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CURRENT PROBLEMS OF FREEZING CONTROL*

ARTHUR BLOCH AND WERNER ROSENBERG†

Public attention these days is being focused on the spectacular and stirring events of military actions, yet there are legal developments in the field of economic defense less dramatic but nonetheless vital to the ultimate goal, viz. the defeat of the aggressor nations. The United States of America through all its history, fighting for economic individualism, has now been forced to create a system of limitations and restrictions on foreign financial transactions. In establishing a foreign funds control, it has equipped itself with the most important weapon in economic defense.

While some European countries established foreign funds control many years ago, this country has now created a control system which, in effect, "subjects to regulation and scrutiny all transactions in which blocked countries or their nationals have any type of interest."¹ But the American system did not follow the European pattern of restrictions. The diversity of purpose made necessary a decisive difference in measures and methods, not so much in fundamentals as in technique. Protection of the national currency against debasement or inflation was the original goal of foreign exchange control in Europe, especially as adopted in Germany.² This self defense measure developed into an aggressive weapon of the new economic policies which "reach their climax

* This Comment was written before the entry of the United States into the War. With the outbreak of war the Trading with the Enemy Act of October 6, 1917 as amended, became effective. Section 3 (a) of the Act prohibits any person from trading with the enemy unless authorized by the President. On December 13, 1941, by virtue of Section 3 (a) of the Act, the President issued a general license permitting all transactions involving German, Italian or Japanese interests already controlled or regulated by the Treasury Department under the Freezing Control Orders. By this action the President integrated the licensing procedure under Section 3 (a) of the Trading with the Enemy Act with that of the Treasury Department under freezing control. Cf. General License Under Section 3 (a) of the Trading with the Enemy Act, December 13, 1941, Federal Reserve Bank Circular No. 2334.

Section 5 (b) of the Trading with the Enemy Act (see *infra*, note 10) is now amended by Section 301 of the "First War Powers Act 1941" of December 18, 1941, Public Law 354, 77th Congress.

Section 302, the validation Section of this Act, approved, ratified and confirmed all the orders and regulations of the freezing control.

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1. Edward H. Foley, Jr., General Counsel for the Treasury Dept., *Freezing Control as a Weapon of Economic Defense*, address delivered before the Committee on Insurance Law, American Bar Association, Sept. 29, 1941, reprinted in N. Y. Fed. Res. Bank Circular, Nov., 1941.

2. Ellis, *Exchange Control in Central Europe*, 59 HARVARD ECONOMIC STUDIES 290; NUSSBAUM, *MONEY IN THE LAW* (1939) 475, 476; Binder, *Practical Aspect of Foreign Property Control* (1941) ADMINISTRATIVE LAW, No. 5, p. 2. For an up to date review of the European Foreign exchange laws see DAS DEWISRECHT EUROPAS (Switzerland 1941).

in totalitarian control methods of trade and finance, designed to strengthen war economy, a process which eventually embraced every aspect of social and economical life."³

American currency needs no protection. The dollar today is the strongest medium of international exchange, the most sought after medium in the world.⁴ In creating freezing control, the American Government had three principal aims:

1) to preserve American property of Axis-invaded countries and their nationals;

2) to protect vital American interests in view of the unlimited national emergency, declared by the President, by preventing the Axis powers from benefiting by their American assets and those looted from conquered nations;⁵

3) to strengthen the economy and foreign exchange of friendly nations at their own request, e.g., China.⁶

The effectiveness of the control is guaranteed by a system of prohibitions and regulations, made flexible and equitable in practice by the issuance of general and special licenses. The legal basis of the control is found in section 5 B of the Trading with the Enemy Act of 1917,⁷ which prohibited trading with the enemy and gave the President power to regulate and prohibit foreign exchange transactions, transfers of credit, and of evidences of indebtedness or ownership of property, either between the United States and a foreign country or between residents of foreign countries and any person within the United States.⁸ This wartime measure was revised and amended in 1933 to permit its application to any period of national emergency.

3. THIESING, CONTROL OF FOREIGN OWNED PROPERTY IN THE UNITED STATES (N. Y. 1941) 4.

4. Foley, *supra* note 1, at 3.

5. Press Release issued at the White House on June 14, 1941; *Control of Foreign Funds*, (Aug. 1941) BANKING 24-95.

6. Foley, *supra* note 1, at 2. In order to assist friendly governments the Treasury furnished copies of Netherlands' freezing regulations (N. Y. Fed. Res. Bank Circular No. 2091) and translation of Luxemburg Decree Laws (Circular Nos. 2211, 2268) to all interested banks or parties. Before paying out Dutch funds, most American banks in respecting these laws require licenses by the Government of the Netherlands in London. See Davis, *Federal Freezing Orders—A Transition Period* (Editorial) N. Y. L. J., Sept. 25, 26, 29, 30, 1941 and Comment, *Protective Expropriatory Decrees of the Governments in Exile—Their Application in the U. S.* (1941) 41 COL. L. REV. 1072; Anderson v. N. D. Transandine, 28 N. Y. S. (2d) 547 (1941). For an analysis of the decrees of different invaded countries and the attitude of the banks, see Strong, *How Foreign Decrees Affect Property Held by Our Banks*, (Apr. 1941) BANKERS MONTHLY, see also Domke, *International Aspects of European Expropriation Measures* (Nov. 1941) AMERICAN FOREIGN LAW ASSOCIATION, Proceedings No. 22.

