The Effects of War on Contracts of Lease Executed in The Philippines Prior to December 8, 1941

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I. *Introduction* —

A. *War as an Intrusion into the Performance of Contracts*

All wars in recorded history always interfered in one way or another, with the orderly relations among men. The simplicity of some of these relations did not afford them any immunity from the operation of this rule. Men and institutions always suffered, and quite needlessly, from serious and violent maladjustments and inconveniences, to say the least, directly attributable to wars. It we consider the great conflicts to which world civilization and humanity were unwilling witnesses, we shall have rendered more evident the truth, and also the inflexibility, of the afore-mentioned rule. And it is not, by any means, stretching the point far if it be said that war between states, rather than between their subjects, never seemed further from reality than in the last war, one so emphatically a struggle between nations and the multifarious ideologies they respectively represented rather than just between their rulers. It affected the whole world and all its institutions, legitimate commerce among men included. Its proportions were all-embracing and far-reaching, its aftermath confusing and disruptive.

Regarding contests of the category to which the last war belongs, a highly qualified writer says:

> "Whatever may be the amelioration of military practices, the old restrictions upon commercial intercourse persist with undiminished rigor. The most significant effects of war upon contracts are seen in its intrusion, as an intervening circumstance, making performance impossible and in its postponing of executed contracts". (Trotter, Law of Contract During War, 6).

These, in the main, constitute the subject of this study.

In this connection, since we are primarily concerned with the frustration of performance of contracts, it will not be necessary to know and apply the technical meaning of the word 'war'. (McNair, Legal Effects of War, 1).

> "War does not itself frustrate a contract and is, of course, not in any way an essential ingredient of frustration. But war and its concomitants generally involve a violent interruption of commercial and other relations and thus

provide the commonest illustrations of frustration . . . For the purposes of frustration unconnected with illegality, the term 'war' is not used in a technical sense; it is the actual facts and consequences that matter". [Court Line v. Dant (1939), 161 L. L. 35 (Eng.)].

b. *The Case of the Philippines*

The Philippines is one of the nations most adversely affected by the last war. It had more than its full of the destruction and disruption wrought by it. It suffered as only a country under the heel of a ruthless enemy did. Economically, the country was left almost totally prostrate. Liberation and peace saw the nation in shambles, its economic prospects thoroughly forbidding. Reconstruction and rehabilitation admittedly constitute the most pressing of national needs. In treating of the effects of war on pre-existing contracts, we concern ourselves with a subject which bears, in our opinion, a close relation to this need.

c. *Classification of Contracts Affected as to Parties*

Contracts, the validity or performance of which may be affected by the supervention of war, may be classified as follows: (1) those in which the parties are citizens or subjects of the same country, whether belligerent or not, (2) those in which the parties are citizens or subjects of different countries both of which are neutral or, if belligerent, are not at war with each other and (3) those in which the parties, upon the outbreak of the war, acquired as to each other an enemy status. Francisco, Effect of War on Contracts (1945), 10 Lawyer's Journal, 100). In this study, we shall be concerned with only the first and second classes.

II. *The Effects of War on Contracts in General*

a. *The Principles to Apply*

Principles of law are envolved by and through experience and necessity. The nations first confronted with the necessity are, therefore, first in the field. And as they met with similar experiences as the years went by, these principles were improved upon to suit the times and the controlling national policies. It would thus appear proper, in the treatment of the effects of war on contracts, to refer to the legal principles and jurisprudence of nations (especially England and the United States) which, having engaged in several wars in their history, were in a position to develop the pertinent principles of law.

Further, it can readily be advanced that, on the afore-mentioned subject, there is a pronounced lack of Philippine jurisprudence squarely on the point. While it is true that this country went through wars prior to 1941, it is likewise true that those wars cannot, to say the least, deserve comparison with the last one in the sense of the degree and extent of destruction, completeness of control by the enemy, thor-

oughness of the disruption of legitmate commercial intercourse and the peculiar position of the nation in relation to other belligerent countries. The necessity, then, of referring to foreign principles of law and jurisprudence is readily apparent.

b. *The Ancient Common-Law Rule*

The ancient and strict common-law rule on the subject is best stated in the case of Paradine v. Jane, Aleyn, 26, decided in England in 1647, which held that subsequent impossibility to perform does not dissolve an express unconditional contract. Under this rule, an obligor, to be exempt from the duty of performance, must expressly state in his contract that the occurrence of war subsequent to its execution shall relieve him therefrom. This rule obtained even if at the time of the execution, was a very remote possibility and the parties themselves actually believed it to be so.

c. *The Modified (and Prosent) Common-Law Rule*

Taylor v. Caldwell (1863), 3 B. & S. (Eng.) occasioned the first breach in the serverity of the doctrine in Paradine v. Jane, *supra*. It was held therein that Paradine v. Jane is applicable only when the contract is positive and absolute and not subject to any condition, express or implied. It was in Taylor v. Caldwell that the doctrine of implied conditions was first expounded for the purpose of doing what justice would seem to require. And in the course of time, the evident harsness of the Paradine v. Jane rule was ultimately mitigated. So in Horlock v. Beal (1916), 1 A. C. 486 (Eng), the common law recognized the existence of implied conditions in many contracts where the contrary intention does not clearly appear. Thus, according to Lord Wrenbury:

> "When a contract has been entered into, and by a supervening cause beyond the control of either party, its performance has become impossible, if a party has expressly contracted to do a lawful act, come what will — if, in other words, he has taken upon himself the risk of such a supervening cause — he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfillment would become impossible if such a supervening cause occurred, then upon such a cause occurring, both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding."

So it is now established in common law that generally war, as an intervening event, is so evidently not within the contemplation of the parties that the courts usually find an implied condition to excuse performance. (31 Harvard Law Review, 640).

d. *The Theories Underlying Frustration of Contracts*

The English courts have advanc three theories in this regard, namely, (1) the implied term, (2) the disappearance of the basis or foundation of the contract and (3) supervening impossibility. (McNair, Legal Effects of War, 143). Although each of these will be adverted to in this study, each having its own particular application, it appears that the balance of judicial authority is in favor of the first theory. But it is to be admitted that the affinity among them is so close and that their legal effects are substantially the same.

e. *The Law in the Philippines*

In the Philippines, the law that may apply is principally found in Articles 1105, 1182 and 1184, Civil Code. The provisions of Articles 1124 (pars. 1 & 2), 1255, 1542, 1544, 1561, 1563, 1568 and 1575 (the last seven Articles particularly applying to leases), id., are likewise applicable on certain phases of the subject. Various other Articles of the Civil Code will also be cited as applicable on certain other points to be covered.

There are certain decisions of the Philippine Supreme Court, herein cited, which may support some principles of law to be discussed. And, of course, reference will also be made to the commentaries of some Spanish legal writers, in proper cases. The bulk however, of the pertinent authorities are English and American, believing as we do that these may apply in the Philippines with equal force and effect because of their evidently universal import and character. We believe these authorities to be applicable, even if only in the character of the suppletory law.

III. *The Effects of War on Pre-Existing Contracts of Lease*

a. *Scope of this Study*

The entire field of contracts is necessarily a broad one. A mere thesis will not do it ample justice. This discussion, therefore, will be concerned only with contracts of lease, whether of things or of services situated or to be performed in the Philippines, as the case may be. (Articles 1542 to 1544, Civil Code). Necessarily included herein are leases of real (suburban or rural) and personal property located in the Philippines. As a further limitation on the scope of this discussion, only contracts of lease entered into in the Philippines, the parties to which are citizens of the Philippines or of the United States, artificial persons of the same nationalities engaged in business in the Philippines, friendly or neutral resident aliens or artificial persons will be considered. We shall not be concerned with leases in which the parties, upon the outbreak of war, acquired as to each other an enemy status. And, of course, we shall deal only with leases the effectivity of which, according to the terms of contracts previously concluded, would have begun, without any legal questions involved, on De-

cember 8, 1941 or later, had not the Pacific War broken out on such date, and those which, having already begun to run before the said date, would have extended beyond it, also without any legal hitch, were it not for the start of hostilities.

b. *The Duties of the Lessor and the Lessee*

Pursuant to the provisions of Articles 1554, Civil Code, the obligations of the lessor are as follwos: (1) to deliver to the lessee the thing leased, (2) to undertake thereon, while the lease continues to exist, all the necessarry repairs to preserve the object leased in serviceable condition of the intended use and (3) to maintain the lessee in undisturbed enjoyment of the lease during its entire period. The lessee, in turn, has the following obligations after the contractual tie is created: (1) to pay the rent in the manner agreed upon, (2) to use the thing leased as a good father of a family would, applying the same to the use agreed upon, or, in the absence of stipulation, to the use nature of the thing leased pursuant to the custom of the land. (Article 1555, id.) He has the further duty (3) to return the thing leased, at the expiration of the contract, in the same condition in which he received it, except what may have perished or been impaired by time or inevitable cause. (Artcile 1561, id.).

