2ND CIVIL NO. **13985**

In the District Court of Appeal

SECOND APPELLATE DISTRICT

State of California

LEON B. BROWN and HARRY ALBERT, as Trustees under the Last Will and Testament of Anna D. Brown, Deceased, and Nadina R. Kavinoky,

Plaintiffs and Respondents,

vs.

Y. OSHIRO,

Defendant and Appellant.

APPEAL FROM SUPERIOR COURT OF LOS ANGELES COUNTY
HON. BEN R. RAGAIN, JUDGE.

BRIEF OF JAPANESE-AMERICAN CITIZENS LEAGUE, AMICUS CURIAE.

JAPANESE-AMERICAN CITIZENS LEAGUE,
AMICUS CURIAE,

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Statement of Questions Involved.

Does the record disclose a proper case for the application of the doctrine of commercial frustration due to governmental acts required in the prosecution of the war?

Should the judgment be reversed and the cause returned for a new trial in order that appropriate and adequate evidence may be adduced, so that the trial and appellate courts may be able to apply the doctrine of commercial frustration justly?

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BRIEF OF JAPANESE-AMERICAN CITIZENS LEAGUE, AMICUS CURIAE.

The Interest of the Japanese-American Citizens League.

The Japanese-American Citizens League is a national organization representing approximately 20,000 American citizens of Japanese ancestry. It was organized in 1920; it was incorporated in 1937; it is maintained to protect the interests of its members and of all loyal American citizens of Japanese ancestry.

Many of the members of said League are in the same position as the appellant herein, in that

they have entered into leases or other contractual obligations which it is either impossible for them to fulfill by reason of the military evacuation orders, or which obligations could be fulfilled by them only as the result of unconscionable hardship.

The Japanese-American Citizens League, in behalf of its members, as well as all other Japanese, actively cooperated in the speedy and efficient execution of the military evacuation orders.

Thus prior to the evacuation on February 21, 1942, at the San Francisco hearings, of the Tolan Congressional Committee, Mike Masaoka, President of the Japanese-American Citizens League, assured the Committee that "if the military say 'move out' we will be glad to move".[1]

Governor Culbert Olson, in his testimony before the Committee, reported that he had

> "called into the Governor's office representatives of the Japanese-American population, professional men, businessmen, farmers, and publishers, and talked the situation over with them . . . And I think practically

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[1]Hearings before the Select Committee Investigating National Defense Migration, House of Representatives, 77th Congress, 2nd Session, Part 29, page 11148.

all of those representatives were in good faith when they said whatever program is decided upon with regard to the removal of the entire Japanese population from any area in California, or from the State, they would follow. In fact, they were willing.

"I asked them if they wouldn't be willing to take a leadership in it, to show it was participated in by the Japanese-American citizens themselves, for their own protection as well as proof of their loyalty to a program which would be very helpful in the entire war and defense situation.

"They all stated that they would be willing to do it; to propagandize it; to take the leadership in it; and participate in programs for removal, and many submitted various programs, by way of suggestion, of voluntary evacuation for all of the adult Japanese population in the military areas."[2]

On June 15, 1942, before a Congressional Hearing on appropriations in Washington, D. C., Milton S. Eisenhour, Director of the War Relocation Authority, in charge of the civilian control over evacuation, in answer to a question as

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[2]*Ibid.*, Part 31, pages 11629 and 11631.

to whether the Japanese had cooperated in the evacuation, replied:

> "Remarkably cooperative. For example, the Japanese-American citizens have an organization called the Japanese American Citizens League, and it has carried on a most vigorous educational program among the total population, urging 100 percent cooperation.
>
> "In fact, I just cannot say things too favorable about the way they have cooperated under the most adverse circumstances."

That great financial loss would inevitably befall the subjects of the evacuation orders has always been generally recognized. On March 2, 1942, Lieut. Gen. John L. DeWitt, Commanding the Fourth Army and Western Defense Command, announced that measures would be taken "to safeguard as far as possible, property and property rights, to avoid the depressing effect of forced sales, and generally to minimize resulting economic dislocations".[2a]

[2a] Tolan Committee Report, House of Representatives, 77th Congress, 2nd Session, Report No. 2124, page 3.