7. 40 STAT. 415, 50 U. S. C. A. App. § 6 (1917).

8. For a well founded analysis of the American treatment of alien property see GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY (1940).

Under the authority of this statute the first freezing order, Executive Order 8389 of April 10, 1940, hereinafter called "the Order", was issued by the President after the invasion of Norway and Denmark.⁹ The Executive Order 8389 and the regulations and general rulings issued thereunder were approved by the Joint Resolution of Congress, on April 23, 1940, which also amended the Trading with the Enemy Act by making far reaching additions.¹⁰ Thereafter new invasions made necessary the issuance of new freezing orders. On June 14, 1941, the Order was revised and extended to the Axis and the remaining European countries with the exception of Great Britain, Ireland and Turkey.¹¹ On July 26, 1941, Japan and China were brought within the scope of the prohibitions, and on December 9, 1941, Thailand was added to the list.¹²

The Order, as amended June 14, and July 26, 1941, is at present *sedes materiae* of the foreign funds control.¹³ The statute under the authority of which the order was issued, to wit, section 5 B of the Trading with the Enemy Act, has been held constitutional by the Supreme Court of the United States.¹⁴ Some extra judicial doubts have been raised as to the constitutionality and validity of certain provisions of the freezing order,¹⁵ but there has been no

9. Amending Executive Order 6560 (Jan. 15, 1934) FEDERAL REGISTER (April 12, 1940) 1400.

10. 54 STAT. 179, 50 U. S. C. A. App. § 5(b) (1940): "During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; . . ."

11. Executive Order 8785 (June 14, 1941), amending Executive Order 8389.

12. Executive Order 8832 (July 26, 1941), amending Executive Order 8389 (China and Japan). Executive Order 8963 (Dec. 9, 1941), amending Executive Order 8389 (Thailand).

13. For the legislative history of the present control system see Comment, *Foreign Funds Control Through Presidential Freezing Orders* (1941) 41 COL. L. REV. 1039, 1045. Binder, *supra* note 2, at 5, THIESING, *supra* note 3, at 7.

14. *Stoehr v. Wallace*, 255 U. S. 239 (1921); *Norman v. B. & O. R. Co.*, 294 U. S. 240 (1935); *Nortz v. United States*, 294 U. S. 317, 350 (1935); *Campbell v. United States*, 5 F. Supp. 156, 167-170, 172-174 (D. C. S. D. N. Y. 1936); *Uebersee Finanz-Korporation, A. G. v. Rosen*, 83 F. (2d) 225, 228 (C. C. A. 2d 1936), 83 *cert. denied*, 298 U. S. 679 (1936); *British American Tobacco Co. v. Federal Reserve Bank*, 104 F. (2d) 652 (C. C. A. 2d, 1939), *cert. denied*, 308 U. S. 600 (1939).

15. Comment, *Foreign Funds Control Through Freezing Orders* (1941) 41 COL. L. REV. 1039, 1067 *et seq.*; THIESING, *supra* note 3, at 5, 23; Harris and Joseph, *Present Problem Concerning Foreign Funds Control*, N. Y. L. J. Jan. 22, 23, 24, 1941, pp. 336, 354, 372.

judicial denial of the constitutionality of any of the provisions of the statute.¹⁶

Freezing control can only be interpreted against the background of its legal history and the public policy which led to its institution. The Order has reopened a wide field of legal theory and practice. The wide range of the functions in the Order, its very nature as an emergency measure, intended to be as broad and flexible as possible,¹⁷ have presented many difficulties to the profession and to the public. A few court decisions construing provisions of the Order, and learned discussions have made valuable contributions toward the resolution of some of these problems. This comment confines itself to difficulties heretofore not fully discussed or recognized.

The major effect of the Order is to prohibit certain transactions in which a "national" of a blocked country has any interest. Who is a "national"? What "transactions" are within the scope of the Order? These are questions of paramount importance.

The Blocked Nationals

A few problems connected with the definition of a blocked "national" will be considered first. A "national" is defined in section 5 E of the Order as follows:

"(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

"(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

"(iv) Any person who there is reasonable cause to believe is a 'national' as herein defined."

The term "national" in its usual meaning embraces only citizens and subjects of a country but in the field of frozen funds control we have a much broader concept. Since we are engaged in military and economic warfare it is only natural that this country cannot grant comity in recognizing any foreign definition of "national" but must give the term "national" a new and broader meaning for the purposes of this problem. There is no question that in principle, citizens or subjects of a blocked country are "nationals" under the usual definition as well as under the order, and form the nucleus of blocked "nationals". By

16. *Brown et al. v. J. P. Morgan*, N. Y. L. J. Nov. 26, 1941, p. 1665, col. 4.

17. *Foley*, *supra* note 1, at 3, 4.

projecting the new elements of "domicile" and "residence" into the definition certain additional groups are included; others are excluded. A native born American citizen with a residence or domicile in a blocked country on or after the effective date of the blocking will be considered a "national" of that country¹⁸ while citizens of blocked countries, residing in the United States on and since June 17, 1940, are exempted and not blocked as "nationals" of their country.