The foregoing are the principal obligations of the parties, i.e., assuming that no supervening cause subsequently occurs. Are they, as a consequence of the outbreak of war, relieved from these duties? The answer to this question depends principally upon the terms of their contract, the character of the specific obligation and the attendant circumstances. The law, in certain instances, leaves no doubt as to the just and proper solution. Account must also be taken of the fact that this study is concerned primarily with supervening impossibility of performance. This impossibility may be due to varied causes directly occasioned by war, among which are the forced absence of the party to perform from the intended place of performance, deprivation of the party to perform of the premises or things leased by the authorities or by the enemy, the loss or destruction of things leased, etc.

c. *Where There Is No Stipulation Against Liability*

In common law, the general rule is that in absence of a stipulation in a contract relieving a party in case of war, the existence of a state of war is no excuse for a breach of contract. (27 R.C.L. 918, Sec. 5). This rule is founded on the familiar principle of law that where a person, by his own contract, voluntarily charges himself with an obligation of performance, he must perform it unless such perfomance becomes impossible by an act of God, by law or by other party. This is so because, as a rule, if a party desires relief from performance in the event of the supervention of a con-

tingency, it is his duty to so specify in his contract. There is no implied stipulation relieving a party from the duty of performance simply by reason of difficulties occasioned by the war. (Associated Portland Cement Mrs. v. Cory & Sons, Ltd., 31 T.L.R. 442 (Eng). The reason for this rule is that where one of two innocent persons must sustain a loss, the law casts it on him who agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it. Trenton Public School v. Bennet, 27 N.J.L. 513).

But this rule admits of an exception in that, in case the prevalence of war makes performance impossible,, legally or physically, the contract is automatically cancelled on the occurrence of the event making performance impossible. (27 R.C.L. 918, Sec. 5). Performance may also become impossible by reason of passage of a law, or by any act of state, making performance illegal.

Another exception is where the specific thing which is essential to the performance is destroyed, i. e., where the contract concerns the use or possession of, or any dealing with, specific things, as in these cases performance necessarily depends upon the existence of these things. Here the impossibility arises from the thing's destruction, assuming that no default exists in the party concerned. The reason is that the parties contracted on the basis of the continued existence of the thing. (Articles 1182 and 1184, Civil Code).

The general rule herein stated is really not in conflict with that laid down in Horlock v. Beal, *supra,* in that this rule treats not of impossibility of performance but of difficulties occasioned by war. By no means should mere difficulty to perform be construed as impossibility of performance.

The common law courts also recognizes another exception in cases where, without fault of either party, there has been such a change in conditions that to enforce performance under the changed conditions is in effect to substitute a different contract. This principle, called by English courts 'the doctrine of commercial frustration' will be discussed under a later sub-heading, *infra.*

It will be noted, in connection with impossibility of performance, that there appears to be no substantial difference between the common law principle here referred to and the combined precepts of Articles 1105, 1182 and 1184, Civil Code. The first of these Articles provides that excepting the cases mentioned in the law and those in which the contract itself so declares, no one shall be responsible for events which could not be foreseen or which, having been foreseen, were unavoidable. This, of course brings us to the concepts of *caso fortuito* and *fuerza mayor* and their effects on the performance of contracts. On these Manresa says:

> "Dentro del concepto general y comun del caso fortuito, se comprenden este propiamente dicho y

> la fuerza mayor, y tanto aquel como esta pueden ser ordinarios o extraordinarios . . . El caso fortuito, como tal, es independiente, no solo de la voluntad del deudor, sino de toda voluntad humana; la fuerza mayor procede de un acontecimiento inevitable, o del acto, legitimo o ilegitimo, de persona distinta de la obligada, que supone para esta la imposibilidad de complir su obligacion."

He then proceeds to classify *fuerza mayor* into ordinary and extraordinary, both having the character of being unforeseen and inevitable, although such character is more evident in the extraordinary, e.g., wars, epidemics, etc. (8 Manresa 85-86).

Articles 1182 and 1184, Civil Code, treat of the extinction of obligations to deliver determinate things and of obligations to do, respectively. The reason for such extinction under the first Article is the loss of the thing without fault on the part of the obligor and before he is in default. Under the latter Article, the basis of the extinction is the legal or physical impossibility of the obligations.

In view of the foregoing, it is quite evident that in the absence of a stipulation against liability, the party having the duty to perform is relieved thereform by reason of impossibility of performance due to war conditions. This conclusion is, in our opinion, amply supported by a line of decisions of the Supreme Court of the Philippines. Thus, in Crame Sy Panco v. Gonzaga, 10 Phil. 646, damages were not adjudged against a party where, under a guarantee conditioned upon the delivery of certain carabaos, the said animals could not be delivered because they died of natural causes. Neither was a person licensed to hold a firearm liable to deliver it to the Government on demand, as was the condition of the permits, when the said firearm was lost in a storm without his fault. (Insular Government v. Bingham, 13 Phil. 558). In Millan v. Rio y Olabarrieta, 45 Phil. 718, no liability attached to an oblgior for the loss of a ship due to a storm. So it was held in Bishop of Jaro v. De la Pena, 26 Phil. 144, that loss of funds through confiscation by the Army did not give rise to an obligation to make good such loss. It has also been held that the impossibilty of performance releases the debtor from his obligation. (House v. De la Costa, O. G., Aug. 16, 1941, p. 47).

Most certainly, war comprehends such circumstances and conditions more decisive and compelling in affecting performance of contracts, and if the obligation in the foregoing cases were excused by reason of comparatively minor supervening events, no valid reason exist for not applying the same rule in contracts rendered impossible of performance by reason of the supervention of war. The conclusion here advanced is definitely more in accord with the legal principles involved relating to *caso fortuito* and *fuerza mayor.*

d. *Where There is Stipulation Against Liability*

Where a contract specifically contains a stipulation which can be construed as exempting the parties from liability in the event of the occurrence of war which affects performance, failure to perform is excused if the existence of war is the proximate cause thereof. (27 R. C. L. 218, Sec. 8). Such is the rule in common law. The cases covered by this rule are those wherein, by plain and unambiguous terms, liability to perform is excused, otherwise, the general rule as discussed in the next preceding sub-heading obtains (subject, of course to the exceptions therein enumerated). The apparent reason is that if, in the absence of stipulation against liability, a party may be dicharged from his obligation under certain circumstances, there is every reason to allow such discharged where the contract expressly provides for the same in the event of war.

