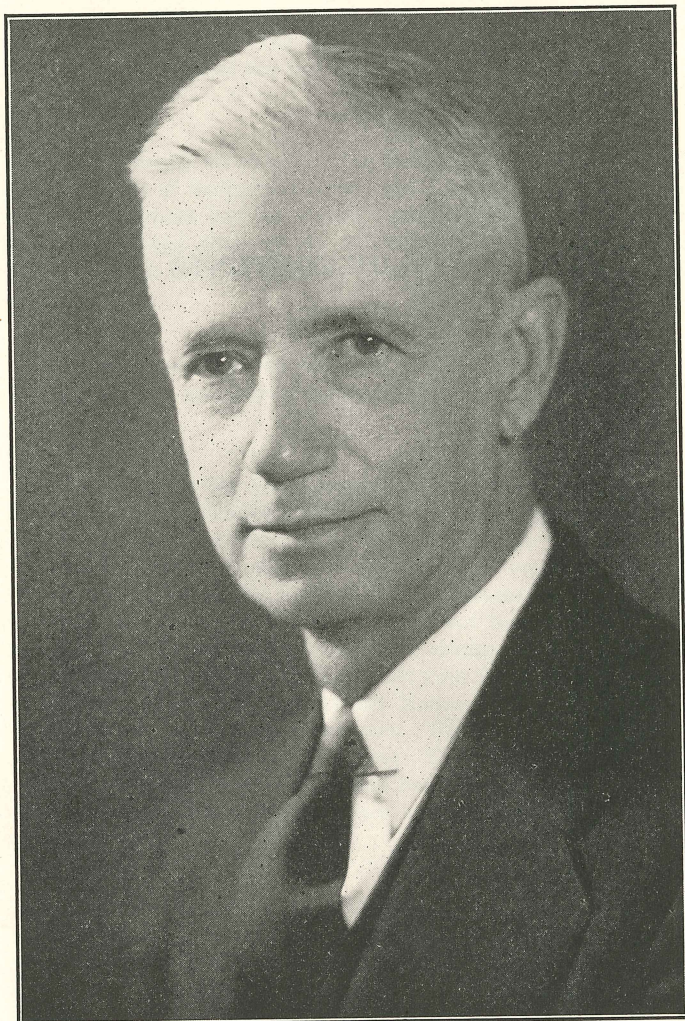


KANSAS JUDICIAL COUNCIL BULLETIN

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E. C. FLOOD
President of the Bar Association of the State of Kansas

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FOREWORD

The frontispiece of this issue of the BULLETIN is the photograph of the Honorable E. C. Flood, President of the Bar Association of the State of Kansas. At the request of the Judicial Council, Mr. Flood has prepared an article on a subject of his own choosing, "The Constitution Goes To War," and the same appears herein. The subject is timely and of interest not only to members of the bench and bar but to legislators and others generally.

We also publish herein an article by the Honorable Grover Pierpont, Judge of the District Court of Sedgwick County, and a new member of the Judicial Council. Judge Pierpont has for several years written the "Fireside Chats" appearing in the several issues of the Journal of the Bar Association of the State of Kansas. His style is distinctive and his article is an interesting expression of his views.

In an early issue we expect to print an article by the Honorable George Templar, the other new member of the Judicial Council.

In this issue we add to the list of lawyers in the military service as printed in our December, 1943, BULLETIN. This supplementary list includes only those names which have been furnished us or have come to our attention casually. We have not made our usual statewide canvass. It is especially desired that anyone aware thereof advise the Council of any omissions, or of the entrance into the service of any lawyer whose name has not been included. We will also appreciate hearing from anyone concerning change of status of any lawyer previously entering the service. Do not limit your information to men from your own county. Let us know about any Kansas lawyer who either enters or leaves the service. Give us his home town. We expect to make a complete resurvey and publish results in an early issue. Every clue helps us. Each list omits the name of some lawyer who should have been included. Be loyal to your lawyer friends in the military service and write us. Don't depend on someone else.

In the near future the Judicial Council will send out blanks for information requested from Clerks of the District Court, and from Probate, County and City Courts. Some of these blanks are being revised in order to simplify the work in returning information requested. Results will be tabulated and published in our October BULLETIN.

In January of 1945 the Legislature will be in session and at that time we shall report on proposed legislation. If you have any proposals in mind which you believe should be adopted in order to promote the administration of justice, please write us at an early date. The Judicial Council makes many studies of questions submitted by its own members and others, but perhaps your excellent idea has never been suggested. Your views as to amendments of the code of civil procedure, the justice code, the probate code, or any measure calculated to improve the judicial processes will be appreciated.

THE CONSTITUTION GOES TO WAR

E. C. FLOOD, President Kansas Bar Association

When our country is at war, particularly a war of the kind and scope of the one in which it is now engaged, all of us feel and are affected by the greater exercise of power of our federal government. Having experienced during the past decade such vast increase in the activities of that government in time of peace, the exercise of its far-reaching war power has not been the shock to us that it otherwise might have been.