The Order does not mention the legal situation of "stateless" persons¹⁹ who are not citizens of any country. As long as these persons were "domicilees" or "residents" in a blocked country at the time of the blocking they are "nationals" as defined in section 5 E of the Order. Under General Licenses No. 42²⁰ and No. 42A,²¹ "stateless" persons who have been residing within the United States since June 17, 1940, are classed as "generally licensed nationals" whose accounts are free. A "stateless" person with domicile and residence in a non-blocked country on or since the effective date of the order is in principle not a "national" of the blocked country, of which he might have been a citizen in the past. To impress him with citizenship of the country of his origin or previous residence would be absurd for the reason that such "forced citizenship might be the very one he does not wish to have."²²

But thousands of "stateless" persons are now in transit in non-blocked countries like England or Cuba, waiting for a chance to immigrate to the United States or to some other country of the Western Hemisphere. Under the law of domicile these persons have not acquired a domicile in these transitory places for lack of intention to establish a permanent home. They do not lose their old domicile until they have actually arrived at another place which they intend to make their permanent abode.²³ Therefore, a stateless person who has left his domicile in a blocked country, even with the intention never to return, and is temporarily a visitor or in transit in a non-blocked country, might be considered a "national" because his domicile is still in the blocked country. Another difficulty arose in connection with the status of "nationals" who have been residing in the United States on and since June 17, 1940,

18. Of course, American Citizens residing in a blocked country on or since the effective date of the blocking are almost completely freed from the effect of the freezing orders after returning to the United States. See U. S. Treas. General License No. 28, August 8, 1940, amended July 8, 1941; U. S. Treas. Dept., *Documents Pertaining to Foreign Funds Control* (Aug. 16, 1941) 26.

19. Political developments in Europe after the last war and recent decrees of totalitarian governments have deprived many thousands of people of their citizenship. Many of them are personally in the United States or with property under American jurisdiction.

20. 31 CODE OF FED. REG. p. 172, col. 1.

21. N. Y. Fed. Res. Bank Circular No. 2321, Nov. 27, 1941, 31 CODE OF FED. REG. p. 131, col. 1.

22. See THIESING, *supra* note 3, at 15.

23. Dupuy v. Wurtz, 53 N. Y. 556 (1873); *In re Rotholz' Estate*, 164 Misc. 914, 300 N. Y. Supp. 56 (1937); Harris and Joseph, *supra* note 15, at part 1.

but could not be considered as "domicilees" under the law of domicile, since General License No. 42 issued on June 14, 1941, freed only the accounts of persons who had been both "domicilees" and "residents" in the United States.

Many thousands of people of the yellow race who, under the present immigration law²⁴ could not immigrate into this country and so were unable to acquire a permanent domicile, and many other people in this country on a visitor's *visa* who could not immigrate because of the difficulties connected with obtaining immigration *visas* were not able to meet the domicile requirement. These classes of "frozen nationals" are now freed under General License No. 68 and General License No. 42A.²⁵

Under section 5E (11) of the Order, partnership, associations, corporations and other organizations are blocked when controlled by a blocked "national" or a substantial part of the stocks, shares, bonds or securities have been controlled or owned by a blocked "national".²⁶ The Order does not give any definition of a "substantial part" of the securities nor specify the amount of control required to bring the corporation or business organization within the scope of the blocked "nationals". Serious doubts arose as to how much must be owned to constitute "substantial ownership". It was suggested that ownership must be enough to give full control²⁷ or that 25% owned by a "national" might be sufficient.²⁸

But even a holding of less than 25% might be sufficient when as a result the national is in a position to exercise a certain control or a substantial influence on the management of the business.

Transactions in General

Six distinct types of "transactions" are prohibited in section 1, A-F of the Order,²⁹ provided that as a basic requirement the interests of the United

24. 43 STAT. 155, 8 U. S. C. A. § 204 (1924).

25. See note 21 *supra*. General License No. 68(a) pertaining only to nationals of China and Japan, issued July 26, 1941. On Dec. 7, 1941, the Secretary of the Treasury revoked all licenses for the benefit of Japan or any nationals thereof. N. Y. Fed. Res. Bank Circular No. 2326 (Dec. 7, 1941).

26. Silent partnerships are included. See Press Release of the Treasury Department in connection with General License 73, October 9, 1941.

27. See Harris and Joseph, *supra* note 15, at part 3.

28. See Comment (1941) *Cor. L. Rev.* 1039, 1047, which arrived at this result by an inference from the last paragraph of section 5 E which classifies the status of a corporation or organization where the ownership or control is split between two or more "nationals". Here the *combined* ownership and control by "nationals" must amount to 25% or more of the stocks.

29. Executive Order 8785, as amended, U. S. Treas., *Documents Pertaining to Foreign Funds Control* reads in part as follows: "Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this

States and a blocked country are involved, as defined in section 1 (i), (ii).

There is no general definition of the term "transaction"³⁰ in the Order. The specific acts named in section 1, A, B, D and E are transfers of credit, payments, export or withdrawal from the United States of certain valuable metals, currency and evidences of indebtedness or ownership of property. It is clear that these acts refer to a disposition of property. A transaction may be an act not involving a transfer of title but merely a change of possession or custody, e.g., where somebody delivers securities or other valuables to a bailee.