In the Philippines, under the precepts of Article 1255, Civil Code, the parties to a contract may include therein terms which they deem advisable as long as these do not contravene the law, morals or public order. They are at liberty, then, to stipulate that the liability to perform on either side shall be excused by reason of the occurrence of war. The question of impossibility or difficulty of performance is not involved in a case of this sort. The parties were within their rights to so stipulate, in most, if not all, cases very probably in anticipation of the impossibility or difficulty of performance should war break out. It is a well-known principles in contracts that, as between the parties and in relation of their contract, what they embody therein as its terms which manifestly and obviously express their intent is the law between them (Articles 1091 and 1281, Id.). As long as the provisions of the aforesaid article 1255 are obesrved, the courts will enforce the contractual terms, even if fortuitous events or *force majeure* should intervene, and render the obligor liable for losses and damages if the contemplated performance becomes impossible. Thus, in Government of the Philippine Islands v. Punzalan, 7 Phil. 546, in spite of the loss of certain rifles, the subjects of the contract, due to *force majeure* they were stolen by a band of brigands, the obligors were nevertheless held liable on their bond because they obligated themselves unconditionally to care for and return the said rifles. The same rule obtained in Government of the Philippine Islands v. Amechanzurra, 10 Phil. 637, where the defense of *force majeure,* in an action on a bond conditioned upon the delivery of certain firearms to the authorities on demand, was considered untenable, the Court holding that Article 1105, Civil Code (relating to *force majeure*), is not applicable in a case where the contract expressly imposes an obligation, even in the event of *force majeure,* to keep the firearms safely and deliver them to the authorities on demand.

In contracts, the agreement of the parties controls. The law has only a suppletory effect. (8 Manresa 613; 4 Sanchez Roman 145-146).

e. *Where the Parties Contracted with Reference to the Existence of War*

Where it is clear that the parties contracted with reference to the existence of a state of war, there is, of course, no basis for reading into the contract an implied reservation in case of impossibility or difficulty of performance occasioned by war conditions. (Smith v. Monroe, 20 La Ann. 220). The case might have been that the parties clearly had in mind the possibility of war when they executed their contract. Perhaps it might have been for that very reason that they created the relationship, for then one of them, e.g., the lessee, might have intended engaging in an enterprise that war would render lucrative, e .g., dealing in, or manufacture of, war materials, equipment, etc., and might have leased the premises or things concerned for use in his intended enterprise. Under circumstances of this nature, the fact that subsequent conditions did not turn out as a party to the contract expected they would is certainly no reason for him to deny whatever liability he may have contracted. It is a case of a bad bargain, pure and simple, on his part.

Again we come to the application of Article 1255, Civil Code. Obviously, the parties were free to so stipulate, the stipulation being against neither the law, morals or public order. The parties were certainly under no restraint whatever when they embodied that stipulation in their contract. Under this same principle of freedom of contract, a party to a contract of lease may assume the corresponding obligations and be rendered liable therefor, even in case of supervention of war, provided such assumption is clear. (Lizares v. Hernaez, 40 Phil. 981).

f. *Liability of the Lessee if the Leased Property Was Destroyed in the Course of Military Operations*

Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates, the subsequent loss of thing, or the cessation of the existence of certain specified conditions, will excuse performance. (Dow v. Sleepy Eye State Bank, 88 Minn. 355; 13 C. J. 642-643, Sec. 717). If performance necessarily depends upon the existence of particular things, the impossibility to perform arising from their destruction, without default of either party, shall excuse performance, it being evident that the parties contracted on the basis of the continued existence of the things. (The Tornado, 108 U.S. 432; 13 C. J. 643, Sec. 718). That contracts of lease of things are squarely within the purview of this rule is incontestable. As provided in Article 1543, Civil Code, the lessor binds himself to give to the lessee the enjoyment or use of a

thing for a specified time and for a certain consideration. The parties, therefore, contracted on the basis of a particular thing and its loss necessarily renders impossible the continued performance of the contract. Logically, whatever contractual relations existed between the parties are, by the loss or destruction of the thing leased, automatically cancelled, dependent as they are on the continued existence of the thing. Thus, for instance, the lessee cannot continue to enjoy his rights as such, the leased thing having ceased to exist. Nor can he be compelled to return the leased thing, as provided in Article 1561, Civil Code, there being nothing to return.

So, although with certain resulting limitations and difficulties of proof, obligations may be extinguished by the happening of unforeseen events, under whose influence the obligations would never have been contracted, because in such cases the very basis upon which the existence of the obligation is founded would be wanting. (8 Manresa 256-257).

In our jurisdiction, the general rule above-referred to, sub-heading c, *supra,* is relieved against by express provision of law. (Article 1182 and 1568, Civil Code). The same is true in the State of Louisiana (13 C. J. 639, Sec. 712). With respect to obligations to do, which includes leases of services, the debtor shall be released where the undertaking becomes legally or physically impossible. (Article 1184, Civil Code). Manresa, commenting on Article 1182, Civil Code, says that the loss of the thing in this part of the Code means not the strict legal significance of 'loss', and it is not limited to obligations to give but extends to those which are personal, embracing, therefore, all cases which may render impossible the performance of the prestation. In some Code, this is designated as 'impossibility of performance'. (8 Manresa 344-345). Thus, aside from the destruction of the thing due, 'loss' would mean its disappearance by loss, theft or robbery, that is to say, its non-existence in the hands of the obligor when, through any cause, the fulfillment of the obligations becomes impossible. (4 Sanchez Roman 442). Regarding Article 1184, id., Manresa says that the impossibility therein referred to occurs after the obligation has been constituted. The obligations therein covered are not expressly required by law to be specific or determinate. (8 Manresa 354-356).

There is, besides, Article 1561, id (relating to the lessee's obligation to return the leased tenement at the end of the term), which exempts the lessee from the duty to return that which may have perished or been impaired by time or inevitable ble cause. Article 1563, id., also exempts him from liability for loss and deterioration which took place without his fault.

Thus, where the leased property was destroyed in the course of military operations, whether by friendly or enemy forces, the lessee is re-

lieved from any liability whatever in relation to the thing thus destroyed. The loss or destruction was due to *force majeure* and to no other. Under the principle of *res perit domino* no liability attaches to the lessee. (Lizares v. Hernaez, 40 Phil. 981; Article 1563, Civil Code). "The lessee is not responsible for loss due to fortuitous events; the loss falls upon the lessor in accordance with the maxim, *res perit domino,* (a thing perishes for its owner)." (Gamboa, An Introduction to Philippine Law, 230).

g. *Liability of the Lessee for Rentals if the Leased Property Was Seized or Requisitioned by the Authorities or the Enemy*

We are primarily concerned, in this connection, with the lessee's liability to pay rent. We, therefore, assume that at the outbreak of the war the lessee was in occupation of the leased premises and continued to do so for sometime thereafter until it was seized or requisitioned. Thus, it is apparent that, in cases of this sort, the outbreak of the war did not, by itself, create an impossibility in the continued performance of the contract, for it was at a later time that the circumstance of seizure or requisition supervened.

The English courts declined to apply the doctrine of frustration in leases, e.g., as to obligations to pay rent, because, to cite Pollock's quotation from Savigny, "there is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay." The reason behind this stand is that lessees are regarded as purchasers of an estate or interest in the land and are therefore exposed to risks of any calamity which befalls the land or anything upon it. (Walford,, Impossibility and Property Law (1941, 345). Another reason is that a lease is both a contract and a conveyance, creating both rights *in personam* and *in rem.* (London & Northern Etates Co. v. Schlesinger (1916), 1 K. B. 20)

There are certain American decisions in accord with the English rule. Thus, in Loggins v. Buck, 33 Tex. 133, it was held that "a plea of failure of consideration in an action on a note to pay rent based upon the existence of war was not warranted." Robinson v. L'Engle, 13 Fla. 482 held that "a plea that the tenant was deprived of the use of the property because of war did not set up a defense." Pollard v. Shaaffer, 1 Dall (Pa) 210 held that a lessee must pay rent because of an express covenant to do so, because it is a sum certain and the extent of the loss known, and because he was to have advantage of casual profits, he ought to run the hazard of casual losses during the term of the lease. The lessee's liability for rent in case of deprivation of the use of the leased property by military authorities can only be terminated by rescission. (Coogan v. Parker, 2 S. C. 255).

But the weight of authority favors the lessee's discharge from lia-

bility to pay rent. Thus, it was held that a tenant may be discharged from liability for rent because of the existence of war and the deprivation of all control and use of the demised premises by the act of military authorities. (Gates v. Goodloe, 101 U. S. 612; Harrison v. Mayor, 92 U. S. 111; Bayly v. Lawrence, 1 S. C. L. 499). This, in our opinion, is the better rule.