Ours is a government organized under a written constitution by which (excepting the powers of external sovereignty inherent in nationality) it is granted all of the powers it may lawfully exercise. War powers are granted in express terms. To congress is granted the power to "provide for the common defense;" and to "define and punish . . . offenses against the law of nations;" and to "declare war . . ." and to "raise and support armies;" and to "provide and maintain a navy;" and to "make rules for the government and regulation of the land and naval forces." And finally "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, . . ." (Article I, section 8.)

The executive power is vested in the President, who is made commander in chief of the army and navy, and of the militia of the several states, when called into actual service of the United States. He is given power to appoint and commission officers and it is his duty to "take care that the laws be faithfully executed." (Art. II.)

And Article VI makes the constitution and laws of the United States made in pursuance thereof, together with treaties made by the United States, the supreme law of the land.

Congress has from time to time enacted various laws for the national defense, for the creation, organization, and equipment of an army and a navy, and laws providing rules and regulations for governing the armed forces. The last mentioned are known as the Articles of War, as applicable to the army, and articles for the government of the navy, as to the navy. They include provisions in the nature of criminal codes of both substantive and procedural law and set up a system of courts for trial of members of the armed forces charged with violations of such articles. Both the army and the navy Articles contain provisions for the punishment of spies, and the former (Articles of War) contain some provisions applicable to certain civilians.

The war powers of the federal government under the constitution is indeed a broad subject. The scope of this article must necessarily be restricted. In the main it will be confined to some of the war powers of congress, as determined by court decisions.

NATURE OF WAR POWER

In general, it is well established that the war powers of the federal government are plenary and exclusive, are not strictly and narrowly defined, but are broad grants of extensive power to wage war with all the force necessary to make it effective. (*Tarble's case*, 13 Wall 397, 408, 20 L. Ed. 597; *Lajoie v.*

Milliken, 242 Mass. 508, 136 N. E. 419; *United States v. MacIntosh*, 283 U. S. 605, 51 Sup. Ct. 570, 75 L. Ed. 1302; *Hirabayashi v. United States*, 320 U. S. 81, 63 Sup. Ct. 1375, 87 L. Ed. 1774, and cases cited p. 1782.)

In the *Hirabayashi* case, decided June 21, 1943, the Federal Supreme Court said:

"The war power of the national government is the 'power to wage war successfully' . . . It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and members of armed forces from injury and from the dangers which attend the rise, prosecution and progress of war." (p. 1782.)

ILLUSTRATIVE CASES

Armed forces may be raised by means of draft laws, Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918 C 361, Anno. Cases 1918 B 856, regardless of religious beliefs, which are allowed as a ground of exemption as a matter of public policy and not of constitutional right. See, also, *United States v. MacIntosh*, supra, L. Ed., l. c. 1310. Minors may be drafted or enlisted without consent of parents. (*United States v. Williams*, 302 U. S. 46, 58 Sup. Ct. 81, 82 L. Ed. 39.) Prices of essential commodities may be fixed. (*Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253, 49 Sup. Ct. 314, 73 L. Ed. 688, *Lajoie v. Milliken*, ante.)

Under certain circumstances freedom of speech may be curtailed. (*United States v. MacIntosh*, supra; Espionage Cases, 249 U. S. 47, 204, 211, 39 Sup. Ct. 247, 249, 252; 63 L. Ed. 470, 561, 566; 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173.) Houses of ill fame may be suppressed and prevented near where military force is situated. (*McKinley v. United States*, 249 U. S. 397; 39 Sup. Ct. 324, 63 L. Ed. 668.) States' statutes of limitations may be suspended under certain circumstances. (*Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176.) Possession and control of transportation systems may be taken by the government. (*Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897.) Also, light, telephone and telegraph systems. (*Dakota Cent. Tel. Co., v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. 910.) Rents may be regulated and controlled in certain areas. (*Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865; *Henderson v. Kimmel*, 47 F. Supp. 635; *Ritchie v. Johnson*, 158 Kan. 103, 144 P. 2d 925.) State regulation of public utilities may be superseded. (*Dakota Central Telephone Company v. South Dakota*, supra.) Speed Laws held inapplicable. (*State v. Burton*, 41 R. I. 303, 103 Atl. 962, L. R. A. 1918 F 559.) Enforcement of rights and pursuit of remedies under state laws impeded—under Soldiers and Sailors Civil Relief Act, and rent control legislation, for examples. (Cases, supra, and also 130 A. L. R. 774.)

It may be said generally that any state law, the operation of which will hinder or obstruct the exercise of constitutional war power by the federal government is, during the exercise of such power, suspended or rendered partially inoperative—the Constitution and laws of the United States being the supreme law of the land. (Cases, supra.)

LIMITATION ON WAR POWERS

War powers are not, however, without limitations. The constitution, as well as expressly granting broad war powers contains express provisions for the protection and preservation of the rights and liberties of individuals and of the rights of the states. Some of these of particular importance in war time are: the restriction on the power of suspension of the privilege of the writ of habeas corpus, the prohibition on the passage of bills of attainder and ex post facto laws found in Article I, and the requirement for trial of crimes by jury and the provision defining treason and specifying the evidence required for conviction thereof, found in Article II, of the original constitution. The right of freedom of speech and of the press, to jury trials in criminal cases (except those arising in the land or naval forces), the right to be informed of the nature and cause of the accusation, provisions prohibiting the taking of private property for public use without just compensation, or depriving a person of life, liberty or property without due process of law, and reservation to the states of all powers not delegated to the United States by the constitution, found in the first ten amendments.