A contract or assumption of an obligation which contemplates the doing of one of the acts above mentioned is no dispositive transaction and apparently not affected by the prohibitions in section 1, A, B, D, E. This interpretation may not be applied to the term "transaction" as used in section 1 F, the so-called catch-all clause. This provision cannot operate effectively unless it embraces contracts and obligations in certain cases where the obligation can only be performed through a prohibited act.

Section 1 C and F uses the same expression, "transaction", as mentioned in section 1 (i), (ii) and prohibits specifically all "transactions" in foreign exchange within the United States and all "transactions" for the purpose of

Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

Section 2 of the Order, not dealt with in this article, prohibits the dealing in, acquisition and transfer of, securities bearing a tax stamp or other stamp of a blocked country or of any interest in securities not physically situated within the United States. The purpose of Section 2 seems to be to prevent the liquidation of "looted" securities. Comment, (1941) 41 *Col. L. Rev.* 1039, 1048; U. S. *Treas., General Rulings* 3 and 5 pertaining to Executive Order 8389.

30. "A transaction is whatever may be done by a person which affects another person's rights and out of which a cause of action may arise." *Scarborough v. Smith*, 18 Kan. 399, 406 (1877).

evading or avoiding the foregoing prohibitions or those which have that effect (i.e., the types mentioned in section 1 A-E). The term "transaction" in section 1, C and F, is more comprehensive than in A, B, D and E. In the latter sections it applies merely to certain specific acts of disposition; in the former, however, it apparently includes not only acts of disposition but also any obligation in the performance of which a prohibited act would be done. Mere negotiations by which a prohibited act is contemplated are not prohibited, since the law can only be applied to acts having a recognized legal effect.

Not only contracts,³¹ however, but also offers, acceptances, releases, set-offs and other one-sided declarations are within the scope of section 1, C and F, if these acts alone or in connection with another declaration or act already done or to be done produce or may produce a prohibited effect. A verification of this concept is to be found in Public Circular No. 2,³² where the Treasury Department declares not only the payment but also the presentation or acceptance of drafts or other orders in which any blocked country or national thereof has or had any interest or which are in favor or in behalf of the same are prohibited. The "presentation" of a draft as mentioned in this Circular is a condition precedent to the obligation to pay. The "acceptance" creates an obligation to honor the draft or order. Both have a legally recognized effect. The acts defined as illegal in Public Circular No. 2 can only be prohibited by the catch-all clause, section 1 F, as they do not represent any act prohibited in section 1 A-E. Apparently the acceptance of the draft is viewed as the assumption of an obligation which cannot be performed without a violation of the prohibitions in section 1, A-E. Whether the obligation is actually performed or whether the performance is now practically made impossible through the provisions A-E is therefore without importance. The fact that somebody assumes such an obligation is treated by the Treasury Department as a transaction for the purpose of evading or avoiding the foregoing prohibitions or one which has that effect. This interpretation of the concept "transaction" is fundamental in construing the catch-all clause in section 1 F and thereby all the other prohibitions of the Order.

Assignment

Where an assignment relates to foreign exchange it is prohibited under section 1 C. In all other assignment cases none of the prohibitions in section 1, A-E applies and the general view seems to be that the assignment is valid.³³ The result is disputable and the question arises whether the assign-

31. As to the effect upon contracts made before the enactment of the prohibitory law and the theory of the implied term or theory of the disappearance of the basis or foundation of the contract see McNair, *Frustration of Contract by War*, (1941) 57 LAW Q. REV. 173, 174.

32. Issued August 1, 1941.

33. Comment, (1941) 41 COL. L. REV. 1039, 1054; THIESING, *supra* note 3, at 21.

ment may not be prohibited by the catch-all clause.³⁴ When the transfer of the credit in a bank to another bank is prohibited under section 1 A, it cannot be allowed to obtain the same economic effect by an assignment made by the creditor of the first named bank to another person. In such case the assignment seems to be an evasion of the prohibition.

We have seen that section 1 F prohibits the acceptance of a draft. The acceptance means the undertaking of an obligation toward an unlimited number of persons who might acquire the note by indorsement as a means of transfer. Public Circular 2 declares this transaction to be within the scope of the prohibitions for the obvious reason that the transfers may aggravate or avoid the control of the asset. That reasoning seems to justify the application of the catch-all clause to any assignment by which a similar situation is created.

One of the tendencies of the foreign funds control is to preserve the *status quo* of the blocked assets and to prohibit their passing from the secure sphere of a controlled situation into a less secure sphere where non-blocked persons or interests may interfere and the result might be an evasion or avoidance of the control itself.

As to the interpretation of the regulations it cannot be overlooked that they expressly exclude evasions by indirect device or tricks and require a wide construction where a transaction, seemingly innocent, can be easily used as indirect device or trick. Should this broad interpretation include an act not injurious to the country, a license may be applied for and will be granted by the Treasury Department where the refusal would create hardship.³⁵

Payment to the assignee, requires authorization by license. Commission for Polish Relief v. Banca Nazionale a Rumanie, 262 App. Div. 543, 546-7, 30 N. Y. S. (2d) 690, 693-694 (2d Dep't 1941). "It [the Order] does not prevent the assignment of the defendant's claim against such a bank in a way conveying effectually to the assignee the title to the claim. The prohibition as indicated extends only to the payment or transfer of the funds. Clearly the sole purpose of the order was to prevent the funds of certain foreign nations, including Rumania, or their nationals, from falling into the hands of the aggressor Axis powers. To accomplish this proper result and for no other or different purpose, the banks in this country are prohibited from paying out or transferring credits to such foreign nations or their nationals, without first obtaining the required license from the Treasury Department. It is more than clear that neither the government nor its Executive intended to do away with a creditor's right to attach 'frozen' or 'blocked' funds or with the debtor's right to assign to another his claim to such funds." In Kalnin v. Kleewen, N. Y. L. J., Nov. 15, 1941, p. 1515, col. 3, the assignment was made in Latvia. The court held that the Order does not prohibit the making of an assignment outside the United States but did not investigate whether the assignment was deemed to be valid if made within the United States.

