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RECENT DECISIONS

ARMY AND NAVY.—*Anderson v. Schouweiler,* 63 Fed. Supp. 802 (1946). This was an action by Virgil M. Anderson against Lloyd Schouweiler under section eight of the Selective Training and Service Act of 1940 (50 USCA Section 308 e, as amended 56 Stat. 724), which provides that any person who, upon entering the military or naval service of the United States has left "a position . . . . in the employ of any employer" shall in the case of a private employer, be restored to such position or to a position of like seniority and pay "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." (50 USCA Sect. 308 b).

The action testing as it does the validity of the rights of the returning veteran is quite important and since this is one of the early cases, it will undoubtedly be cited often to sustain or disprove positions of the relative parties in subsequent disputes.

The facts briefly are these: the plaintiff was inducted into the armed forces in late 1943 and prior to that time for a previous two years had been in the employ of the defendant as manager of the defendant's company in Boise, Idaho. In December of 1944 Anderson was honorably discharged and in January of 1945 made application for reinstatement to his former position, verbally at first, and then in March, by writing. His former employer refused to reemploy him and he now seeks to avail himself of the provisions of the act hereinbefore set out.

Schouweiler contends that the plaintiff was discharged before he left to be inducted, that the plaintiff filed a suit against him while he was in service, that after the plaintiff left he found evidences of mismanagement in his business and, lastly, the petition fails to state a cause of action.

Evidence at the trial brought out some of the salient facts on both sides. The defendant had proferred the job to Anderson originally only after due investigation and the offer was accepted on Schouweiler's terms, too detailed to recount here. Suffice to say the plaintiff came to work and up to the time of leaving had produced as Schouweiler had demanded originally, and the relationship of the litigants was extremely pleasant.

Accounting records admitted to the court showed a tremendous gain in profits, introduced also was a brief sent to the Commissioner of Internal Revenue requesting an adjustment in the plaintiff's salary figure for reasons set out, many of which tend to corroborate the plaintiff's story but not the defendant's. The request for the permission to raise the plaintiff's wages was in conformity with wartime rulings and were obviously asked for in order that the defendant's tax liability would be reduced.

After all the evidence was in, the court found that the various points stressed by the defendant could not sustain a verdict since; a man cannot be barred from a right given him by law because he sought reparation in court for wages withheld from him while a civilian, since this would open the way for untold injustice on the part of employers; that the evidence shown of mismanagement is not conclusive since the test of this is the progress of the business and it did progress; that Congress did not intend such defenses to be raised since they did not provide for such action in the original bill; that when a service man or woman returns, the right he or she has under the Constitution cannot be denied them unless there is clear and convincing proof given the court of the veteran's disability or inability to be reemployed.

For these reasons Section eight of the Selective Service act must be invoked and employee Anderson must be paid his earnings from March 5th, 1945, plus the additional stipulated sums agreed on in open court and such further adjustments as are necessary and not inconsistent with this opinion.

The excellent opinion of Judge Clark in this case will undoubtedly give comfort to many returning service men and women who might be subjected to similar attempts to divest them of their rights under Section 308. The climate of judicial opinion being what it is there is little doubt that the act will be interpreted very strictly and those rights which the veterans were fighting for will blossom into reality if *stare decisis* prevails.

John D. O'Neill.

CONTEMPT—EXTENT OF JUDGE'S POWER TO HOLD FOR CONTEMPT.—People v. Richardson, 65 N. E. (2d) 467, Feb. 14, 1946. This was an appeal on two separate judgments of guilt of direct contempt. The punishment was ten days in the county jail. In the first judgment it was said that Agnes Richardson while a witness on the stand had insulted and abused the court. Judge Trude accused her of not telling the truth, of not searching her mind to attempt to tell the truth. He further charged that she had been coached by Mr. Parker an attorney in the case. There was a denial of this by Mr. Parker. In response to these accusations, Agnes Richardson told the judge that he had made an unkind remark and she resented it. She further told him that his imagination was running away with him.

The court reversed the first judgment on the grounds that the witness had a right to defend herself under the circumstances. It is the duty of the witness to show proper respect to the trial court, but it is

also the duty of the trial judge to maintain his judicial poise and to show due respect for a witness. He should proceed with great caution and deliberation. He showed that he had temporarily lost his usual judicial temperament and good judgment.