It has been consistently held that even war does not remove constitutional limitations safeguarding essential liberties and that the war powers of the government are subject to all applicable constitutional limitations. (*U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 426, 54 Sup. Ct. 231, 235, 78 L. Ed. 413, 422; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194.)

In *Ex parte Milligan*, 71 U. S. 2, 18 L. Ed. 281, decided in 1866, the United States Supreme Court said:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." (L. Ed. 295.)

It is well established that the power of the government to take or requisition private property in time of war is subject to the limitation of the fifth amendment against the taking of private property for public use without just compensation. (137 A. L. R. 1290.) In the case of *U. S. v. New River Collieries*, 262 U. S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014, which was an action to recover a quantity of coal requisitioned by the government for war use, it was held that the war or the conditions which follow it do not suspend nor affect the provisions of the federal constitution; that just compensation must be paid for property taken for public use and that the amount of compensation to be paid is a question for the courts. Said the court in this connection:

"The ascertainment of compensation is a judicial function and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard." (l.c. 343, 344.)

Ordinarily, the claimant is entitled to a jury trial on the issue of the amount of compensation. (*Filbin Corporation v. United States*, 266 F. 911.) It has been held, however, that the owner of property destroyed by military authorities as a military necessity in order to prevent seizure by the enemy is not entitled to compensation. (*United States v. Pacific Railroad*, 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 634.)

The case of *United States v. Cohen Grocery Co.*, *supra*, was one involving the constitutionality of the Lever act enacted by congress in 1917 and reenacted in 1919. The act made it unlawful for any person willfully to make any unjust or unreasonable rate of charge in handling or dealing in or with necessities or to conspire to exact excessive prices. The court held the act in violation of the fifth and sixth amendments. The head note reads:

"The mere existence of a state of war could not suspend or change the operation upon the power of congress of the guaranties and limitations of the fifth and sixth amendments as to delegating legislative power to courts and juries, penalizing indefinite acts and depriving citizens of the right to be informed of the nature and cause of the accusations against them."

Limitations on the war power, however, must be found in the constitution itself or in applicable principles of International Law (*United States v. MacIntosh*, *supra*.)

In *Hamilton v. Kentucky Distilleries Co.*, *supra*, the wartime prohibition act of 1918, prohibiting the sale of liquor after a certain fixed date, was held not to violate the fifth amendment as taking property without compensation or without due process of law. The court held that the fifth amendment imposes no greater limitation upon the national power than does the fourteenth amendment upon state power. In its opinion, the court said:

"If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the 5th amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency." (l. c. L. ed. 199.)

EX PARTE MILLIGAN

This famous case (*supra*) arose during the latter part of the Civil War. There was involved a question of constitutional guaranties versus martial law—and the constitution won.

In 1863, the President, under the provisions of an act of congress granting him such authority, suspended the privilege of the writ of habeas corpus in cases where, by his authority, persons were held in custody by military officers. In 1864, Milligan, not a resident of one of the rebellious states nor a prisoner of war, but a citizen of Indiana, who never was in the military or naval service was, while at home, arrested by the military authorities and tried by a military commission on a charge of conspiracy against the government and giving aid and comfort to rebels. He was convicted and sentenced to be hanged. He petitioned the United States Circuit Court of Indiana for a writ of habeas corpus and in due course the case came before the supreme court. The supreme court held that under the act of congress involved the military commission had no jurisdiction to try Milligan, a civilian, and his trial before such commission rather than in the civil courts (which were open and in the unobstructed exercise of their jurisdiction), with his rights to a jury trial preserved, was void. The opinion of the majority of the court, delivered by Justice Davis, stated:

"Martial law cannot arise from threatened invasion. The necessity must be actual and present; the invasion real, . . . Martial rule can never exist

where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (L. ed. 297-298.)

Seemingly it was the opinion of the majority that under the circumstances congress did not have the constitutional power to have authorized Milligan's trial before a military commission. Four members of the court, concurring in the result and in the order made, nevertheless contended that when a nation is involved in war and some portions of it invaded and all exposed to invasion, it is within the power of congress to authorize the trial and punishment of citizens for offenses against the discipline or security of the army or against the public safety; that the fact that the federal courts were open was regarded by congress as a sufficient reason for not exercising the power, but such fact could not deprive congress of the right to exercise it and that "it was for congress to determine the question of expediency."

Some of the critics of this decision contend that in this day of rapid communication and transportation and of aerial warfare, the decision should no longer be followed. In Willoughby on the Constitution, page 1251, the author takes the position that the doctrine of the majority of the court is sound, that the necessity justifying martial law may not be created by mere legislative declaration. Also, that the statement of the majority that a threatened invasion can never justify martial law, and that the fact that the courts are open is a conclusive test goes too far; that the better doctrine is "not for the court to attempt to determine in advance any one element what does and what does not, create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances."