On March 29th, General DeWitt publicly stated:

> "No Japanese need sacrifice any personal property of value. If he cannot dispose of it at a fair price, he will have opportunity to store it prior to the time he is forced to evacuate by exclusion order. Persons who attempt to take advantage of Japanese evacuees by trying to obtain property at sacrifice prices are un-American, unfair, and are deserving only of the severest censure."[3]

Because Japanese, both American citizen and alien, have cooperated in the military orders, and have already endured suffering unnecessary to recount here, the Japanese-American Citizens League urges that the courts should visit additional hardships upon Americans of Japanese ancestry only where the law requires it, and equity and fair dealing permit it.

Hence, the appearance of the League herein *amicus curiae*.

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[3]*Ibid.*, page 6.

ARGUMENT.

I.

The Doctrine of Frustration of Purpose.

The doctrine of frustration of purpose, that is, that parties to an agreement are excused from a strict performance when the purpose of the agreement becomes impossible of fulfillment, is acknowledged by both parties litigant herein.

Thus it is recognized by the respondent in his discussion of *Johnson v. Atkins,* 35 Cal. App. (2d) 430, "as resting upon the theory that there is implied in every contract a condition that it shall terminate if the thing or state of affairs which makes possible the desired object or effect ceases to exist."[4]

The controversy herein revolves about its application in the instant case.

II.

The Application of the Doctrine of Commercial Frustration Is Governed by the Facts of Each Case.

Numerous exhaustive annotations concerning the rights of parties to contracts, the performance of which is frustrated by war conditions, or acts of the government in prosecution of war, are at hand. See 9 *A. L. R.* 1509; 11 *Id.* 1429;

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[4]Respondent's brief, page 9.

15 *Id.* 1512; 37 *Id.* 1499; 137 *Id.* 1199; 90 *U. Pa. L. R.* 533 (1942); 91 *Id.* 267 (1942); 20 *Tex. L. R.* 710 (1942); 42 *Col. L. Rev.* 1058 (1942). (The *A. L. R.* annotations contain the statement that there can be no excuse for failure to comply with a lease. As indicated herein later, this conclusion is based upon English cases and is not the law in this country. For example, the American courts have consistently applied the frustration doctrine, where the facts of the case warranted, in leases for saloon purposes, where such purposes were subsequently declared illegal by legislative action.)

See, also, 22 *A. L. R.* 821; 32 *Am. Jur.*, Landlord & Tenant, Sec. 489; and *Industrial Development and Land Company v. Goldschmidt,* 56 Cal. App. 507 (1922).

Recent developments in the cases involving the application of the doctrine of commercial frustration indicate a more liberal judicial attitude—an attitude seeking to correct hardship and inequitable consequences of unforseen circumstances.

Canrock Realty Corporation v. Vim Electric, 37 N. Y. S. (2d) 139 (1942);

Colonial Operating Corporation v. Hannan Sales, 36 N. Y. S. (2d) 745 (1942);

Signal Land Corporation v. Loecher, 35 N. Y. S. (2d) 25 (1942);

Jefferson Estate, Inc., v. Wilson, 25 N. Y. S. (2d) 582 (1942);

Davidson v. Goldstein, Appellate Dept. Sup. Ct. L. A., Civ. A. 5446;

Schantz v. American Auto Supply Co., 36 N. Y. S. (2d) 747 (1942).

However, in the following recent cases, the courts have not applied the doctrine because the facts of each particular case did not warrant such application.

The Wildwood, 41 Fed. Supp. 956 (1941);

Kunkel Auto Supply Co. v. Leech, 139 Nebr. 516, 298 N. W. 150 (1941);

Robitzek Investing Co. v. Colonial Beacon Oil Co., 37 N. Y. S. (2d) 772 (1942).

It would appear, moreover, that it is insufficient to excuse non-performance of a contract where war conditions have merely rendered performance more difficult or expensive. See the authorities cited above.

III.

The Doctrine of Commercial Frustration Applies to Leases.

The respondent contends that the doctrine of commercial frustration is inapplicable to a lease because it is an estate in property. (Resp. Br. p. 9.) The authorities cited, however, indicate the views of the English courts rather than the experience in this country.

The many cases in which courts of this country have declared leases inoperative, because of changed conditions due to governmental acts, resulting in a loss of use for the purpose for which the premises were originally leased, argue against the conclusion that the doctrine does not apply to leases in this country. See 42 *Col. Law Rev.* 1058 (1942), where the writer indicates that there is general dissatisfaction with the theory that a lease is a conveyance; and that the doctrine, as applied to leases, is an exception to the rule that a lease is a conveyance instead of a contract.

