October 14, 1944, it was provided that all debts incurred in reichmarks during the occupation which remained unsatisfied when the occupation ended should be converted into and made repayable in francs

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78 See note 4 *supra*, 23 PHIL. L. J. at 592.

79 Philippines: Philippine Trust Co. v. Araneta, Supreme Court, March 17, 1949, 5 DECISION LAW JOURNAL 202 (Phil. 1949), 14 THE LAWYERS JOURNAL 318 (Phil. 1949).

80 Burma: Act No. 36, 1947, The Japanese Currency (Evaluation) Act, 1947, § 4.

81 [1944-1947] 15 PASICRISIE LUXEMBOURGEOISE 234-237.

at the exchange rate of 1 reichsmark for 5 francs.[82] The Court did not consider itself bound to inquire into the actual value of the reichsmark when the pre-occupation debt was paid. The decision was rendered even though the creditor had refused to accept the reichsmarks, and the debtor had deposited them with the local district court to be held for the creditor.

The legislation of Hong Kong and Singapore and Malaya partially validates, and partially revalues payments of pre-occupation debts in occupation currency. The general provisions of such legislation, which declare that payments are validated are set forth below, while the exceptional provisions, which provide for revaluation are set forth in the next succeeding section of this article:

> Where any payment was made during the occupation period in . . . occupation currency by a debtor . . . to a creditor . . . and such payment was made in respect of a debt—
>
> (a) payable by virtue of an obligation incurred prior to the commencement of the occupation period and
>
> (b) accruing due either prior to or after commencement of the occupation period, such payment shall subject to the provisions of sub-section (2) of this section be a valid discharge of such debt—
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> * * *
>
> (ii) at the official rate prescribed by the occupying power. . . .[83]
>
> Subject to the provisions of sub-section (2) of this section, where any payment was made during the occupation period in . . . occupation currency by a debtor . . . to a creditor . . . and such payment was made in respect of a pre-occupation debt, such payment shall be a valid discharge of such pre-occupation debt to the extent of the face value of such payment.[84]

Revaluation of Payments of Pre-Occupation Debts in Depreciated Occupation Currency

In Indonesia Japanese-issued guilders and Netherlands Indies-issued guilders apparently depreciated to the same degree. Legislation was enacted to provide for the revaluation of payments in both kinds of guilders of pre-occupation debts.

> 1. If a guilder contract originated before the [occupation period] . . . payments of Japanese bank notes made during the [occupation period] . . . in connection with the contract shall be considered valid payment of the amount owed to the percentage of the amount

82 [1944] MEMORIAL DE GRANDE-DUCHE DE LUXEMBOURG 61.

83 See note 54 *supra*, § 3.

84 See note 55 *supra*, § 4.

of bank notes shown in the next paragraph. The same shall be true if the regular medium of exchange was used.

2. The percentage mentioned in the previous paragraph shall, if the transfer . . . was carried out before the end of August, 1943, amount to 100%; in September, 1943—90%; in October, 1943—80%; in November, 1943—70%; in December, 1943—60%; between January 1 and September 30, 1944—50%; in October, 1944—40%; in November, 1944—30%; in December, 1944—20%; in January, 1945—10%; in February, 1945—9%; in March, 1945—8%; in April, 1945—7%; in May, 1945—6%; in June, 1945—5%; in July, 1945—4% and after July 31, 1945—3%.[85]

The exceptional provisions of the legislation of Hong Kong and of Singapore and Malaya provide for the revaluation of payments in depreciated occupation currency of pre-occupation debts in two types of cases.[86] The first type is the case where the acceptance of the payment in occupation currency is caused by duress. Duress is defined to include a threat to inform an official of the occupying power of the refusal of the creditor to accept payment.

The second type of case in which revaluation is decreed is any case where payment was made in respect of a "pre-occupation capital debt" which (i) was not due at the time of such payment, (ii) if due, was not demanded by the creditor, or (iii) if due and demanded, was not made within three months of such demand. In Singapore and Malaya revaluation in the second type of case is limited to debts in excess of 250 Malayan dollars. "Pre-occupational capital debt" is defined in Hong Kong to include interest, but not rent; in Singapore and Malaya, to exclude both interest and rent.