The decision in this case has stood for nearly eighty years without being overruled and perhaps has been a wholesome restraint on the arbitrary or capricious exercise of power under martial law. It was not overruled by the recent German Saboteur Case.

ESPIONAGE CASES

The Espionage Act of 1917 provided for the punishment of seditious utterances or writings under certain specified circumstances. In a series of cases, commonly known as the "espionage cases," *supra*, the United States Supreme Court upheld the constitutionality of this legislation. The court seemingly placed considerable emphasis upon the circumstances under which the words or writings alleged to constitute a violation of the law were uttered or circulated and the fact that it was in wartime. Said Justice Holmes in one of these cases (*Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470) in which he concurred in upholding a conviction:

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured as long as men fight and that no court could regard them as protected by any constitutional right."

In another case, however, in which he dissented (*Abrams v. United States*, *supra*), the same Justice said:

"I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States may constitutionally punish

speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times. But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." (l. c. 627-628.)

JAPANESE CURFEW CASE

In the case of *Hirabayashi v. United States*, supra, known as the Japanese Curfew Case, there was involved the question of the constitutionality of a curfew order issued by the Commander of the West Coast Military Area, requiring all persons of Japanese ancestry residing in such area to be in their places of residence between the hours of 8:00 p. m. and 6:00 a. m. Hirabayashi, an American citizen of Japanese ancestry, upon a trial by a jury was convicted in the federal district court of violating the act of congress of March 21, 1942, making it a misdemeanor knowingly to disregard restrictions of the military commander, applicable to persons in the military area prescribed by him as such. The evidence showed that the defendant was born in Seattle of Japanese parents who had come to the United States from Japan and never afterward returned to Japan; that he was educated in the Washington public schools and was a senior in the University of Washington at the time of his arrest; that he had never been in Japan or had any association with Japanese residing there. Apparently there was no evidence that he was personally disloyal. He contended that the curfew order was unconstitutional under the fifth amendment to the federal constitution because this order discriminated between citizens of Japanese descent and those of other ancestry.

The case ultimately reached the United States Supreme Court. That court in its opinion reviewed at length the conditions existing on the Pacific Coast following the Pearl Harbor incident, including the large number of persons of Japanese ancestry (112,000 of the 126,000 in the United States) concentrated in that area and the majority of these in or near the three large cities of Seattle, Portland and Los Angeles. In addition, large numbers of children of Japanese parentage had been sent to Japanese language schools outside the regular hours of public schools, and on the whole there had been relatively little social intercourse between the Japanese and the white population. Also, in the area in question, there was a great volume of production of military equipment, especially ships and aircraft; that immediately following the commencement of the war, there was a fear, which was real and not fanciful, of a Japanese invasion of the Pacific Coast and of the menace of "Fifth Column" activities, together with the knowledge that such activity and espionage had been particularly effective in the surprise attack on Pearl Harbor. The court also commented on the impracticability of sifting the loyal from the disloyal persons of Japanese ancestry.

The supreme court in sustaining the conviction held that the curfew order in question was, under the circumstances, a proper exercise of war power and did not unconstitutionally discriminate between citizens of Japanese ancestry and those of other ancestries, the circumstances being such to make the racial

discrimination relevant. Among other things the court in its opinion, delivered by Chief Justice Stone, said:

"We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. . . . We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the current order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." (l. c. 1786-87 L. Ed.)

Said Justice Douglas in a concurring opinion:

"Peacetime procedures do not necessarily fit wartime needs. . . . Where the peril is great and the time is short, temporary treatment on a group basis may be the only practical expedient whatever the ultimate percentage of those who are detained for cause. Nor should the military be required to wait until espionage or sabotage becomes effective before it moves." (l. c. 1789 L. Ed.)

There was no dissenting opinion in this case, but Justice Murphy stated in reference to the discrimination on the basis of ancestry upheld in the instant case: "In my opinion this goes to the very brink of constitutional power." (l. c. 1792 L. Ed.) He further stated:

"We give great deference to the judgment of the congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war . . . could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law." (l. c. 1791 L. Ed.)

While the last sentence of the above quotation is dictum, it is reassuring to hear such an expression from a justice of our highest court. Too many in high places in other departments of our federal government do not, we fear, entertain the same sentiments.

GERMAN SABOTEUR CASES

These seven cases, reported under the title of *Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 2, 87 L. Ed. 3, were brought before the Supreme Court of the United States in July, 1942, on petitions for habeas corpus. All eight saboteurs had been born in Germany. One claimed to be a citizen of the United States. All others were citizens of Germany. All were sent to the United States by the German military authorities to commit sabotage for which they had been trained. They were landed in the nighttime from German submarines on the coast of the United States. When they were landed, they were wearing caps of the German marine infantry and carrying with them a supply of explosives, fuses, etc. On landing they immediately buried their military caps and the explosives, etc., and scattered to various points in the United States. Upon their arrest, the President by proclamation denied them access to the civil court and directed their trial before a military commission. They were charged with violations of the laws of war, including article 82 of the articles of war, defining the offenses of spying.