In the Philippines, a "lease ordinarily is only a right *in personam,* a personal right. Thus, if the lessor sells the thing leased the new owner is not bound by the contract of lease (unless it was registered in the Registery of Property) . . . In a lease of things the subject matter of the hire is not the thing itself but the use of or enjoyment of the thing." (Gamboa, An Introduction to Philippine Law, 226-227). One reason behind the English rule (that a lease is also productive of a right *in rem*) may not, therefore, exist in the Philippines. On this account, there is no barrier to the application of the doc trine of frustration in lease contracts in this country. The right to demand payment of rent is, at least on equitable grounds, conditioned upon the existence of the thing leased and the continued enjoyment of its use by the lessee: Where the lessee is deprived of the use of the leased premises by *force majeure,* e.g., seizure or requisition of the premises by the authorities or the enemy, the basis for the right to demand rent is gone. Further, the said deprivation constitutes a circumstance of supervention rendering impossible the continued performance of the contract, and under the principles previously adverted to the contract is automatically cancelled. All obligations incident to the contract are terminated. We again find it proper to resort to Article 1105, Civil Code, under which no one shall be held responsible for events which could not be foreseen, or which having been foreseen, were unavoidable. For all legal purposes, the leased property seized or requisitioned by the authorities or by the enemy may be deemed lost to the lessor and lessee (at least during the period the authorities or the enemy held it) and the lessee's obligation to pay rent is thus deemed extinguished. (Articles 1156 and 1568, Civil Code). On the subject of leases of rural tenements (Article 1575, id.), Manresa comments as follows:

> "La rebajo o extencion de renta, por los terminos en que ha sido formulada, tiene todas las apariencias, en el Derecho romano y en el patrio, de ser una solucion de equidad, no de estricto derecho. El caracter conmutativo del contrato, la consideracion del perjuicio que el arrendatario se causa cuando no habiendo recogido frutos tiene que pagar renta, y algo quiza de politica protectora de le agricultura, han sido sin duda, los motivos de los preceptos. Pero la equidad como dicen los senores Giner y Calderon con la precision que les caracteriza, no es al cabo una idea mas

o menos a fin la del derecho sino una interior relacion de este, en cuanto se afirma como superior de la regla abstracta, cuya aplicacion retifica. . .

"Estimamos, pues, que el Codigo, acomodandose a la tradicion, ha consignado en los articulos que comentamos un principio de equidad, el cual, entendido en el concepto explicado, implica una excepcion del derecho, sino una confirmacion mas evidente, En efecto, si atentamente examinemos el supuesto legal veremos que al no existir los frutos en todo o en su mayor parte, falta para el arrendatario, aunque sea de una manera transitoria, un elemento esencial de la relacion juridica, que es la causa del contrato, y a esta carencia de causa o a este modo incompleto de darse, logico es que acompañe o una suspension de la obligacion de pagar la renta o su adecuada modificacion." (10 Manresa 592).

The rule enunciated in the foregoing commentary may apply to all kinds of leases of things, there being, in our opinion no distrinctin in principle.

h. *Liability of the Lessor to the Lessee if the Latter Is Dispossessed of the Leased Premises by the Enemy or by Government Authority*

There seems nothing to distinguish, in principle, the dispossession here referred to and the mere fact of trespass contemplated by Article 1560, Civil Code. If the forcible dispossession is effected by the enemy to suit his own purposes, such dispossession is due to *force majeure* and is, therefore, not imputable to the lessor. He is not liable therefor. (10 Manresa 171). The act of the Japanese Forces in dispossessing the lessee may be said to be an act of mere trespass (*de mero hecho*) inasmuch as it was arbitrary and without legal justification. (10 Manresa 513-514). It is only in cases of trespass in law (de derecho) that the lessor is liable (par. 3, Article 1554, id.). Trespass in fact only affects the use of the property leased and the duty to repel it is incumbent upon the lessee. (Goldstein v. Roces, 34 Phil. 562).

The same result will obtain if the dispossession is effected by authority of the Government pursuant to any emergency or defense measure in time of war. The same is true in instances where the dispossession of the lessee is effected by Goverment authority to serve a public pupose. Thus, it was held in Sayo v. Manila Railroad Co., 43 Phil. 551, that the landlord (lessor) is not liable for the tenant's eviction through condemnation proceedings and, therefore, cannot be held liable in damages.

The requisition or seizure by the Government of the subject matter of a contract, e.g., a ship under charter, is a supervening event rendering impossible the continued performance of such contract. (McNair, Legal Effects of War, 153).

i. *Liability of the Lessor if the Leased Property, Materially Damaged in Military Operations, Was Repaired or Reconstructed by the Lessee*

It is to be assumed, in this respect, that subsequent to the period of deprivation of the leased premises by reason of its having been previously damaged or destroyed by military action, the lessee resumed possession. Necessarily, in order to make use of the premises, repairs or works of reconstruction were imperative. It is also to be assumed that the lessee was not aware, as most lessees would not be, of the automic cancellation of the contract, by reason of supervening impossibility barring continued performance, and considered it expedient to resume possession. In such a case, who shall assume liability for the costs of repairs or reconstruction?

On the subject of repairs of leased premises, we find paragarph 2, Article 1554, Civil Code, that the lessor has the obligation to make all the necessary repairs thereon in order to preserve them in serviceable condition for the purpose for which they were intended. Article 1558, id., deals with the obligation of the lessee to permit the repairs, even if in prosecuting the work he may be deprived of the use of part of the property concerned. But all these provisions presuppose that the lease continued to exist and that the repairs referred to became necessary during the period of such lease. In view, however of the fact that by the supervation of war and the consequent discharge of the contract by reason of its frustration, we find it proper to deduce that these provisions of the Civil Code are inapplicable because the contract of lease no longer existed when the works of repairs or reconstruction were undertaken. We cannot, therefore, on the strength of these legal provisions, hold the lessor liable for the costs occasioned by the works referred to.

The repairs of which we are here concerned imply the putting of something back into the condition in which it was originally and cannot extend to an improvement by adding something new. (Alburo v. Villanueva, 7 Phil. 277). The duty to undertake repairs must mean to apply to the restoration of property which has undergone deterioration from use or has been destroyed in part without its identity being totally lost. (Lizares v. Hernaez, 40 Phil. 981) Such repairs must be a matter of most urgent necessity (reparacion urgentisima) and the tenant may undertake the absolutely necessary means to avoid the loss at the owner's cost. (10 Manresa 499-501).

But, to go back to the original question, who assumes liability for these repairs? It is believed that, inspite of the inapplicability of articles 1554 and 1558, Civil Code, the lessor, as owner of the property, shoulders the costs.

We find nothing in these instances to prevent the application of the principle of *Negosiorum Gestio* (gestion de negocios ajenos). The

good faith of the lessee in his act of reoccupation and his subsequent undertaking of the repairs can hardly be questioned. That, in all probability, it was his honest belief that he was entitled to repossess the premises, on the basis of the original lease contract, upon the termination of actual hostilities, is to be taken for granted, especially if the term of the lease, at the time of the interruption of possession has not yet expired. It is provided in Article 1888, Civil Code, that a person who voluntarily takes charge of the business of another, without the latter's authority, is obliged to continue managing the same until the completion of the business and its incidents. In Article 1893, id., we find that the owner of property or a business who avails himself of the advantage of the management of the same by another shall be liable for the obligations contracted for his benefit and shall indemnify the manager for any necessary and useful expenses he may have incurred. Under these provisions, a complete stranger to the property may lawfully require of the owner of the same an indemnity for necessary and useful expenses incurred in behalf of the property.. All that it necessary, at the time of the assumption of the management of the property by the stranger, is that he be inspired by the beneficient idea of averting losses and damages to the owner and that he shall not have undertaken "the matter in the hope of obtaining profits or with the avaricious idea of gain." (12 Manresa 493-500; Sison & Azcarraga v. Balgos, Phil. 885).