The Hong Kong legislation is so worded as, in effect, to revalue all payments of debts in occupation currency to Japanese custodians and liquidators. The Singapore and Mayalan legislation, however revalues payments to the enemy occupant, if there is no other ground for revaluation, only if the payments were not caused by force or duress. If they were caused by force or duress, they are given effect at the face value of the currency. This legislative provision has the curious consequence of giving greater validity to an act of the occupant accomplished by force, than to a similar act accomplished without the use of force.

Invalidation of Transfers of Occupation Currency

In Hong Kong and in the Philippines it has been declared that, in certain instances, transfers of occupation currency during the occupa-

[85] See note 53 *supra*, art. 52.

[86] See notes 54 and 55 *supra*, § 3 and 4.

tion period are to be considered as transfers of so many scraps of paper. These instances refer solely to transfers to banks. While the invalidation of transfers of occupation currency is believed to be exceptional, the writer has found a comparable example of invalidation in the Netherlands. Netherlands legislation provides for the invalidation of the use of German reichsmarks by non-residents to purchase property in the Netherlands during the occupation period.[87]

In Hong Kong banks are declared to be free from liability for any excess of deposits of occupation currency over withdrawals of occupation currency by a person holding an account in a bank in occupied Hong Kong.[88]

The Philippine Government, on June 6, 1945, issued Executive Order No. 49, which nullified all unpaid obligations of banks to depositors arising out of the deposit of occupation currency.[89] The Supreme Court of the Philippines has upheld the constitutionality of the Order.[90] The Court found it possible to reconcile the nullification of deposits of occupation currency with (a) the validation of withdrawals of occupation currency in reduction of pre-occupation bank balances, and (b) the revaluation of unpaid occupation debts other than liabilities of banks to depositors.

Referring to the *Haw Pia* and *Philippine Trust Co. v. Araneta* cases, the Court said that withdrawals of occupation currency were effective to extinguish the liability of a bank on a pre-occupation bank balance "for it cannot be disputed that the relationship between a depositor and a bank is that of creditor and debtor". Referring to the doctrine that unpaid debts contracted in occupation currency should be revalued, the Court then distinguished the obligation of a bank to a depositor from a debt, and held that it was within the power of the Philippine Government to nullify unpaid obligations of banks to depositors, while revaluing unpaid debts.

The Authority of Enemy Occupants To Issue Currency

The authority of an occupant to maintain a currency in circulation in the occupied country may be implied from the occupant's obligation to ensure public order. The authority to maintain a currency in circulation, in turn, implies the authority to regulate the quantity of currency in circulation, to issue currency for circulation.[91]

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87 Netherlands: Law of July 18, 1947 [1947] STAATSBLAD No. H251.

88 See note 54 *supra*, § 6.

89 [1945] 41 OFFICIAL GAZETTE 198.

90 Hilado v. de la Costa, April 30, 1949, 14 The Lawyers Journal 424 (Phil. 1949).

91 FEILCHENFELD, *op. cit. supra* note 13, ¶ 271-298. Hyde, *Concerning the Haw Pia Case,*

In general, therefore, it may be expected that transfers of occupation currency will either be held to be effective at face value, or will be revalued to reflect the actual value of the currency at time of use. Theoretically, a restored government might regard all transfers of occupation currency as invalid, but the restored government, as a practical matter, cannot undo all such transfers. Yet once occupation currency is recognized to have been legal tender for certain purposes, it must be recognized to have been legal tender for all other purposes.

If, in accordance with the *Hilado* case,[92] a deposit of occupation currency is held to have been invalid, and a withdrawal valid, what happens when an account is transferred from one bank to another by means of a delivery of occupation currency? Is the transfer effective as a withdrawal, but ineffective as a deposit? It is not clear from the report of the *Everett Steamship Corporation* case[93] how the transfer of the deposit was effected. The Court merely says that a check was drawn by the Bank of the Philippine Islands in favor of the Bank of Taiwan.