The prisoners contended that they could not constitutionally be tried before a military tribunal and that they were entitled to be tried in the civil courts with a right to a jury. The supreme court held that the part of the Presidential Proclamation denying access of the petitioners to the courts and directing their trial before a military commission, nor the fact that they were enemy aliens, foreclosed consideration by the civil courts of their contention that the constitution and laws of the United States constitutionally enacted forbid their trial by a military commission. The court also held that constitutional provisions relating to right of trial by jury were not intended to apply and did not apply to offenses against the law of nations which, at the time of the adoption of the constitution, were well known among civilized nations and in consideration of that class of cases triable by jury.

That one of the petitioners might have a status of a citizen of the United States was held to be immaterial as the offense of unlawful belligerency was distinct from treason and could be committed by a citizen as well as an alien. The petitioners were held to have committed the offense of unlawful belligerency and their petitions for habeas corpus were denied. The case of *Ex parte Milligan* was not overruled, the court holding that the facts on which the decision in that case were based were entirely definite. It was pointed out that Milligan was not an enemy belligerent, either entitled to the status of prisoner of war or subject to the penalties imposed upon unlawful belligerents.

Two of the saboteurs were given prison sentences and six were executed a few days after the supreme court handed down its decision.

All of the saboteurs clearly were subject to the well-recognized laws of war relating to spies and unlawful belligerency. They did not bear arms openly or wear uniforms or distinctive badges or emblems to identify themselves. It would appear there could be no doubt that the military commission had jurisdiction. Perhaps the most important thing about the case from a standpoint of constitutional rights is that the Supreme Court of the United States granted a hearing on the petitions for habeas corpus, inquired into the facts upon which jurisdiction of the military tribunal was claimed and ascertained that there was a reasonable basis for military jurisdiction.

An interesting review of this case by Robert E. Cushman appears in the *Cornell Law Quarterly*, Vol. 28, No. 1, page 54.

EMERGENCY PRICE CONTROL CASES

The Emergency Price Control Act of 1942 provides for the regulation of prices of commodities, of rents, and of market and renting practices. It also provides for an administrator, who is given power to issue such regulations and orders as he deems necessary to carry out the purposes and provisions of the act. The act creates the Emergency Court of Appeals, upon which is conferred the exclusive jurisdiction to hear complaints in regard to regulations, orders, or price schedules of the administrator. The judgments and orders of that court are subject to review by the Supreme Court of the United States. The administrator has issued many regulations, some quite drastic. A rather full review of the provisions of the act and of the regulations of the administrator is set forth in the opinion of *Ritchie v. Johnson*, *infra*.

Some of the effects of the legislation are the impairment of the obligations of contracts—a thing that congress may sometimes constitutionally do while

a state may not; interference with the operation of state laws—those relating to landlord and tenant for example; and curtailment of the exercise by the courts of their ordinary jurisdiction.

The act has been productive of much litigation (A. L. R. Anno., Vols. 142-148, incl.). Its constitutionality, however, has been upheld by a number of state and lower federal courts and just recently by the United States Supreme Court. One or two decisions of the lower federal courts hold it to be unconstitutional.

Several cases involving this act arose in Kansas. In *Henderson v. Kimmel*, 47 F. Supp. 635, a Wichita apartment-house owner was enjoined from demanding or receiving rents in excess of those established by the rent regulations or prosecuting any action to evict the tenant. The act was held not unconstitutional as denying to the landlord "due process of law" or "improperly delegating legislative power," and the court, in its opinion, said:

"In such a time a nation that may draft its young men into the armed forces to serve at a modest pay most certainly can require its citizens on the home front to make financial and other sacrifices essential to the successful defense of our country." (l. c. 641.)

In another (unreported) case, *Brown v. Loveland*, which also arose in Wichita, the defendant (landlord), the marshal of the city court, and the clerk of that court, who was also the judge thereof, were enjoined from enforcing an eviction judgment. The federal court, however, was careful to state in its opinion that the city court itself was not enjoined.

On January 22, 1944, the Supreme Court of Kansas, in *Ritchie v. Johnson*, opinion by Thiele, J.; *Morrison v. Hutchins*, opinion by Hoch, J.; and *Bell v. Dennis*, opinion by Parker, J.; all reported in 158 Kan., 103, 123, and 35, respectively, all rent-control cases, held the Emergency Price Control Act of 1942 to be constitutional as a valid exercise of the war powers of congress. Also, that the regulation requiring notice to the administrator before commencement of action to evict a tenant is valid, and a condition precedent to the commencement of such an action; and that a state court is without jurisdiction to pass on the validity of any of the regulations of the administrator. In the comprehensive opinion in the Ritchie case, the court took the position that a state court has jurisdiction to determine whether the act is constitutional. Harvey and Smith, JJ., partially dissented in each of these cases.