The lessee of property damaged or destroyed in military operations, who repossesses the same after his contract was discharged by reason of fustration occasioned by the property having been damaged materially, is most certainly better situated than a total stranger in the matter of assuming management of the property damaged and incurring expenses necessary and useful to the same. The term 'expenses' can most positively comprehend repairs. Account must also be taken of the fact that, in the cases comprehended herein, the damaged property must be deemed to have abandoned by its owner.

In view of the foregoing, it is be lieved that for the costs of such works of repair or reconstruction, necessay and useful, undertaken by the lessee, the lessor is liable.

j. *If the Lessee Did not Make Use of the Leased Premises for a Certain Period during the Conventional Term, Is He Entitled to an Extension for a Period Equal to that of Deprivation? — The Doctrine of Commercial Frustration*

The lessee will most likely insist upon a concession of this sort. It is to be assumed, in this respect, that the failure to make use of the leased premises was due to circumsances beyond the lessee's control, i. e., *fuerza mayor* or *caso fortuito*, occasioned by war or its incidents, which resulted in an impossibility of performance.

In England, the courts have envolved what is now known as the 'doctrine of commercial frustration'. This doctrine has been held to obtain in cases where, without fault of either party, there has been such a change in conditions that to enforce performance would amount, in effect, to a substitution of contracts. Frustration by delay, which is what this doctrine really amounts to (for during the period of perturbation, there exists, an interference in, or a delay of, performance), means the occurence of an unforeseen event causing delay, not attributable to either party, of such a character as that by it the fulfillment was originally contemplated and practicable is so inordinately postponed or interferred with that its fulfillment, when the interference or delay is over, will not accomplish the objects the parties must have known each had in view at the time of the contract and for the accomplishment of which the contract was made. (Admiral Shipping Co. v. Weidner & Co. (1916), 1 K. B. 329; Naylor & Co. v. Krainische Industrie Gessellschaft (1918), 118 L. T. N. S. 442).

In the application of this rule, the English courts disclaim any assumption of power to absolve the promissor on the ground that to require performance is not equitable (as in instances where performance has become more difficult, dangerous or unprofitable). But they do assume to give effect to an implied term that the situation contemplated, and to which reference was made at the time of the making of the contract, shall remain essentially unchanged. Whether the interruption or perturbation will discharge the parties depends on whether or not such interruption or perturbation goes to the root of the matter of the consideration, i. e., whether the carrying out of the contract would amount to something substantially different from that intended by the parties. In Tamplin v. Anglo-Mexican Petroleum Products (1916), 2 A. C. 403 (Eng) it was held that "if from the nature of the contract the parties must have made their bargain on the footing that a particular thing or state of things will continue to exist, a term to that effect will be implied." This is so where the discontinuance is such as to upset altogehteh the purpose of the contract. A similar ruling was laid down in Metropolitan Wate Board v. Dick & Co. (1917), 2 K. B. 1 (Eng).

From the foregoing, it is readily apparent that where the perturbation or interruption goes to the root of the matter, i.e., insistence upon carrying out of the contractual terms will in effect mean a substitution of one contract with another, different from that intended by the parties, the contract is resolved.

Applied to contracts of lease, in a situation where the same are resolved becausee of frustration, there can be no basis for a demand for an extension of the term of the original lease for a period equal to that of interruption or deprivation. Having no legal basis, the claim for

such an extension cannot prosper. Any right relative to the leased property necessarily arises from the contract of lease. The contract having been resolved by its frustration, all rights arising therefrom are likewise terminated. After the period of interruption, any right, if any, to the property formerly leased must of necessity proceed from another contains no provision giving a lessee a right to add the period of dispossession to the conventional term of the lease. To do so will, in the light of the foregoing authori ties, mean in effect a substitution of contracts. The entering into of another and different contract, with all the attendant formalities required by law, will be necessary in order to legalize the act of holding, in the character of a lessee, the premises in question over and beyond the term of the original contract.

It is believed, therefore, that the English doctrine of commercial frustration may, at least inferentially and in the manner pointed out, apply in this jurisdiction in proper cases.

k. *Where the Lessee Used the Leased Premises for Another Purpose*

It may very well happen that the lessee was not actually deprived of the possession and use of the leased premises by the mere fact of existence of war. But, on the assumption that the war made it impossible for him to dedicate the property to the use agreed upon or for which it was intended, he utilized the same for another and distinct purpose. He did not, therefore, comply with paragarph 2, Article 1555, Civil Code, in that he did not use the leased premises in the manner stipulated, or in the absence of stipulation, he did not dedicate it to the use which may be inferred from the nature of the thing leased according to prevailing usages.

In cases of this sort, it is believed that, although the lessee should not be liable in damages for the misuse of the property (because war rendered impossible its use for the stipulated or intended purpose), liability attaches to him, e.g., for the reasonable rentals for the period covered, under the universally recognized principle that no person may undully enrich himself at the expense of another. One reason behind certain American decisions denying to the lessee discharge from the liability to pay rent simply because of deprivation of control of the leased premises as a result of the existence of war is "that he was to have advantage of casual profits" and he therefore, "ought to run the hazard of casual losses and and not lay the whole burden upon the lessor." (Pollard v. Shaaffer, *supra*). It has also been held that "where the event discharging the contract occurs during performance, a party who has received something of value udner the contract is liable to the other party on an implied promised to the extent of the value received but not in excess of the contract price or compensation."

(Williams v. Butler, 48 Ind. A. 47). So it was held that in case of resolution each party must return to the other what he has received from the latter with interest thereon. (Hodges v. Granda, 59 Phil. 429). These rulings, it is believed, may apply not only in relation to benefits received by one party from the other, but also what the former received from a third party which benefits, were it not for the former, would have been due the latter from such third party.

It is our opinion that, the cases of the nature above-mentioned and as between the parties to the orginal contract of lease, there is either an implied promise (Williams v. Butler, *supra*) or a quasi-contract (the previous one having been automatically cancelled by supervening impossibilitiy of performace occasioned by war). But, since in our law an implied contract exists only if there was consent in the first place, these instances are more of quasi-contracts than implied ones, there being no contract at all. The fomer lessee, for legal purposes, voluntarily assumed management or control of another's party by his act of using the leased property for another purpose. Under the provisions of Article 1887, Civil Code, the lessee (now a stranger for present purposes) becomes obligated to the owner of the property in the manner therein stated. This condition is, in our opinion, another instance of *gestion de negocios ajenos*. While there are English authorities to the effect that the parties must remain in the position in which they were when the supervening event occured, unless there is something special in the terms of the contract conferring a different right on either party (Chandler v. Webster (1904), 1 K. B. 493), we believe that the American rule (Williams v. Butler, *supra*), in the man ner above-explained and applied, is more in keeping with the demands of justice. Expressed in civil-law parlance, the latter case supports the existence of *gestiones de negocios ajenos*.

1. *The Prevailing Principles in Leases of Works and Services, Affreightment, Etc.*

Leases of works and services are of three kinds, namely: (1) hiring of domestic servants and laborers, (2) hiring of contractors and (3) contracts for carriage of goods (Gamboa, An Introduction to Philippine Law, 231).

In bailment of services (contractors) only ordinary care and diligence of the bailee are required and he is not liable for a loss not attributable to his fault, but the loss, as in other hirings, falls upon the owner pursuant to the maxim *,res perit domino*. (Gamboa, id., 232). Thus, the bailee is not responsible for loss in cases of force majeure, e.g., war.

Although the liability of carriers by land or water is greater in that they are liable for damages to the goods by their servants or employees as well as by strangers, they are not so liable for those arising from

robbery by an armed band or which may be caused by any other event of force majeure. Gomboa, id., 232; Articles 1601, 1602, 1783 & 1784, Civil Code; Articles 361, 362 & 620, Code of Commerce). In this jurisdiction, carriers are not insurers.