The court referred to having filed an opinion in People of the State of Illinois v. Parker, 65 N. E. (2d) 457 in which Judge Trude found Parker guilty of direct contempt for filing with the clerk of the circuit court certain documents in which was contained a serious and wanton charge against the father of Judge Trude. The filing took place a few days before the present case. The transcript showed that Judge Trude had manifested hostility towards Mrs. Richardson during the entire examination. The charge that Mrs. Richardson was being coached in open court by Parker was founded on the statement of the baliff of the court that "she hesitated and he shook his head." This does not even make out a *prima facie* showing.

The second judgment order for contempt was upheld. On this occasion Mrs. Richardson had presented in open court a certain false, scurrilous, defamatory motion in which she said that the court had destroyed certain papers. The filing of the motion was an obstruction of justice and an abuse of the process of the court. It took place in open court in a manner which tended to lessen the dignity and authority of the court. It was for that reason a direct criminal contempt.

Robert W. Moran.

JURISDICTION OF COMMISSION ESTABLISHED TO TRY WAR CRIMINALS.—Application of Yamashita, *Yamashita v. Styer,* Commanding General, U. S. Army Forces, Western Pacific, 66 Sup. Ct. 340, Feb. 4, 1946. ——— This was a denial of the court to an application by General Tomoyuki Yamashita, former commander of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, in which he petitioned for a writ of certiorari to the Supreme Court of the Commonwealth of the Philippines, and the denial of an application to file a petition for writs of habeas corpus and prohibition. The petitioner had been tried as a war criminal by a military commission and had been condemned to death by hanging as a result of his alleged violation of the law of war. The principal grounds for the writs petitioned for are: (1) that the military commission had not been lawfully created, (2) that the charge preferred had failed to charge him with a violation of the law of war, and (3) that the trial procedure had deprived him of a fair trial in direct violation of the Fifth Amendment to the Constitution of the United States of America.

The majority opinion of the court, written by Chief Justice Stone, ruled as follows: (1) as long as a state of peace has not been proclaimed and since the trial of enemy combatants who have violated the law of war is a sanctioned authority of the military who had in this matter acted under orders of the commanding general, namely General of the Army MacArthur, that the commission had been legally created; (2) that the breach of the petitioner's duty in the failure to control the operations of the members of his command, by permitting them to commit the specified atrocities made him liable for culpable failure to perform the duty to so control his subordinates; and that (3) "the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court . . . . They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War," as a result of which it is not a matter for the Supreme Court to decide whether or not the rulings on evidence and the mode of conducting the proceedings by the commission controvene the Fifth Amendment.

A contrary opinion as regards the third point above was voiced by Mr. Justice Murphy in his dissenting view in which he stated . . . . "The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment." By the failure of concretely establishing the personal culpability of the petitioner and "the trial proceeded with great dispatch without allowing the defense time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part."

In supporting Justice Murphy's dissent, Mr. Justice Rutledge in a separate opinion attacked the validity of the commission to try the petitioner and also condemned it for the arbitrary and unjust manner in which the trial was hurried through to completion.

Further importance of this resort of a tried and condemned war criminal to the review of the Supreme Court of the United States is found in the fact that similar procedures may be resorted to in the case of the Nuremburg trials of Nazi war criminals and, further, that condemned Japanese General Mashura Homma whose trial followed in time and location that of Yamashita resorted to similar and as unsuccessful steps to obtain writs of certiorari, habeas corpus, and prohibition after he had been condemned to death for permitting atrocities to be committed by members of his command while he was commander of Japanese forces in the Philippines. The crime for which he was tried and condemned occurred in large part during the surrender of American forces in the spring of 1942 and upon the subsequent notorious Bataan Death March. An interesting addition to his petition that is not to be found so fully developed in the petition of Yamashita is that the commission could not come to an enforceable decision since the accuser was also the judge, that is, party to a trial in which it was to give judgment.

James D. Sullivan.

QUINONES v. LIFE AND CASUALTY INSURANCE CO. OF TENNESSEE (24 So. (2d) 270 ..... La. ..... 1945).— In one of the first cases of its kind to reach the courts the judicial history of aviation took unto itself another enlarging precedent. In *Quinones v. Life and Casualty Insurance Co. of Tennessee* the Supreme Court of Louisiana recognized the rapid wartime development of the Army-Navy Air Transport Service to a position equalling, if not surpassing commercial airlines.