While this article was being written, the Supreme Court of the United States upheld the constitutionality of the Emergency Price Control Act in two cases; one involving the price-fixing provisions and the other the rent-control provisions. No report of either of these cases has been seen other than that contained in newspaper accounts. It was stated that three justices dissented in the first mentioned case and one in the other.

GENERAL COMMENT

In a number of cases, the courts have said that the constitution "is not self-destructive" and that the power which it confers on the one hand, it does not immediately take away on the other. [See *Billings v. United States* (taxing power), 232 U. S. 261, 282, 34 Sup. Ct. 421, 58 L. Ed. 596; *Henderson v. Kimmel* (war power), supra.]

The courts have struggled to uphold the exercise by the government of all

necessary war powers and at the same time avoid overriding express constitutional guaranties relating to individual rights and liberties. This, at times, has been both a difficult and delicate task.

In the great majority of the cases involving war powers, the war legislation or rules and regulations pursuant thereto, challenged on constitutional grounds, was held to be a valid exercise of the war power.

Supremacy of the constitution and laws of the United States is mentioned in quite a number of cases as justifying the decision. In many cases it is given as one of the reasons; in certain of them it would seem to have been the only one necessary.

In some cases a particular exercise of war power has been held not to violate the guaranties of the fifth amendment on the ground that the United States, in exercising its constitutional war powers, has power "akin" to state police power. This was the express ground of the decision in *Hamilton v. Kentucky Distilleries Co.*, supra. In other cases, seemingly decided on the same ground, "police power" is not expressly mentioned, but the opinions contain much the same line of reasoning as that in the Kentucky Distilleries case, and in these cases the courts have stated that "due process" is not violated by the war measure involved, and that any loss caused thereby is "consequential" for which the injured person is not entitled to compensation.

War emergency apparently has been the ground (or one of the grounds) upon which the courts in many cases have justified, and held constitutional, a war measure which might seem, at least on first view, to be in irreconcilable conflict with express constitutional guaranties. The courts have said repeatedly that many things are permissible in time of war that could not constitutionally be done in time of peace.

It is quite noticeable, however, that in case after case wherein war legislation is held constitutional, the oft announced rule that "even the war power does not remove constitutional limitations safeguarding essential liberties" is reiterated.

Certain war measures are extremely drastic and do go "to the very brink of constitutional power." Some of these shock our sensibilities. However, war itself and much that goes with it is a shock. And after all, it is vital that our government have and exercise all of the power necessary to national defense, to insure that we as a nation "shall always be free" and to prosecute this war to a successful and speedy conclusion. It should not have such power that would utterly and, perchance, permanently destroy the very liberty we wish to preserve. This war will end. Upon the termination of the war emergency, legislation valid when enacted because of that emergency can no longer have any justification. So has said the Supreme Court of the United States. Here both the congress and the courts will have a high and solemn duty. Continuance of war measures too long after the war is ended would be a real danger to constitutional rights and civil liberty.

TORTS

By GROVER PIERPONT

The subject may mean nothing or everything connected with wrongs, depending on the slant accorded it. Perhaps it is presumptuous to attempt to deal with such a topic. Justice Smith gave us a new slant in Kansas when he said dissenting, *Shively v. Burr*, 157 Kan. 346, "A further scrutiny of the argument that one entitled to a jury trial is not deprived of the jury trial because there is a right of appeal to the district court from the action of the probate court has failed to convince me of its soundness."

Torts is a subject of esoteric qualities. It is plural and one wonders why it is not singular. The author Bigelow says "A tort in the English law can only be defined in terms which really tell us nothing. . . . To put it briefly, there is no English law of tort; there is merely an English law of torts, *i. e.*, a list of acts and omissions, which in certain conditions, are actionable."

Pollock says, "Neither is there any law of delicts, but only a list of certain kinds of injury which have certain penalties assigned to them." We are so accustomed to thinking of a penalty as something connected with the criminal law that it is difficult to class a recovery for loss by reason of negligence as a penalty. Perhaps penalty is not a happy word to use. Continuing, Mr. Pollock says, "If we are asked, What are torts? nothing seems easier than to answer by giving examples, but we shall have no easy task if we are required to answer the question, What is a tort?" In 2 Wils. 146, we find this statement, "Torts are infinitely various for there is not anything in nature that may not be converted into an instrument of mischief." Justice Holmes, in his learned treatise, states, "At the two extremes of the law are rules determined by policy without reference of any kind to morality. Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community." If there isn't a law of tort and only a law of torts then it must be a daring task to attempt to discuss something without end, because after all new torts are arising every day and will continue to arise as long as man is inventive, creative and given to divergence from a straight and narrow pathway either of commission or omission.