In addition to the cases referred to by counsel for the appellant, the following may be cited in support of this conclusion:

Swiss Oil Co. v. Riggsby, 252 Ky. 374, 67 S. W. (2d) 30 (1933);

McCullough Realty v. Laemmle Film Service, 181 Iowa 594, 165 N. W. 33 (1917);

Doherty v. Monroe Eckstein Brewing Co., 198 App. Div. 708, 191 N. Y. S. 59 (1921);

Heart v. Tennessee Brewing Co., 121 Tenn. 69, 130 Am. St. Rep. 753 (1908);

Greil Bros. v. Mabson, 179 Ala. 444, 60 So. 876 (1912);

Bowditch v. Heation, 22 La. Ann. 356 (1870);

Kaiser v. Zeigler, 115 Misc. 281, 187 N. Y. S. 638 (1921);

Adler v. Miles, 69 Misc. 601, 126 N. Y. S. 135 (1910).

But see the following cases in California where the courts on the basis of the facts involved, did not apply the doctrine.

Grace v. Croninger, 12 Cal. App. (2d) 603, 65 Pac. (2d) 940 (1936);

Security Trust and Savings Bank v. Clausen, 44 Cal. App. 735, 187 Pac. 142 (1919).

IV.

The Record Fails to Furnish the Court With Sufficient Facts Disclosing Either the Intention of the Parties or the Present Ability of the Lessee to Use the Premises for the Purpose for Which It Was Leased.

The record below is barren of any factual information which could assist in the court in determining the intention of the parties as to the purposes for which the premises were leased.

Some of the information which might enable the court to determine the facts appears in the briefs of counsel. It is to be observed, however, that counsel censure each other for raising any facts which are not in the record. Counsel have substituted recriminations for facts.

The application of the doctrine of commercial frustration is primarily governed by the facts of the case; and where the record is incomplete the court should direct that the necessary factual information, be furnished, before a decision is made. The record should contain definite information concerning the intention of the parties as to the principal use of the premises, the location of the premises, the present ability of the lessee to use the premises for the purpose for

which leased, and the personal occupancy of the premises by the lessee or the personal supervision over the business by the lessee. In connection with the latter point, it is to be observed that the lease provides for personal occupancy, and the stipulation indicates that the lessee personally supervised the business but did not reside at the premises.

It is a matter of common knowledge that persons of Japanese ancestry have resided in a portion of the City of Los Angeles, which is referred to as "Little Tokyo" and which is centered at First and San Pedro streets.

Certain facts of common knowledge may properly be brought to the attention of this Court by way of judicial notice; thus in "Rider's California: A Guide-Book for Travelers", compiled under the general editorship of Fremont Rider by Frederic Taber Cooper, A.M., Ph.D., Macmillan Co. N. Y. 1925, we find (p. 442):

> "San Pedro Street, E. of Los Angeles St., is interesting mainly because it passes through the Japanese Quarter, which extends from Market to 2nd St., centering on 1st St. which for several blocks E. of Los Angeles St. is lined with shops, restaurants and hotels bearing Japanese signs."

Again in "Official Tourist Guide—Southern California", November, 1933, published by All-Year Club of Southern California, Ltd. (p. 19):

> "A day's exploring can include gay Olvera Street (situated almost in the shadow of the great City Hall), a genuine old Mexican street market with sidewalk cafes, senoritas and curious latin merchandise . . . Ferguson Alley is nearby Chinatown, a favored location for movie-making . . . *and three blocks south, the Japanese Quarter centering on First Street* . . ." (Italics supplied.)

Similarly, in "California: A Guide to the Golden State", compiled and written by the Federal Writers' Project of the Works Progress Administration for the State of California, American Guide Series, sponsored by Mabel R. Gillis, California State Librarian; Hastings House Publishers, N. Y. 1939 (p. 209), we read:

> "The 21,000 Japanese, many of them American citizens, have their own shops, restaurants, native-language schools and newspapers, chamber of commerce, and American Legion Post, in the district centering on E. First Street, between Los Angeles Street and Central Avenue."

Finally, Edward K. Strong, Professor of Psychology at Stanford University, in "Japanese in California", Stanford University Press, 1933, states:

> "Los Angeles—Most of the Japanese district is on the north side of East First Street. This side is the older (nearer Chinatown), the more densely settled, and the more substantially built as far as Japanese are concerned."