It is submitted that no reverse alchemy of the Philippine Supreme Court can transmute legal tender currency in the hands of a payor into scraps of paper in the hands of the payee. The Court may decide that Japanese military notes were currency or were not currency. It cannot decide that Japanese military notes, upon leaving a bank, were currency, but that the same notes, upon entering a bank, were scraps of paper. On the assumption that it may ultimately be decided in the Philippines that Japanese military notes were legal tender for all purposes, the writer turns to an examination of the question of the effect to be given to a payment in depreciated occupation currency.

Duty of Enemy Occupants To Prevent Currency Depreciation

If the authority of an occupant to issue currency is recognized, is it nevertheless possible to attribute depreciation of the currency to illegal conduct on the part of the occupant? If it were possible to do so, a basis would be established for obliging a restored government to take steps to eliminate losses resulting from the illegal depreciation.

Is an occupant under an absolute duty to prevent the depreciation of currency in circulation during the occupation period? It is believed that

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24 PHIL. L. J. 150 (Phil. 1949). TREASURY MEMORANDUM, *Re Opinion on the Legality of the issuance of AMG Currency in Sicily, Hearings before the Committees on Appropriations, Armed Services and Banking and Currency on Occupation Currency Transactions,* United States Senate, 80th Cong., 1st Sess., p. 73.

92 See note 90 *supra.*

93 See note 3 *supra.*

such a duty is too heavy a burden to place upon an occupant.[94] There is, first, the question whether the science of preventing currency depreciation has developed to the point where it can be said that depreciation is due to the failure of the authority maintaining the currency to take appropriate regulatory measures. There is, secondly, the question whether an occupant can be expected to employ the necessary regulatory measures effectively.

One reason, alone, suffices to prove that an occupant cannot be placed under an absolute duty to prevent currency depreciation. That reason is the uncertainty surrounding the fate of occupation currency when liberation day arrives. The inhabitants of the occupied country have every reason to expect that liberation will mean a monetary reform. With each defeat of the occupying power on the battlefield, the actual value of occupation currency may tend to decline. When such a condition exists, it is difficult to imagine how any regulatory measures can save the purchasing power of occupation currency.

The most that can be said is that an occupant is not authorized to take certain types of action which tend to cause currency depreciation. Even this limitation upon the occupant's authority establishes a higher standard of conduct for an occupant than peace time sovereigns are willing to accept.

When currency depreciation in countries not subjected to belligerent occupation has been followed by monetary reform, it is immaterial that the depreciation may have been deliberately induced. Provision for revaluation in such cases is left to the discretion of the government instituting the monetary reform. In general, no provision is made for the revaluation of payments made during the period of depreciation of pre-depreciation debts.[95]

The question whether, in a particular country, the occupant has taken illegal action resulting in a depreciation of currency is difficult to answer. The fact that depreciation has resulted from the levy of contributions for the needs of the occupation army and for the administration of the occupied territory does not prove that the depreciation was caused by illegal action. For the occupant is expressly authorized by Article 49 of the Hague Regulations to levy contributions for such purposes. It would be necessary to show that contributions were levied in excessive amounts.

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[94] For a statement of an opposing view, see Hyde, *Concerning the Haw Pia Case,* 24 PHIL. L. J. 141 (Phil. 1949).

[95] Rashba, *Debts in Collapsed Currencies,* 54 YALE L. J. 1 (1944). HARGREAVES, RESTORING CURRENCY STANDARDS (London 1926). NUSSBAUM, MONEY IN THE LAW §§ 22-24 (1939).

The fact that the quantity of currency in circulation at the end of the of the occupation greatly exceeds the quantity in circulation at the beginning of the occupation does not prove that the occupant acted illegally.[96] It is a ticklish question, in any given case, to determine whether increases in the supply of currency have caused a currency depreciation, or whether other factors have caused the depreciation which, in turn, makes necessary increases in the supply of currency.

Presumably currency issued by an occupant should have coverage. Is the occupying power to be required to furnish coverage which will be adequate even in the event it is ultimately defeated? What kind of coverage would be adequate in such an event?