As one looks into textbooks it will be found that matters upon which recovery may be had are almost endless. Likewise other matters will be discovered in which no recovery is allowed. Statutes of various states limit action and recovery. Individuals, associations or corporations may be liable. One alone may have to respond in damages or there may be joint liability. The point at which one steps from contract to tort is often found in a twilight zone and courts hesitate, yes even indulge in language which makes it clear that they do not know which is which. When one is acting as a representative or agent for another and when as an independent contractor is a constant problem. How shall the courts of last resort handle actions in tort is another question? In many instances the result has been and may well be that such courts in high disregard of all precedents and statements of law have forgotten that juries pass upon the facts, the trial court approves or disapproves. They have, acting in their supreme capacity, reached down into the evidence, disregarded the absence of the witnesses, and determined appeals solely from the evidence as it appears in the cold pages of transcripts. In other words they have elected

to forget the rules and decide the issue as they think it should be decided. Quite often justice is thus administered, but the actual result is that trial courts do not have a yardstick left for the trial of some actions in tort.

WRONGFUL DEATH

Since only a limited discussion of torts may be made here it seems well to first consider what should be the greatest of all, to wit, wrongful death. An action did not survive at common law. Under G. S. 60-3201 it survives in Kansas and section 3203 "The damages cannot exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin. . . ."

The common law said, "*Actio personalis moritur cum persona*"; Kansas says it shall survive. But why should it be treated as a limited action? Why, for instance, should a young lady who has her leg severely injured recover \$11,000 while a family deprived of a loving and good providing husband and father be limited to \$10,000 with the likelihood of receiving about half that amount? A Wichita lawyer who made a diligent search of the Kansas reports states that the largest amount for the loss of a child approved up to a few years ago was thirty-five hundred dollars.

It seems it would be reasonable if the limit is to remain at the present amount that the first five thousand should be set up as a penalty for the death. Assuredly if death is wrongful and if the learned writer above quoted is correct in using the word "penalty" then five thousand would be small enough. It would, as in other states be considered as a deterrent from the commission of mortal wrongs and a preservation of human life. It has been argued that one of the reasons for small damage verdicts in Kansas in contrast with other states is this same death statute. Naturally jurors are more or less acquainted with the law and it is only reasonable for them to say "Well, if a human life in Kansas is only worth ten thousand dollars, surely an arm or a leg should not be worth more than half of that."

However, the amount fixed by statute is a maximum amount. Our court has struggled with verdicts in death cases apparently always remembering its own language that there is no yardstick. Well, if there is no yardstick for the supreme court to go by, and none for a judge and jury there ought to be some measure to begin with and the penalty measure is a reasonable one.

Striking purely at random the first case coming to the writer's attention is *Hilliard v. Southern Kansas Stage Lines*, 146 Kan. 288. Without going into detail, the action was one for the death of an adult daughter about to be married, and who had done little for the family. The jury said, using their measure, that \$4,500 would pay for the death. Judge Geo. H. Benson, looking over the evidence and considering the arguments, used his measure and the result was \$4,000. The supreme court, speaking through Justice Harry K. Allen, used its measure and the final result was \$3,000. The girl who was killed was not allowed to make a measurement. Before passing this case it should be noted that Justice Harvey did some measuring and found that Judge Benson was correct. Justice Smith after measuring the damages said "Appellate courts are supposed to be guided in their conclusions by some precedent or statute, some guidepost. I defy anyone to point out to me a rule or formula by which the judgment in this case should be reduced from \$4,000 to \$3,000."

Then one wonders just what precedent there could be for surely there never was another girl just like this girl who was killed. If her life had been taken by an assassin's bullet the law would have said we have a measure and that measure is either life in prison or death by hanging. The question is left to the legislators. Shall we not change the statutes and make wrongful life taking more costly?

We have instances in our statutes where penalties are provided in civil liability, as G. S. 21-2435, imposing treble damages:

GENERAL AND SPECIAL DAMAGES

Perhaps no problem in torts is more disturbing to the average lawyer than that of general and special damages. In *Hatfield v. Gazette Printing Co.*, 103 Kan. 513, a libel action, our supreme court states, "So far as the damages are concerned, general damages from such a publication arise from inference of the law and need not be proved." The statement seems simple enough. Going to 131 Mo. App. 357, 111 S. W. 832, 834, this definition is found, "General damages are such as the law implies or presumes to have occurred from a wrong complained of, while special damages are such as really took place, and are not implied by law, but are either superadded to general damages from an act injurious in itself, or are such as arise from an act not actionable in itself, but injurious only in its consequences. Thus damages to the market value of a horse are general damages, while damages from loss of earnings or use are special damages." Another definition, "Special damages are those that do not necessarily, but do directly, naturally and proximately, result from the breach." (20 L. R. A., n. s., 350.) Again, "Special damages are the natural but not necessary result of the act complained of and must be specifically alleged." Returning to *supra* 103 Kan. 513, syl. 4, "the only question left for submission to the jury was the amount of damages sustained by the plaintiff." Again we have a question submitted to a jury without a yardstick to guide. Taking a more tangible question than libel, a judge is presented with this question as to what damages should be allowed. A jury having been waived the judge is asked to fix the damages resulting to a man from a broken arm. One judge says one thousand dollars, another seven hundred fifty, another two thousand dollars. Are they each right or are they all wrong? If the judge at the same time allows an amount for doctor, hospital and other bills shall he take this into consideration when fixing the amount of general damages? Shall he deduct for an amount allowed for loss of earnings? When all is said and done might it not be that amounts allowable for such damages should be fixed, depending on the quality and extent of the injury.