34. See Order, section 1 F.

35. This point of view is stressed in the English case of Stockholm Enskilda Bank v. Schering Ltd., 57 T. L. R. 289 (1941), noted in 57 LAW Q. REV. 162.

Transfer of Credit, Payments and Other Transactions

Section 1 A and B prohibit banking institutions³⁶ from transferring credits to another bank within or without the United States and from making or receiving payments.

The opening of an account with a bank by a blocked national is not a transfer of credit and there is no reason why this transaction should be prohibited. The account once created becomes automatically blocked and money of a blocked national, up to this time uncontrolled, is brought under the control of the State. On the other hand, such opening of an account is regularly achieved by a payment or a transfer of credit, both prohibited by section 1 A and B. As far as we can ascertain the New York banks open such accounts without a license. General License No. 1 permits payments and transfers of credit to a blocked account and the inference can be drawn that the opening of such an account is also within the scope of this provision. However, the general license does not include transactions in foreign exchange. Therefore, a blocked national, arriving in the United States, cannot without a special license open a bank account by paying foreign money to the bank, nor can he exchange the money into American dollars, because this cannot be done since payment is a transaction falling under section 1 C. It seems, however, that the banks treat such exchange of American dollars for foreign currency, not as a payment, but as a transaction, *sui generis*.

Payments made by a non-blocked person to a blocked national within the United States are not prohibited by section 1 A-E (except where the provision in F may apply). Section 5 A defines a transaction as "any payment or transfer" to any blocked country or national. But this definition expressly refers only to section 1 (i) and (ii) and therefore explains only the notion "transaction" in general. It does not increase the number of the prohibited types of transactions in section 1 A-F. A, a non-blocked person wants to support his friend B, a blocked national. He gives him a check for \$100. The bank cannot pay the check to B.³⁷ If A himself draws the money from his bank and pays the sum to B the transaction seems to be allowed. With this exception, *gifts* are prohibited since they require actual or constructive delivery and cannot be performed without violation of section 1 A-E. Where a gift is made by a deed, section 1 F will apply in most instances.³⁸

An interesting question arises in the frequent cases where a non-blocked American becomes the heir or legatee of a blocked national, residing abroad. Under many European laws the heir at law or beneficiary under a will automatically becomes the owner of the foreign assets.³⁹ However, he retains

36. See note 29, *supra*.

37. Order, section 1 B.

38. *Cf.* Comment, (1941) 41 COL. L. REV. 1039, 1050, n. 64.

39. Principle of *successio universalis*. "*Hereditas nihil aliud est, quam successio in universum jus, quod defunctus habuerit.*" Code of Justinian (D. 57, 17, 62).

the right to renounce the inheritance within a certain period in which case other heirs or other persons may obtain automatically the ownership. Can the American heir renounce his succession without a license: Or can he, failing to get the license, be compelled to keep the assets? Where the inheritance consists of real or personal property, except money, we find no prohibition of a renouncement. When it consists of foreign money, section 1 C would apply and prohibit the renouncement as a transaction in foreign currency. As any property can be exchanged into foreign money the result is not satisfactory, particularly as most inheritances consist of both kinds of property and there cannot be partial acceptance and partial renouncement.

Procedural Problems

Where a complaint is brought to enforce a transaction prohibited under the Order, the question arises whether the lack of a license is a good defense. The suit itself cannot be regarded as a "transaction" falling under the Order. It represents only a method of obtaining the performance of a transaction through the aid of the courts. May a court decree a performance which is at present illegal and punishable and which may become unenforceable in the event of refusal of a license? In *Kalnin v. Kleewen*⁴⁰ the City Court held that the orders "would not prevent the maintenance of a suit to determine rights between litigants; they apply primarily to the removal of funds to a foreign country."

The New York Supreme Court likewise denies that the Order interferes with judicial proceedings or in itself prevents an adjudication of liability. "Perhaps if judgment be rendered, a license to pay will be forthcoming".⁴¹ The courts assume that the Federal Government will cooperate by licensing the transaction in question to enable the court's judgment to be enforced.⁴²

Even the attachment of the defendant's bank account in New York by which the court obtained jurisdiction requires no license and the Order by which the accounts are "blocked" or "frozen" is held not to have rendered those accounts unattachable.⁴³ A different view seems to operate in *Bollack v. Societe Pour Favoriser le Developpement du Commerce*.⁴⁴ The plaintiff sued for conversion to recover from the defendant, a French Corporation doing

40. N. Y. L. J. Nov. 15, 1941, p. 1515, col. 3.

41. *Sabl v. Laenderbank*, N. Y. L. J., Oct. 29, 1941, p. 1268, col. 7. The court applies this rule with reference to the Austrian Foreign Exchange Laws promulgated by Germany, but apparently applies the same rule to the question of a license by the Federal Reserve Bank; the necessity of such a license is not even mentioned.