There is no doubt that a restored government, in the exercise of its sovereign powers, may carry out a monetary reform, whether depreciation has been caused legally or illegally by the occupant. The fact that a monetary reform has been effected, therefore, is not a clear indication that the restored government regarded the depreciation as illegal.

Revaluation of Transactions in Depreciated Occupation Currency: Duty or Privilege?

Let us assume that it can be established that the depreciation of currency in a country occupied by the enemy was caused by illegal conduct on the part of the occupant. To what extent is the restored government obliged to undo the effects of the "illegal depreciation"? May the restored government excuse itself from revaluing on the ground of practical difficulties? May the restored government insist that an obligation to revalue would be an infringement of its sovereign powers in monetary matters?

Before a restored government can revalue transactions in depreciated occupation currency, it must establish a new rate of exchange between the occupation currency and other types of currency in circulation, or else declare the occupation currency to be worthless. While this step is normally taken, is it an obligatory step?

During the German occupation of Belgium in World War I, German marks were put into circulation and depreciated to about 50% of their value in terms of Belgian francs. Instead of establishing a new rate of exchange between the German mark and the Belgian franc, the restored government of Belgium announced that all holders of German marks could exchange them for Belgian francs at the same rate established by the occupant, 1.25 francs to the mark. Belgium then succeeded in im-

[96] See note 94 *supra.*

posing upon Germany an obligation to reimburse Belgium for its expenditures in redeeming the German occupation currency at face value. Although creditors may have been paid in depreciated currency during the occupation, no revaluation of such payments was attempted.[97]

Even in a case where a restored government has established a new rate of exchange between occupation currency and other types of currency, before it can revalue payments of debts in occupation currency, it must revalue unpaid debts created in occupation currency. While unpaid debts are not revalued to reflect the actual value of the currency used, creditors whose debts have been paid cannot expect relief. While the revaluation of unpaid debts has been undertaken in a number of countries, is it obligatory?

In Greece, for example, currency issued during and prior to the occupation has been withdrawn from circulation at a rate of exchange of 50 billion old drachmae to one new drachma. Holders of obligations contracted during the period of depreciation and even holders of obligations contracted prior to the depreciation can enforce their obligations in the new currency only at rate of 50 billion to 1. Creditors whose debts were paid during the period of the depreciation are not permitted to revalue the payments.[98]

Even in a case where a restored government has revalued unpaid debts contracted in occupation currency, the restored government may fail to take the additional step of revaluing payments of debts in occupation currency. Is it obliged, or should it be obliged to take this step?

In the Philippines by court decision, and in Burma, Hong Kong, Indonesia, Singapore and Malaya by legislation, unpaid debts contracted in occupation currency have been revalued to reflect the actual value of the currency at the time of use.[99] However, as we have seen, only in Indonesia, and to a limited extent in Hong Kong, Singapore and Malaya, has there been revaluation of payments made in occupation currency of pre-occupation debts.

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The monetary systems of the world being what they are, Mr. B, it is difficult for the law to prescribe that a restored government of an occupied country must revalue payments of pre-occupation debts in depreciated occupation currency. The depreciation of the currency may

97 HENRY L. SHEPHERD, THE MONETARY EXPERIENCE OF BELGIUM 1914-1936, 45 (1936).

98 See note 73 *supra.*

99 Philippines: La Previsora Filipinas v. Conchita Juachon, Court of First Instance of Manila, December 4, 1946. Burma: Act No. 36, 1947, § 3. Hong Kong: see note 54 *supra,* § 5. Indonesia: see note 53 *supra,* art. 53. Singapore and Malaya: see note 55 *supra,* § 6.

have been due to the illegal conduct of the occupant, and it might be easier to prove illegal conduct if the occupant were regarded as an aggressor. But restored governments, as sovereigns, apparently consider themselves free to determine whether they will institute a monetary reform and the extent to which the reform will be carried. However, Mr. B, a question remains, in view of the *Hilado* decision, as to whether an effective transfer of your deposit was ever made to the Bank of Taiwan.