On contracts of employment, the effects of war are usually as follows: (1) it may produce a fundamental change in the character of the service that insistence upon the contract may give rise to more expenses, create risks or hardships, different conditions, etc. The obligor may be placed in a situation different from that he bargained for. (2) it may cause the servant or the subject-matter of his service to be no longer available. The fortunes of war are varied and usually impossible of being forseen. A person or thing may be at one place one day and somewhere else far away on the next. Confusion in war is normal, instability is the rule. To hold a person who, for imperative reasons, e.g., safety and quest for primary necessities, had to be constantly on the move is to countenance an unjust imposition. The law, therefore, discharges him from liability on his contract. The duty he incurred assumed, by the occurrence of war and its incidents, all the characteristics of an obligation impossible to perform. (3) if the personal qualifications of the obligor were taken into account as a main consideration of the contract, such contract is discharged upon his death or injury (such a contingency, while also possible in peace, is more likely to happen in times of war) because it is no longer possible of performance in the manner stipulated.

English authorities have held that war may frustrate building contracts because to hold them binding is really not to maintain the original contacts but to substitute different ones for them. (McNair, Legal Effects of War, 214). The reasoning behind the doctrine of commercial frustration squarely applies in contracts of this kind.

The same rule obtain in England with respect to ship-building contracts. The frustration by reason of war was held to be of such a character that it completely transformed the nature of the contract and the extent of the obligations incurred. (Federal Steam Navigation Co. v. Sir Raylton Dixon & Co. (1919), 1 Ll. L. 63; Woodfield Steam Shipping Co. v. J. L. Thompson & Sons (1919), 64 S.J. 6 7).

As to affreightment (charter parties), the doctrine of frustration is nowhere more appropriate. (McNair, id., 198). The history of the doctrine shows that it was first evolved in connection with affreightment. In Pacific Phosphate Co. v. Empire Transport Co. (1920), 36 T. L. R. 750 (Eng), it was held that the principle of frustration applies in instances where, due to a change in circumstances so great, it cannot be justly presumed that a reasonable man would have entered into the contract under the new circumstances.

We believe that the foregoing pinciples of English law are applica-

ble in the Philippines. There appears to be nothing in these principles contrary to, or not justified by, the provisions of the Civil Code and the Code of Commerce relating to leases of services. On the other hand Article 1272, Civil Code, provides that impossible things or services may not be the objects of contracts. In view of Article 1184, id., this impossibility may be either original or simply supervening.

Under the provisions of Article 1592, Civil Code, a person may bind himself to execute a work by the piece or by measure. He has the right to require his employer to receive the work by parts. Should the supervening impossibility take place after some parts have already been delivered, such supervention affects, in our opinion, only those parts not yet finished and delivered. The consequences of resolution of the contract apply only to these parts. Those already finished and deliver ed are beyond the effectivity of such resolution.

m. *Where War Did not Affect Performance*

This sub-topic is strictly not within the range of this discussion because, as has been stated, this study is primarily concerned with war as constituting a circumstance of supervening impossiblity. What is here contemplated is a case where the lessee continued to be in possession in the manner intended by the contract, his enjoyment of the same not having been disturbed either by the authorities or by the enemy. There must have been instances in areas occupied by enemy forces, e.g., the City of Manila, where none of the foregoing principles could apply. Thus, leases of suburban residential or commercial lots and buildings held under contracts executed before the outbreak of the war, and where the possession and control by the lessees were left unmolested, are not within the compass of the rules previously referred to and discussed. Many are the instances of lessees whose tenancies, began before the war, still exist.

While, in these case, difficulty in the performance of obligations may have obtained, there was no supervening impossibility of performance. We have previously made a distinction between impossiblity and just mere difficulty, and we found that the latter is no excuse for discharge from contractual liability. (Associated Portland Cement Mfrs. v. Cory & Sons, Ltd., *supra*). In these instances, we are not at all at liberty to advance the applicability of the doctrine of supervening impossibility in the absence of a clear showing of such conditions and circumstances justifying its application. What these conditions and circumstances are have been dealt with in detail elsewhere.

It seems proper to conclude, then, that for the purposes of this particular subject, the occurence of war was not of far-reaching or important legal consequence. Essentially, the obligation contracted by the parties remained unaffected; they must produce their intended

legal effects. The difficulty occasioned by the war are, at most, simply the result of a bad bargain for which no others but the parties affected are to blame. Conversely, the parties are entitled to casual profits obtained. In fact, many persons and entities realized millions of pesos in business transaction during the enemy occupation.

n. *The Pinciples of Supervening Illegality*

Essentially, this is another subtopic not strictly within the scope of this study, our main concern being supervening impossiblity. Of course, it may be argued that what is illegal acquires the character of the impossible. But the distinction lies in the fact that while supervening impossiblity is the immediate consequence of war, supervening illegality is occasioned by an act of state, i.e., a legislative enactment or an executive order rendering illegal certain acts and transactions heretofore valid and binding. The former takes place by operation of existing principles of law, the latter by the passage of a new law or the promulgation of a new executive order. The justification of the latter lies in the prevailing state policy adopted by reason of the existing emergency (itself perhaps occasioned by war) in order to protect state and public interests.

At any rate, the legal effects of both are the same — contracts affected are deemed automatically cancelled. (27 R. C. L. 918, Sec. 5, *supra*. We again resort to Article 1255, Civil Code, which allows the parties to a contract to include therein such clauses as they may deem advisible provided they are not against the law, morals or public order. As regards clauses against the law, it is enough that the said law is mandatory or prohibitive. It need not be penal. (8 Manresa 685-686).

The said Article 1255 also condems a contract which is against order. What is against public order is, therefore, against the law. Public order signifies the public weal — public policy, is the English equivalent of 'order publico' in this Article (12-25). There is no difference in principle between 'public policy' as it is known in the United States and in the Philippines as determined by the constitutions, the laws and judicial decisions. (Ferazzini v. Gsell, 34 Phil. 697). Nowhere can public policy be of more importance than when the nation is at war, for it is in war that the very existence of the State and its institutions is at stake, Private interest must invariably yield to that of the public as a whole, especially in times of grave emergency, e.g., war.

Thus, a contract the consideration or object of which contravenes some established interest of society or inconsistent with sound policy and good morals or tends clearly to undermine the security of the rights of others has been held to be against public order. (Gabriel v. Monte de Piedad, O. G. Supp. Dec. 6, 1941, p. 67). So, even where the public policy is not defined in so clear-cut a manner, a contract was held as

against it. With more reason, then, will a court so hold in instances where the public policy is laid down in concrete terms in a legistlative enactment or executive order.

o. *Remedies*

(1) *Resolution or Rescission*

Ordinarily, the mere failure of a party to perform his undertaking does not *ipso jure* produce the resolution of the contract. "Si el arrendador deja de cumplir alguna de su obligaciones, el remedio para el arrendatario esta en el Articulo 1556." (10 Manresa 479). The party entitled to resolve should apply to the court for a decree of rescission or resolution. (Rubio de Larena v. Villanueva, 53 Phil. 923; Guevara v. Pascual, 12 Phil. 311).

But this rule, in our opinion, cannot obtain in the rescission or resolution which takes place in contracts rendered impossible of performance by war and its incidents. It is to be noted, as discussed previously, that by the supervention of war rendering performance impossible, the contracts affected are automatically cancelled. The mere fact of impossibility to perform, such being a direct consequence of war, terminates the relationship *ipso facto*. It is also to be noted that the rule announced in the cases above-cited is an application of Article 1124, Civil Code, which certainly does not comprehend war as a cause of supervening impossibility. Under this Article, the resolution is demandable in case one of the obligors does not comply with what is incumbent upon him. It assumes, therefore, that there must be some element of default, voluntary non-fulfillment, etc. attributable to the obligor. This circumstance cannot, by any means, obtain in contracts rendered impossible of performance by the occurrence of war, for its happening cannot at all be attributed to any obligor, it being a case of *force maure* — something independent of his will.