42. *Milbert v. Parent*, N. Y. L. J., March 5, 1941, p. 999, col. 2. In case of refusal of a license by the Federal Reserve Bank there is no resort to the courts of New York since the Federal Government has exclusive jurisdiction. *Schmoll, Inc. v. Federal Reserve Bank of N. Y.*, 286 N. Y. 503, 37 N. E. (2d) 225 (1941).

43. *Commission for Polish Relief v. Banca Nazionale Rumaniei*, 262 App. Div. 543, 30 N. Y. S. (2d) 690 (2d Dep't 1941).

44. N. Y. L. J., Sept. 4, 1941, p. 494, col. 4.

business in New York, the possession of securities delivered to it at New York City for plaintiff's account or the value thereof and damages for the detention. The first defense was that the plaintiff as a French national was deprived of the securities, deposited in New York, by a confiscation decree of the French government. The second defense was that the plaintiff had not procured a license from the Secretary of State for the transfer of the securities. The court denied the motion to strike out both defenses.⁴⁵ As to the second defense the court held that a demand is a prerequisite to both an action for replevin and conversion and since there can be no transfer of the securities without license, the defense may be directed only to showing a valid excuse for failure to comply with a demand. Thus, the court insists that the plaintiff should apply to the Federal Reserve Bank for a license before any "demand" can be made on a defendant who declines to perform for quite another unalterable reason, to wit: confiscation which cannot be eliminated by the license. The demand is hardly a transaction under section 1 or 2 of the Order. A license was only required for the performance. Furthermore, we should not impose a duty on the plaintiff to apply for a useless license nor on the Federal Reserve Bank to investigate cases where the allegedly liable person declines the performance for reasons outside the foreign funds control. The better view seems to be to hold the defense as insufficient unless the defendant alleges that he was ready, willing and able to perform under a license.⁴⁶

In *Brown and Ano v. J. P. Morgan & Co., Inc.*,⁴⁷ funds of a blocked national on deposit with the defendant were attached by the plaintiff. Among other defenses the defendant pleaded that under the Order a license had to be obtained by the plaintiff from the Treasury Department for the payments of the sum demanded and that no such license had been granted. The Court held that the duty to apply for a license rested on the defendant and not on the plaintiff. This seems to be the better and more reasonable view. Under the German Foreign Exchange Law no license is required for a law suit but the court may adjourn the case at any time upon request of one of the parties

45. As to the first defense the court justifies its opinion under *U. S. v. Belmont*, 301 U. S. 324 (1937). But the present political and economic conditions are quite different; see pp. 000-000.

46. A transaction without license being illegal, the lack of a necessary license should be considered by the court *ex officio*. Decisions like *Sabl v. Laenderbank*, N. Y. L. J., October 29, 1941, p. 1268, col. 7, where the question of a license is not considered, seem to indicate that the court does not hold a license to be prerequisite for an adjudication of liability.

47. N. Y. L. J., Nov. 26, 1941, p. 1665, col. 4. The Court held that by no fair, reasonable and sensible construction can an intention be implied from the Order "to interrupt the orderly and established processes of the law, or to impair the efficacy of judicial process or to interfere with or obstruct the administration of justice, or to inhibit the delivery of such property into *custodia legis*, or to prevent the courts, their processes and officers from pursuing and discharging their normal duties and functions."

until a license is procured. In Germany and in Switzerland a license is necessary for the execution on property of a "blocked" person.⁴⁸

Problems of Conflict of Laws

The important question arises, whether foreign exchange laws are to be recognized and applied by the courts of a country where its courts have jurisdiction and the case is generally to be adjudicated under the foreign law. Does this mean that the exchange restrictions of the foreign country govern the case and that the defendant is entitled to refuse the performance prohibited under such restrictions? The question does not seem to have been definitely settled, particularly not in consideration of the present world situation. Up to the present war the European countries with the exception of Great Britain have regularly rejected the idea of applying or recognizing the exchange laws of foreign countries. Exchange restrictions are held to have no extra-territorial effect and to be a violation of the Public Order.⁴⁹

The consideration that the United States cannot expect recognition of their foreign funds control in European countries, could not affect decisions of the courts in this country, as long as there was no foreign funds control in the United States. But this country's point of view might now be changed.

In some cases where the Soviet Government confiscated the property of their nationals, the New York Court of Appeals held that such confiscatory decrees were against the public policy of the United States and did not prevent the victim from obtaining relief here as far as jurisdiction could be acquired by attachment.⁵⁰ Subsequently the United States recognized the Russian Soviet Government and the Supreme Court took the point of view that by this recognition all decrees of the Soviet Government as a *de jure* government were validated *ex tunc*. The confiscatory decrees were recognized, unless American citizens were affected, and applied to assets within the United States.⁵¹

The Court of Appeals of New York, for the same reason overruled its former decisions and denying an extra-territorial effect to the constitutional

48. DAS DEISENRECHT EUROPAS, *supra* note 2, at section on Germany, Chapter 9 and Switzerland Chapter 9.

49. Germany, decision of Kammergericht, Oct. 27, 1932; (1932) JURISTISCHE WOCHENSCHRIFT 3773 (The Hungarian foreign exchange laws are irreconcilable with the German laws). Switzerland: decision of Schweizerisches Bundesgericht, 60 BGE II, 390; 64 BGE I, 273. Schweizer Juristen-Zeitung 38. Jg. S. 33 (July 15, 1941) declares the application of German foreign exchange laws as against public policy of its own country. We find the same point of view in the decisions of the highest courts of The Netherlands, March 30, 1936, of former Austria Sept. 25, 1934 in (1936) Juristische Wochenschrift 1870, 1871, and of Czechoslovakia Nov. 3, 1933, in (1934) Juristische Wochenschrift 1136.

50. Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 147 N. E. 703 (1925); Dougherty v. Equitable Life Assur. Soc., 266 N. Y. 71, 193 N. E. 897 (1934).

51. United States v. Belmont, 301 U. S. 324 (1925).

protection as to property, applied the same rule as the United States Supreme Court.⁵²

These decisions seem to indicate that the rule would not be the same where the government is not recognized by the United States, e.g., the German Government in the Bohemian Moravian territory, in Belgium and all other occupied countries. But in *Werfel v. Zivnostenska Bank*,⁵³ where the plaintiff sought recovery of money deposited with a bank in Czechoslovakia, reversed the judgment for the plaintiff rendered by the Supreme Court and recognized the validity of the foreign exchange laws promulgated by the German Government as a *de facto* government. The complaint was dismissed.⁵⁴

In *Branderbil v. Hamburg America Line*⁵⁵ the Appellate Term held "that the contract of passage insofar as it related to the right to demand a refund upon cancellation of the scheduled sailing, was performable in Germany and hence all matters connected with its performance are governed by the laws of Germany. Since the action is between German nationals on a contract performable in Germany, the so called *Devisen* (foreign exchange) laws of that country must be held to apply, 'however objectionable' we may consider them. (*Holzer v. Deutsche Reichsbahngesellschaft*, 277 N. Y. 474-479). Under the *Devisen* laws plaintiff is entitled to refund only in blocked marks, payable in Germany."⁵⁶

In two recent cases, the New York Supreme Court gave judgments for the plaintiff and distinguished the *Werfel* case as decided by the Appellate Division on the ground that in the *Werfel* case a license to pay the deposit had been made and denied by the foreign government, whereas in the case under consideration no such application had been made.⁵⁷ The latter case⁵⁸ was

52. *United States v. The Manhattan Co.*, 276 N. Y. 396, 12 N. E. (2d) 513 (1938).

53. 260 App. Div. 747, 752, 23 N. Y. S. (2d) 1001, 1005 (1940): "It is impossible to treat such decrees as violating the laws of nations and as not subject to respect by the courts of the United States." See also *The Denny*, 40 F. Supp. 92 (D. C. N. J. 1941).

54. The Court of Appeals reversed this judgment and granted a new trial. *Werfel v. Zivnostenska Banka*, Law Report News, Nov. 28, 1941, p. 7. Defendant held not entitled to summary judgment. Where on a motion for summary judgment the record as submitted by both parties reveals the existence of conflicting issues of fact, which can only be resolved by a trial, summary judgment should not be granted. Upon such a motion, the deciding consideration is the existence of conflicting issues of fact rather than the sufficiency of the pleadings considered without the supplementary affidavits. Among the issues to be tried are the terms of the contract; what is the foreign law which either party claims to be applicable and in what respect may such law have been rendered inoperative by reason of events happening subsequent to the making of the contract.

55. N. Y. L. J., Nov. 26, 1941, p. 1673, col. 4. See also *Steinfink v. North German Lloyd S. S. Co.*, 176 Misc. 413, 27 N. Y. S. (2d) 918 (1941).

56. We leave aside the question whether the duties arising out of the transportation contract having become imperformable are actually only to be performed within Germany.

57. *Sabl v. Laenderbank*, N. Y. L. J., Nov. 29, 1941.

58. *Milbert Importing Corp. v. Parent*, N. Y. L. J., Mar. 5, 1941, p. 999, col. 2.

decided on the ground that the bank deposits were located in the United States and not abroad.

It is submitted that the result of the *Werfel* case in the Appellate Division is unsatisfactory from an equitable point of view. Nevertheless from a legal standpoint we are unable to find that the "distinctions" mentioned above solve the problem or are justified. The legal question remains in all these cases subject to foreign laws, whether or not we are compelled to apply the funds control laws of the foreign country. It has been suggested that the foreign exchange laws of foreign countries need not be applied by the courts of this country.⁵⁹ We believe that this view is justified, particularly under the present circumstances.

First of all, in the field of foreign exchange laws, which protect the currency and assets within a certain country, the distinction between persons within the country and persons without the country and not the distinction between citizens and non-citizens is that upon which most of these laws are based according to the aim and purpose of foreign funds control.⁶⁰

Foreign exchange regulations as intended and applied at the present time, are weapons of economic warfare, often as important as measures of military warfare.⁶¹ If for no other reason, this consideration alone should exclude the application of the exchange restrictions of certain countries in the American courts.⁶²

59. Weiden, *Foreign Exchange Restrictions*, CONTEMPORARY LAW PAMPHLETS, series 1, no. 11, p. 43: "1. Foreign Exchange Restrictions have no extraterritorial effect regardless of the intention of the foreign legislation. They leave the debt intact. They regulate only the stream of capital from one country to another. The American Court has to give judgment in its own currency. . . ." The author, in an able discussion, shows that the restrictions interfere with the interests of the American creditors to a greater extent than a foreign bankruptcy law and are not entitled to a higher degree of recognition. That they are contradictory to our public policy because of their discriminatory effect and their specific aims.