The record in this case indicates that the premises involved are located at the northeast corner of First and Los Angeles Streets, which is one block west of First and San Pedro streets. In view of the location of the premises in Little Tokyo, and in an area from which all persons of Japanese ancestry have been evacuated, this Court may well determine that it was the intention of the parties to use the premises as a hotel for persons of Japanese ancestry, and for renting office space to such persons exclusively. There are no persons of Japanese ancestry in "Little Tokyo" as a result of the exclusion order.

The Court, too, may take judicial notice of the general effect upon business establishments in "Little Tokyo" by the evacuation orders. Thus the Tolan Committee in its official report,

as early as May, 1942, advised the United States Congress that:

> "In some west coast cities, notably San Francisco and Los Angeles, where evacuation has already been effected, there are marked physical changes in certain districts within the community, which a few weeks previous were thriving business centers. Vacant stores, buildings, offices, and residences, tell the story of the economic disintegration of these 'cities within cities.' As the evacuation proceeds, this deterioration of sections of communities will continue." (Tolan Report, *supra,* p. 13.)

An interesting account of the effect of the evacuation may be found in the Los Angeles Times for July 13, 1942, which reads in part:

> "The area blighted as a result of the enforced desertion by its former Japanese businessmen and residents is centered at First and San Pedro Sts. It extends eastward to the Los Angeles River, north and south for several blocks and westward one block to Los Angeles St.
>
> "Building after building, store after store, the area was used exclusively by Nipponese. They paid their rent, they conducted their businesses—largely among themselves except for tourist trade—and until the outbreak of war were left largely to their own devices.
>
> " 'Little Tokyo' was a city within a city."

V.

Judicial Notice Is Not Adequate Formula.

It is admitted, however, that our Supreme Court has looked with disfavor upon the taking of judicial notice of facts which are in dispute. See *Communist Party v. Peek,* 20 Cal. (2d) 536.

Particularly in cases involving far-reaching consequences should the courts eschew the use of the judicial short-cut of "judicial knowledge" and require the submission of full, precise, and authentic facts, upon which to rest sound judicial opinion.

Thus in *Borden's Farm Products Company v. Baldwin,* 293 U. S. 194, 209, the Court reversed a judgment below because of the inadequate and inconclusive factual determination by the trial court. Quoted with approval as the correct procedure to follow was (at p. 212 *Hammond v. Schappi Bus Line,* 275 U. S. 164, in which the validity of a city ordinance, regulating motor traffic, was challenged. The court observed that in the *Hammond* case:

> "The lower courts had not made findings upon crucial facts."

Said the court:

> "We held that before the questions of constitutional law, both novel and of far-reaching importance, were passed upon by

this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence' . . . Concluding that the case had not been appropriately prepared for final disposition, we remanded it for proceedings in the District Court, 'with liberty, among other things, to allow amendment to the pleadings.' This procedure was in accordance with well-established precedents."

Accordingly the court directed (p. 213):

". . . a similar course should be taken here."

It is to be noted that the constitutional scholars on the court, Chief Justice Stone (then Justice) and Justice Cardozo, concurred in the result, observing:

"We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer."

Compare Justice Brandeis, dissenting (with Justice Holmes) in *J. Burns Baking Company v. Bryan,* 264 U. S. 504, 517.

"Knowledge is essential to understanding; and understanding should precede judging."

Conclusion.

Because of the inconclusive factual record before the court, it is respectfully urged that the judgment be reversed; that a new trial be granted, in order that all of the pertinent facts may be presented to the trial court and available to the appellate courts so that an adequate determination of the important judicial questions may be made.

Some of these facts would be:

1. The intention of the parties as to the principal purpose for which the premises were leased;

2. The actual use to which the premises were put, to the knowledge of the parties; and

3. The effect of the military evacuation orders, not only upon the neighborhood, but upon the premises.

Respectfully submitted,

JAPANESE-AMERICAN CITIZENS LEAGUE,
AMICUS CURIAE,

By A. L. WIRIN,

Counsel.

Received copy of the within for the judge who tried the case this.....day of March, A. D. 1943.

J. F. MORONEY, *County Clerk.*

By....., *Deputy.*

Service of the within and receipt of a copy thereof is hereby admitted this.....day of March, A. D. 1943.

3-9-43—85