It is, therefore, our conclusion that, in contracts which constitute the subject of this study, the resolution which takes place should performance become impossible is automatic (27 R. C. L., 918, Sec. 5); there is no need for resort to court action. This is our conclusion in spit of Article 1568, Civil Code, for we believe that this Article, like Article 1124, does not comprehend war as a circumstance of supervening impossibility. And since, in the contracts with which we are here concerned, performance is impossible, the alternative remedy provided for in Article 1123 (that of demanding fulfillment or specific performance) is not in point. In cases, perhaps, where war did not affect performance, this alternative remedy could be resorted to; but then, on the other hand, there would be need for court action to effect the other remedy (resolution), should it be deemed proper to resort to it.

(2) *Ejectment*

Since we are primarily concerned with frustration of contracts by war or causes occasioned by it, is quite absurd to think of ejectment in cases

where the lessees are no longer in possession, the contracts of lease having been *ipso facto* resolved because of impossibility of perfomance. In this discussion, therefore, the subject of ejectment arises, in our opinion, only in relation to those instances (1) where, in spite of war, the lessees remained and continued to be in possession until after the war and beyond the contractual term and (2) where the lessees, whose leaseholds were resolved by reason of supervening impossibility caused by war, reoccupied the premises after the close of hostilities, the interruption having ceased to exist. The remedy of ejectment appears proper in these cases — in the first, because the lessees continued to occupy the premises in spite of the expiration of the term of the lease, thereby unlawfully detaining them, and in the second, because the original contracts of lease having been deemed automatically cancelled or resolved, the lessees, by their reoccupation, committed forcible entry.

That the situation above-referred to actually prevailed is amply borne out by the state of affairs which has been obtaining in Manila since its liberation by the American forces. Due to the whole-sale destruction of buildings as a direct consequence of the battle for the City and the resulting Japanese retreat, there has been an acute shortage of housing facilities. It was quite natural for persons having any semblance of a right over a building to hold on it. In other cases the occupancy of some buildings was downright uncalled for. Thus, as in the instance above-mentioned, the conflicting rights of owners and the squatters clashed, the result of which is the clogging of the dockets of the Municipal Court with ejectment cases.

Our main concern, then, is to determine the propriety of ejectment as a remedy and whether or not it will lie sucessfully. Article 1569, Civil Code, provides (par. 1) that the expiration of the conventional term is a ground for ejectment. Thus, in the first of the instances aforementioned, if property beyond the contractual term, the applicability of the said par. 1 is incontestable. In the same instances, even if the term has not yet expired, ejectment is proper if the lessee defaults in the payment of rentals agreed upon (par. 2, id.). So will breach of any of the conditions stipulated (Par. 3, id.) and the use of the thing for purposes not stipulated and which diminish its value or the failure of the lessee to use the property with the diligence of a good father of a family (par. 4, id.). In the second instances the occupancy having all the earmarks of rank usurpation, ejectment is proper.

Doubtless in recognition of the state of emergency which obtained since liberation, Commonwealth Act No. 689 was passed. This was later amended by Republic Act No. 66. The effect of these enactments was to modify Articles 1569, Civil Code, in that as regards leases without a fixed term, such term shall be one year (even if a monthly rent is fixed, in our opinion) and, as regards default in the payment of rentals

(which is a recognized ground for ejectment under par. 2, Article 1569, id., and sanctioned by Sec. 2, Rule 72, Rules of Court), ejectment will not lie unless the rental is unjust and unreasonable. Pars. 2 and 4 of the same Article, are considered unaffected because there appears no inconsistency between them on one hand, and the provisions of Republic Act. No. 66 on the other, and because implied repeals are not favored, (Valdez v. Tuazon, 40 Phil. 493; Smith Bell v. Maronilla, 41 Phil. 557; Lichauco v. Apostol, 44 Phil. 138). But the new law added two more causes for ejectment, namely, (1) sub-leasing by the lessee of the property (Sec. 11) and (2) the lessor's personal need of the leased property (Sec. 2).

Our Supreme Court, in Santos v. Alvarez et al, G. R. No. L-332 (June 18, 1947), laid down the following rule:

> "A lessee cannot be ejected even for non-payment of rents, where such non-payments is not willful and deliberate and the lessor does not need the property for himself and the lessee has never sub-leased it without authority. In other words, a lessee who is unable to pay on time the agreed rents because of poverty or of any other cannot, under the present law, be circumstance beyond his control ejected from the leased property, if the two other circumstance are not present."

But in Belmonte v. Marvin, 42 O. G. No. 10, p. 2416, the same Court held as follows:

> "The lessor may under Article 1569, of the Civil Code, judicially dispossess the lessee for default in the payment of the price agreed upon. *But where such default is based on the fact that the rent sought to be collected is not agreed upon, an action for ejectment will not lie.*"

It is believed that the underscored portion of the above ruling contemplates a situation where, for instance, the lessor raised the rental rates and the lessee was not willing to pay as much. In a case of this sort, even if the lessee was in default, ejectment will not lie since the non-payment of rentals was not willful and deliberate. The provisions of Republic Act No. 66 on willfull and deliberate non-payment of rents as a ground for ejectment should be construed in the light of the foregoing rule.

The rule laid down in Santos v. Alvarez et al, *supra*, is open to question. It seems to be a forced construction of the rental law and is apt to create an anomalous situation. The essence of lease is the payment of rents (Article 1543, Civil Code) which the lessee must pay in the manner agreed upon (par. 1 Article 1555, id.). The rule, by saying that if the non-payment of rents "is not willful and deliberate" ejectment will not lie, poses the probability of the lessee continuing to be in occupancy for an indefinite time. It will leave in effect to his exclusive will the fulfillment of the obligation (that to pay rent) arising from the contract, contrary to the provisions of Articles 1115 and 1256, id. Such a situation

is unjust to the lessor because, in addition to the lessee's continued occupancy (which is possible under the rule in question), he, the lessee, may very well escape payment of rents on the plea that his non-poyment of the same "is not willfull and deliberate." The new law certainly did not contemplate that the lessee may gratuitously partake of the lessor's property. To allow the lessee, with State tolerance, to do so will be to undully burden private property without just compensation and without due process of law (Sec. 1, Article III, Constitution). In effect, his property is being used not only 'without just compensation' (this phrase implies there is compensation, although not just), but without any compensation at all. What appears to be the proper application of the phrase 'willful and deliberate nonpayment of rents" relates to cases where the lessor and the lessee, after liberation could not agree on what amount shall be reasonable as rentals, the disagreement resulting in a suit for ejectment. These rentals, then, are those demanded by the lessor, not those *agreed upon* (and, therefore, presumed reasonable) and and deliberate. In a case of this kind, the failure to pay the same is willful poverty cannot be a valid defense. (Padilla, May a Tenant's Failure to Pay His Agreed Rental Be Excused by Poverty or a Circumstance Beyond His Control? 22 Philippine Law Journal, 238-234).

It is our opinion that Republic Act No. 66, concerned as it is with house rentals, cannot extend to rural realty. The provisions of the Civil Code affecting the latter are, therefore, deemed unaffected. Implied repeals are not favored. Neither does to affect leases of commercial establishments, since it is concerned only with dwelling houses. (Padilla v. Lim Hon et al (Court of Appeals), 43 O. G. 1701 (1947).

(3) *Damages*

The general rule as to damages is found in Article 1101, Civil Code. The said Article provides that persons who, in the fufillment of their obligations, are guilty of fraud, negligence or delay, and those who in any manner whatever contravenes the tenor thereof, are liable for he losses and damages thereby caused. Concerned as we are, primarily with contracts whose performance was frustrated by war, there will appear to be no occasion, as a rule, for the matter of damages to arise since, in the frustration of contracts, we can attribute to neither party any fraud, negligence or delay in the carrying out of his obligations, or any contravention of the terms thereof. In other words, it is our contention that if performance of a contract is excused because of supervening impossibility directly attributable to war, it follows that there can be no liability for the consequent lossess and damages. The principle of *res perit domino* prevails. It is quite clear that under the provisions of Article 1105, Civil Code, no such liability shall attach. The legal impossibility of a prestation, according to Manresa, cannot render

the obligor for damages. (8 Manresa, 355-356).