"It is submitted that the application of conflict rules should in no case thwart the purpose of the Order." Comment, (1941) 41 COL. L. REV. 1039, 1055. See also Cohn, *Currency Restrictions and the Conflict of Laws* (1939) 55 L. Q. REV. 552, 557.

60. The German Foreign Exchange Act of Dec. 12, 1938. (Reichsgesetzblatt I, 1733) § 5; see the Order, section 5 E.

61. The courts of Switzerland—a country with a public policy very similar to ours—do not apply foreign exchange laws of other countries even in cases where under Conflict of Laws rules foreign law has to be applied. Cf. DAS DEVISENRECHT EUROPAS, *supra*, note 2, at section on Switzerland, Chapter 3, II.

62. Ellis, *Exchange Control in Central Europe*, 59 HARVARD ECONOMIC STUDIES, 290. BINDER, PRACTICAL ASPECTS OF FOREIGN PROPERTY CONTROL, 2: "In the economics of war foreign exchange control indeed plays an important part. The belligerents use this control. . . . The leader of the non-belligerent democracies, the United States, has unhesitatingly adapted itself to the lightning necessities of economic political strategy. Though hampered by delicate problems of foreign policy which had to be handled by the State Department, the Treasury has blow by blow replied to every conquest by every

We are not called upon to respect foreign economic warfare rules. That does not mean that our courts would not have to give effect to the exchange restrictions of friendly nations. No uniform rule can be applied and the political situation has to be taken into consideration. We might expect that our courts would follow the ideas as expressed by Justice Pecora in *Amstel Bank, N. V. v. Guarantee Trust Company of New York*⁶³ that "In withholding recognition to the Nazi régime in continental Netherlands, the government of the United States has made a determination of the policy which our courts should follow. Therefore, any German decree promulgated in the Netherlands should be given no force or effect whatsoever in the determination of questions involving property in this State." The importance of political considerations is stressed too in *Sullivan v. The States of Sao Paulo and of Rio Grande do Sul*,⁶⁴ where the foreign funds control of a foreign State, with which we are in amity, is indirectly recognized.

Neither recognition nor force and effect should be given to any expropriation done forcibly and wrongfully by an aggressor nation.⁶⁵

But the Netherland decrees, mentioned *supra* footnote 6 were upheld in American Courts as "a measure of protection not of expropriation. Its purpose is to conserve not to confiscate, to protect the rights of individuals not to destroy them."⁶⁶

According to the circumstances of the case the following considerations may apply as well: Foreign exchange regulations are of fiscal character. Their purpose is the strengthening of the financial power of the government or country and they are handled and executed by the financial department of the government. For this reason they have no extraterritorial effect.⁶⁷ Furthermore, they contradict the public policy of the other country where performance can be had or compelled. These laws may *de facto* prevent or delay payments to be made by a person within the country but cannot impair contractual rights or property of persons without the country.⁶⁸ These reasons apply with greater force where a country for its own emergency purposes is

aggressor since April 1940". Dietrich, *The International Significance of the Foreign Exchange Law* (1935) JURISTISCHE WOCHENSCHRIFT 3014: "Emergency Laws which are directed as warlike or economic measures against certain countries, are not recognized either by the inimical or the neutral countries" (translated). The article denies that the German foreign exchange regulations have the character of a warlike measure.

63. N. Y. L. J., Nov. 29, 1941, p. 1728, col. 6. Cf. *Feuchtwangner v. Central Hanover Bank and Trust Co.*, 27 N. Y. S. (2d) 518 (1941).

64. 122 F. (2d) 355 (C. C. A. 2d 1941).

65. *Price v. Gestia, Inc.*, N. Y. L. J., Dec. 10, 1941, p. 1900, col. 6.

66. *Anderson v. N. V. Transandine Handelsmaatschappy, et al.*, N. Y. L. J., May 25, 1941, p. 2320, col. 5.

67. Weiden, *op. cit. supra*, note 61, at 13.

68. This point of view is stressed by the following German authorities: 151 Entscheidungen des Reichsgerichts in Zivilsachen 116; Decision of Kammergericht (1936) JURISTISCHE WOCHENSCHRIFT 2449; see also note 2, *supra*.

compelled to control the foreign funds and the recognition of laws of another country would weaken the effect of the application of its own regulations.

The restricted function of such laws leads to the question whether they are substantive or adjective laws. As we have already seen they have no expropriatory effect⁶⁹ and do not deprive anyone of his ownership or right. They restrict only certain functions and this only temporarily. That contracts, intended to be in *fraudem legis* or *contra legem*, may be void under such regulations does not determine their character. We may well ask: whether the application of foreign laws of that kind is to be denied on the ground that their true character is an adjective one?

The conclusion is, that under the rules of conflict of laws, comity may be urged to give effect and recognition to foreign laws, but foreign exchange legislation of other countries is purely local and should have no extraterritorial effect unless advantageous to the economic policy of the United States.

69. See *supra*, notes 33, 48.