On Oct. 1, 1942, Dr. Pascasio Quinones, a member of the Medical Corps of the United States Army was accidentally killed when a military plane in which he was riding crashed near the City of San Juan, Puerto Rico. At the time of his death Dr. Quinones held a twenty thousand dollar life insurance policy issued by the Life and Casualty Company of Tennessee which named the six minor children of the deceased as beneficiaries. In this case Mrs. Quinones, as tutrix and on behalf of her minor children, seeks to recover the amount of the policy from the insurance company.

The defendant insurance company answered the plaintiff by denying liability for the principal sum of the policy with two alternate defenses. The first defense, denying liability for any amount of the principal sum of the policy, relied on the aviation clause of the policy; the second defense, denying liability for more than one-fifth of the principal sum of the policy, relied on the military service clause of the policy.

The court below rendered judgment in favor of the plaintiff for the full amount of the policy and the defendant insurance company has appealed from the decision.

The defendant argues that Dr. Quinones, at the time of his death, was assuming risks which would not permit insurance coverage according to the policy's aviation and military clauses.

The Supreme Court of Louisiana held that Dr. Quinones' actions did fall within the coverage as permitted by the aviation and military clauses and discussed first the facts which led the court to place the Army-Navy Air Transport Service on the level of a commercial airline as far as the aviation clause of the policy was concerned.

The facts disclosed that Dr. Quinones was a passenger on an airplane regularly operated by the United States Government between Borinquin Field and the City of San Juan. The plane was one of many used before the war for transportation purposes by commercial airlines and after being requisitioned and slightly altered by the Army was used to carry passengers and cargo on this route. The airfields on this route were used by the Pan American Airways in conjunction with the Army and Navy and compare favorably with civilian airfields in the United States. The pilot was an experienced flyer having piloted passenger planes at Borinquin Field for a year and a half prior to the fatal accident. The passengers, members of the armed forces and civilians, were authorized by the commanding officer of the field to make this flight and Dr. Quinones was making the trip under military orders to obtain some serum.

The aviation clause in the policy is as follows: "Aviation. Should the death of the Insured result from operating, or riding in, any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regular passenger route between definitely established airports, only the reserve under this policy shall be payable and said reserve shall be in full settlement of all claims hereunder."

The court pointed out that it recognized the rights of insurance companies to limitations of liability contained in policies and noted that the intention of the parties in the construction of these limiting clauses must be controlling in determining the liability of the insurance companies.

Since the airplane has been proved to be the same as that used by the commercial airlines; the pilot as well qualified as any commercial pilot; the flight regular over an established route and the airfields as well equipped as civilian airports, the only remaining feature to be considered is the fare-paying status of the passenger. It is a matter of fact that Dr. Quinones enjoyed the privilege of travelling by airplane, by government car, or by train. If he had chosen to travel by

train, the Army would have furnished him a railroad ticket and certainly he would have been considered a fare-paying passenger. It seems fair, the court says, to conclude that no distinction should be made between a passenger whose fare is paid directly or indirectly or absorbed by his employer and a passenger who pays directly his own fare.

With all of the qualifications of the aviation clauses satisfied there is no reason why the insurance company should not be liable for the principal sum stipulated in the policy.

The second defense of the insurance company contended that the military service of the insured greatly reduced the principal sum to be paid. However the court held that the limited liability of the insurance company, as modified by its military service clause, pertained only to those cases where the insured was enrolled in the military service with no provision of such action being dealt with in the policy. The policy of the deceased most certainly acknowledged his status as a serviceman and by its acknowledgment grants full recovery of the principal sum, particularly when his death resulted from no hazards of combat.

Thomas Broden.

BOOK REVIEWS

JUSTICE FOR MY PEOPLE.—By Ernst Frankenstein, Dial Press, New York, 1944 — When Anne Morrow Lindbergh, in the days just before the war, impliedly sanctioned a "wave of the future," the most active interventionists roundly damned her views as lacking courage and idealism. In these days just following a war fought for four freedoms, when many a voice proclaims that the wave of the present now engulfing eastern Europe must be accepted with "realism," it is most refreshing to read a book which holds up the Atlantic Charter as a basis of its argument.

We have recently received for review *"Justice for My People"* by the celebrated international lawyer, Ernst Frankenstein. In brief, the work deals with a problem perhaps more tortured today than ever before: that of the seventeen million Jews on earth, a large number of whom are now displaced, homeless, and living in the midst of hostile populations. In concise language covering less than two hundred pages, Mr. Frankenstein states what he believes to be the case for his people, "the test case for humanity."

Mr. Frankenstein, unlike some writers on international problems, is not more fond of the problem than of the solution. He is most specific as to the solution of the Jewish problem. It is "the estab-

lishment of an independent Jewish State, comprising Palestine, west and east of the Jordan, as originally intended by the Allied statesmen."