That brings out another question. What part does ability to pay have in awarding damages? The answer is "none," and yet that is not the true answer. We are not considering punitive or exemplary damages, but general. Why should a jury award a greater amount against a large corporation, the driver of a Lincoln car or an insurance company than against an individual of ordinary means? The answer is, "It shouldn't, but it does." General damages are no greater where one is knocked down by a Ford or a Lincoln, where the same injuries are sustained, but all law to the contrary the verdicts are not the same. Further discussion of this would lead nowhere, but it would seem that there might be a solution which would equalize recovery to a large extent.

JURISDICTION

Heretofore we have had few questions of jurisdiction in Kansas. Now with the new probate code we find in 157 Kan. 336 "A demand against the estate of the deceased wrongdoer on account of a wrongful death must be brought in the probate court where the estate of the deceased wrongdoer is being administered." A prior opinion had stated "One who deems himself entitled to a part or all of such an estate, whether the right contended for is founded in tort . . . must recover, if at all, from the decedent's estate." Reading and rereading the opinion in the *Shively v. Burr* case makes it clear that our supreme court had little doubt as to the correctness of the decision, yet one must almost come to the conclusion that it doubted the practicability of the provision of the code. Only after specially concurring opinions by Justice Harvey, Justice Wedell and Chief Justice Dawson did the court seem to feel free to let the decision stand. And then after having written the opinion Justice Smith adds a dissenting opinion, which seems to come directly from the heart, in which he expresses doubt as to whether the legislature intended to make such a sweeping change.

Two methods are available, either of which might satisfy all parties. First: Providing legal requirements for probate judges and supplying a jury equal to those used in district court trials. Second: Authorizing probate judges to immediately certify such matters to the district court for advance and preferential trials and prompt returns of results to the probate court. If the first is to be followed then it would seem advisable that an appeal in such matters should be directly to the supreme court as if the matter had been originally tried in the district court.

COMMON LAW

Blackstone's Commentaries, Vol. 3, p. 2, "I am now, therefore, to proceed to the consideration of *wrongs*; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right . . . the contemplation of what is *jus* being necessarily prior to what may be termed *injuria*, and the definition of *fas* precedent to that of *nefas*."

"Wrongs are divisible into two sorts of species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals: . . .

"The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited."

"The lowest, and at the same time the most expeditious, court of justice known to the law of England, is the court of *piepoudre curia*, *pedis pulverizati*; so called from the dusty feet of suitors or, according to Sir Edward Coke, because justice is there done as speedily as dust can fall from the foot." Blackstone is here quoted as there is no finer exposition of the basis of torts and the courts. Proceeding he outlines the provinces of eleven courts ending with courts of assize or *nisi prius*. This does not include ecclesiastical, military and maritime courts.

AND FINALLY

From the cradle to the grave we have rights of person and of property which are not to be infringed. Indeed, even farther than that. Before birth of her child the mother has rights which are peculiar to her and for which recovery may be had when they are injured. After death there is still a right in the body which belongs to the next of kin.

Judge Edgar B. Kinkead in his Commentaries says, "these rights relate to either person, personal or real property and reputation. 'Rights of person' is perhaps not expressive of personal rights which, added to the above, describes the domain of torts so far as concerns what may be injured."

Now so as not to unduly prolong this discussion which has been more or less fragmentary, I would like to mention a matter which has always been of peculiar interest.

THE DEAD BODY

Quoting Judge Kinkead again, "The right of the husband, wife or next of kin to the possession of the dead body for burial purposes being recognized and protected in law, it necessarily follows that such persons have the right to the body in its natural state at death. Hence no one, physician or hospital authorities, have the right to perform an autopsy, dissect or in anywise mutilate the body of the deceased without the consent of those in whom the right of burial vests. Such acts, without consent, give rise to a right of action in favor of those entitled to the body." There are exceptions to this as where the coroner is given that right. And once the body is buried it usually must be permitted to lie in peace to its final dissolution.

Kansas has provided severe penalties for those who remove dead bodies for selling, dissection, etc. (G. S. 21-911.) In view of our capital punishment law and the recent execution it might be well to consider G. S. 21-914 which is an exception to the preceding and provides that the provisions as to removal shall not extend "to the disinterment or removal for such purposes of the body of any criminal executed for crime."

Our law also throws further protection around private burial grounds in G. S. 17-1305 not expressly provided for by will, deed, or in actual possession of the owner in life by giving control to the probate court and making it the judge's duty to commence and conduct civil suits for damages to the burying ground or its enclosures. Further, in 1941 Supp. G. S. 21-1410, blasting within five hundred feet is regulated for the protection of a restful place of abode for the dead body. In these days when wars tear asunder the foundations of our governmental, economical and social structures, our bodies in this home of democracy have a right to rest secure from interference until the final trump.

Tort may not be definable, torts may be a subject made up of many parts, but the courts and human justice will continue to protect our persons and our possessions from wrongful acts. This is one of those matters which distinguishes humanity from the beast and gives us hope for a better world.

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