But in the cases where the remedy of ejectment lies, *supra*, it is our opinion that damages may accrue, in proper cases, because there exists a violation of certain rights and injuries were sustained. Thus, where a lessee extended his possession and use of the leased premises beyond the term of the contract, he prevented the owner thereof from receiving benefits that would have pertained to him; if the former lessee committed a forcible entry, he deprived a person of that which such person owns. In the first, the lessee's act caused what is known as *lucro cesante*, in the second, his act gave rise to what is called *daño emergente*. (8 Manresa 100).

The measure of damages which may be recovered shall be determined under the provisions of Articles 1106 and 1107, Civil Code, i.e., the indemnity shall include not only the value of the losses suffered but also that of profits which the lessor failed to realize, and that in case the erring lessee or usurper acted in good faith, the indemnity shall be limited to those losses and damages foreseen or could have been foreseen at the time of the constitution of the obligation. If he acted in bad faith, he shall be liable for all losses and damages arising clearly from his acts. Mention has elsewhere been made of instances where damages are proper, together with reasons in support thereof.

(4). *War and the Statute of Limitations*

Even in contracts resolved y the supervention of war there may be rights that have accrued prior to the said resolution. Thus, for instance, under the provisions of Article 1592, Code, rights and obligations attach after the delivery of the finished portions of a work contracted to be executed by the piece or measure. If, in a case like this, war should supervene before the rights accruing are enforced, did the corresponding Statute of Limitations continue to run, or was it interrupted? It was held that "where a payment is due under a contract before the impossibility, it may be recovered after such time." (Blakely v. Muller, 88 L. R. Rep. N. S. 90 (Eng).

In England, it has been the rule that the Statute of Limitations will not run: (1) where the parties are so divided by the lines of war that the plaintiff cannot have any access to the court or (2) when the court to which the plaintiff has a right to have recourse does not sit on account of the disorder of war. (McNair, Legal Effects of War, 76; De Wahl v. Braune, 25 L. J. Ex. 343).

The prevailing doctrine in the United States is that the Statute of Limitations is suspended during war. (Hanger v. Abbott (1867), 6 Wall. 532). It was held in this case that:

> "Peace restores the right and the remedy, and as that cannot be if the limitations continue

during the period the creditor is rendered incapable to sue, it necessarily follows that the operations of the Statute is also suspended during the same period."

To the same effect, it was held in Brown v. Hiatts (1872), 15 Wall, 177, that the Statute of Limitations did not run during the period of the American Civil War. It is, of course, obvious that as soon as peace is restored, the remedy is likwise restored. The Statute of Limitations, therefore, resumes to run upon the termination of war. (Hanger v. Abbott, *supra*).

The foregoing principles apply in our jurisdiction. It was held in Espanña v. Lucido, 8 Phil. 419, that the Statute of Limitations is suspended by war, rebellion or insurrection when the regular course of justice is interrupted to such an extent that the courts cannot be kept open.

(5) *Debt Moratorium*

In recognition of the existence of serious economic and financial difficulties, the direct and immediate consequences of the war, President Osmeña promulgated Executive Order No. 25, dated November 18, 1944, which, as amended by Executive Order No. 32, dated March 10, 1945, provided, among others for a debt moratorium, to wit:

"Enforcement of payment of all debts and other monetary obligations payable within the Philippines, except debts and other monetary obligations entered into in any area after declaration by Presidential proclamation that such area has been freed from enemy occupation and control, is temporarily suspended pending action by the Commonwealth Government."

In accordance with this Executive Order, the enforcement of monetary obligations, e.g., rentals for lands, buildings and movables, is temporarily suspended provided these obligations became due prior to the date of a Presidential proclamation declaringt he area where such properties are located as freed from enemy occupation and control. This Order is broad enough to cover monetary obligations which became occupation and also those contract-due and owing during the enemy ed before the start of the war but which became due thereafter. This can be inferred from the fact that the provision in question before its amendment, read as follows: "Payment of all debts and other monetary obligations contracted after December 31, 1941. . . is temporarily suspended pending action by the Commonwealth Government." That is was amended to read as it does now clearly indicates the intention to include in the scope of the moratorium obligations contracted before the start of the war but which became due thereafter. Debts and other monetary obligations arising from lease contracts not otherwise affected by the war, as well as those which became due after the close of hostilities but before the date of a Presidential pro-

clamation above-referred to, are, therefore, within the scope of the moratoium.

IV. *Conclusion*

By way of a general concluding statement, contracts resolved by supervening impossibility consequent to war may be deemed to be agreements impliedly subject to resolutory conditions, i.e., while previous to the supervening impossibility the contracts existed, they were resolved by the occurrence of the event of supervention. This conclusion, evolved from a mass of predominantly common-law principles is compatible with the civil-law doctrine which control in our jurisdiction.

The authorities are quite agreed that, as a rule, the consequence of frustration of contract is to kill the same and discharge both parties automatically. (Joseph Constantine Case (1942), A. C. 154 (Eng). It has long been settled in English and American jurisdictions that where parties enter into an agreement on the asumption that some particular thing essential to its performance will continue to be available for the purpose, and neither expressly agrees to be responsible for its continued existence and availability, the contract is to be regarded as subject to an implied condition that if, without default of either party, the particular thing ceases to exist or be available for the purposes agreed upon, the contract shall be dissolved and the parties excused from performing it. Where the event causing the loss of the thing was apparently not anticipated and where there was no agreement casting the risk on either party, the contractual tie is immediately served and the parties absolved from liability under it. (Texas Co. v. Hogarth Shipping Corp., 41 Sup. Ct. Rep. 612 (U. S.).

We in the Philippines, labor under no restraints in adopting this rule. This and the others discussed, *supra,* are the results of a legal evolution enlightened and tempered by centuries of commercial relations, local and international, interrupted now and then by wars and conflicts both petty and global. We cannot, for instance, dispute with sincerity the wisdom and authority of judicial pronouncements of responsible courts in England and America on matters which, by reason of the varied experience of their citizens and nationals, they had to expound, perhaps with new legal difficulties at each turn. Add to these the fact that the progress of commerce and industry in these countires has been temendous, and we find these nations properly well-disposed to develop a progressive system of legal literature on the subject of war and its effects on contracts. And if, in addition, we find nothing in our law and scanty jurisprudence on the subject to warrant non-acceptance of these principles, we certainly shall do very well by applying the same in proper cases. Adopting from another system of law, where our own is deficient, is proper and expedient. That has been

the experience of many nations. It has, in fact, been our experience since the start of the American regime. We shall, by so doing, do no violence to our Civil Law.

There is no attempt at asserting, by any means, that the principles and rules discussed in the foregoing pages are exhaustive. Rather, what is attempted is to show their applicability and perhaps justify, in a small measure, the applicability of others of the same character and origin in their porper spheres. After all, as par. 2, Article 6, Civil Code, provides, "when there is no statute exactly applicable to the point in controversy, the customs of the place shall be applied, and, in the absence thereof, the general principles of law."

It is submitted that our Civil Code, together with what commentaries were written on it, is not up-to-date enough to cover the varied question that may arise in connection with war and its effects on contracts. Nor can our customs furnish the proper answers, the questions involved being almost new to us. By our own law, then, and in accordance with it, we must resort to the general principles of law. The opinion of Manresa, to the effect that the decisions of courts should be first resorted to before the general principles of law are applied (1 Manresa 84; In re Shoop, 41 Phil. 213), notwithstanding, we believe in the application of these general principles (which, quite logically, comprehend the authoritative jurisprudence of other nations) because the law is not providing for a prior recourse to court decisions, implied its intention not to consider them as suppletory law. (1 Caston 21; 2 Sanchez Roman 79-80). *Inclusio unius est exclusio alterius.*

We believe, therefore, that recourse to the foregoing principles and rules is the logical stand to take, i.e., in proper cases.