Whereas it is the legal aspects of the Zionist claims that form the most absorbing portion of the work, the reader will well pause to examine the statement of facts with which Mr. Frankenstein begins his case. This statement involves, first of all, a summary of the history of the Jews and then an account of the causes of anti-Semitism in modern times. While praising the forthrightness of the author here, we need not agree entirely with his view of history. Catholic readers will search in vain for any reference made to the Church other than to place her, without qualification, in a long line of persecutors, of whom the earliest were the Babylonians and the most recent the Nazis.

But the problem cries out for solution, and, Mr. Frankenstein believes, had the terrible persecutions of the past decade and the displacements resultant never taken place, there would still be a Jewish problem to be solved. The uncertainty of the position of the Jews in Gentile society "compels them to strive for security by excelling the Gentiles in merit or wealth, thus exposing themselves anew to envy and hatred, while centuries of exclusion from the soil and most other occupations have estranged these former peasants and craftsmen from the land, and crowded them into a limited number of professions and occupations . . . These facts have obliged the Jewish people to live a life which . . . is unnatural and unsound."

Thus having laid bare the roots of the hatred of the rootless, Mr. Frankenstein examines in succession the solutions which have been proposed to solve the Jewish problem. Christianity, internationalism, Communism, or a general policy of assimilation all seem to him futile. To him homelessness is the basis of the Jew's problem and ". . . the homelessness of a people can be remedied only by the disappearance of either the people or its homelessness."

The solution being Palestine, what legal claim has world Jewry to this land? This right the author finds expressed in Clause 3 of the Atlantic Charter: "They respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them." The right is evidenced in two claims: the ancient claim based on the sovereign ownership of the land by the Jews for many centuries, and the new claim expressed in the Balfour Declaration and the Palestine Mandate.

As to the original claim, Mr. Frankenstein believes that the doctrine of prescription cannot be applied in favor of any rulers of Palestine subsequent to the Jews. We would agree, in that title by prescription arises only out of long-continued possession *where no original source of proprietary right can be shown to exist.* Nor can it be said that

the Jews were severed from their rights through the destruction of the Jewish State and the dispersion by the Romans in 70 A. D. The mere fact of conquest does not deprive the conquered of title unless the conqueror were "in continuous and undisturbed possession" for a considerable time. And, quoting from Oppenheim, the author states "as long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed."

But the Jewish people has not "renounced its rights nor acquiesced in its loss," but rather has it continuously proclaimed in religious practice, in propaganda, and in attempted migrations to the homeland its right to the homeland. And the age of the claim does not affect the justice of the claim.

In delineating the original claim, Mr. Frankenstein looks to three groups of prior claimants in Palestine, taking us down to the year 1922. First, were those early inhabitants of Palestine, subjugated by the Jews three thousand years ago and who have ceased to exist. The author here takes sharp issue with pro-Arab writers of the present, who would assert Arab claims over Jewish claims on the basis of the fact that these predecessors of the Jews in Palestine were Arabs. "The truth is that, with the single exception of the Aryan Hittites, all these peoples, like the Jews and the Arabs, were of the Semitic race and had, like all the Semitic peoples, come from Arabia. They were exactly as much Arabs as the Jews were Arabs."

The second group considered are all the succeeding conquerors of Palestine from the Romans down to the Turks, and these, one after another, have disappeared as distinct nations in history.

The third group, the Turks, — after a sovereignty of four hundred years in Palestine — renounced title to Palestine in favor of the Allied Powers by the Treaty of Lausanne in 1923. But the Allied Powers, in taking over Turkish rights, took them over subject to the provisions of Article 22 of the Covenant of the League of Nations and the Palestine Mandate of 1922. It is in these two documents and the Balfour Declaration that the new claim is found.

Mr. Frankenstein sees the crux of the legal question in whether or not, under the Mandate, Great Britain had the right to dispose of Palestine. Since, under the Mandate, Palestine is to be developed into an independent state, then "the present sovereign is acting only as a kind of guardian for the future sovereign, and the Mandatory Power has no sovereign rights at all. In other words, if there is any legal claim to Palestine, no right of sovereignty can be opposed to it." But the Palestine Mandate itself recognized the old Jewish claim, stating that "recognition is thereby given to the historical connection of the Jewish people with Palestine and *to the grounds for reconstituting their national home in that country.*" (Italics mine).