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Constitutional Law--Court-Martial--Jurisdiction Over Civilian Dependents and Employees

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is incorporated by reference. Hence, the trustee's powers are limited to those which the state allows a supposed creditor of the bankrupt, who at the date of bankruptcy completed the process for perfection of a lien. *In re Wright Industries*, 93 F. Supp. 58 (N.D. Ohio E.D., 1950). Although the extent of the trustee's rights, remedies, and powers are measured by state law, it nonetheless remains that the determination of the trustee's right to such a status is dependent on the Bankruptcy Act. It is the federal law which controls this aspect of the problem. Valid liens may be created by state legislation, but the state may not limit the duration of such liens by the time of bankruptcy, or extend their duration beyond that time upon any conceivable theory. *Commercial Credit v. Davidson*, 112 F.2d 54 (5th Cir. 1940). Furthermore, both the powers of the trustee and the rights of creditors are determined as of the date of bankruptcy and remain fixed thereafter, regardless of state law. *Lockhart v. Garden City Bank & Trust Co.*, 116 F.2d 658 (2d Cir. 1940).

From the foregoing authorities the conclusion is obvious that § 70(c) gives the trustee in bankruptcy all rights, remedies, and powers of an actual creditor granted to him in respect to § 70(e) plus all those of the hypothetical creditor under § 70(c).

The principal case has certainly curtailed, if not destroyed, the effect of these sections. For it cannot be denied that an actual creditor could have proceeded in the state court any time before the bankruptcy petition was filed and could have avoided the mortgage because by state law it was until this time void as to him. His rights as a "flesh and blood" creditor should pass to the trustee in bankruptcy. Since § 70(c) does not require an actual creditor this right should logically extend to the trustee under the facts in this case. However, such was not the holding. The ultimate result here is to confer upon the state not only the power to determine just what rights, remedies, and powers the trustees in bankruptcy has, but to determine whether the trustee is entitled to the status of a creditor created by state law. Past decisions indicate that this is not the law.

R. M. H.

CONSTITUTIONAL LAW—COURT-MARTIAL—JURISDICTION OVER CIVILIAN DEPENDENTS AND EMPLOYEES.—The United States Supreme Court on January 18, 1960, decided four cases involving the constitutional validity of court-martial trials of civilian personnel

employed by or accompanying the armed forces outside the United States in time of peace. The four cases involve three situations: (1) No. 22, a civilian dependent tried for a noncapital offense; (2) Nos. 21 and 37, civilian employees of the military tried for non-capital offenses; and (3) No. 58, a civilian employee of the military tried for a capital offense. *Held*, that the provision of the Uniform Code of Military Justice Art. 2(11), 10 U.S.C.A. § 802 (11), was unconstitutional as applied to such persons during peace time regardless of the crime, since it deprived them of certain constitutional rights. No. 58, *Grisham v. Hagan*, 80 Sup.Ct. 310 (1960); No. 22, *Kinsella v. Singleton*, 80 Sup. Ct. 297 (1960); No. 21, *McElroy v. Guagliardo*, 80 Sup. Ct. 305 (1960); No. 37, *Wilson v. Bohlender*, 80 Sup. Ct. 305 (1960).

The Constitution art. 1, § 8 cl. 14 empowers Congress to regulate the armed forces and clause 18 authorizes Congress to make all laws necessary in implementing the foregoing powers. Under such authorization, the aforementioned provision of the Uniform Code of Military Justice was enacted subjecting persons serving with, employed by, or accompanying the armed forces outside of the United States to court-martial trials. The question involved in all these cases is whether this provision is constitutional since it apparently contravenes certain other constitutional provisions guaranteeing indictment by a grand jury and trial by jury. U. S. CONST. amends. V and VI.

On June 11, 1956, the United States Supreme Court upheld military court convictions of civilian dependents for capital offenses. *Kinsella v. Krueger*, 351 U. S. 470 (1955), and *Reid v. Covert*, 351 U. S. 487 (1955). However, on June 10, 1957, these decisions were reversed and Article 2(11) of the Uniform Code of Military Justice was declared unconstitutional when applied in the trial of capital cases of civilian dependents accompanying members of the armed forces overseas in time of peace. *Reid v. Covert*, 354 U.S. 1 (1956).

The majority opinions in the principal cases relied heavily upon the final *Reid* decision, *supra*, in determining whether court-martial trials of civilian dependents and employees for non-capital offenses were constitutional.

The government contended that art. 1, § 8, cl. 18 of the Constitution was sufficient to allow the expansion of art. 1, § 8, cl. 14 to include civilian dependents and employees overseas during peacetime. It was argued that such expansion was essential to secure

discipline among such persons. The court held that clause 14 could not be so expanded by clause 18 to include prosecution of such civilians for noncapital offenses since it had previously decided that clause 14 could not be expanded to include prosecution of capital offenses committed by such civilians. *Reid v. Covert*, 354 U.S. 1 (1956). The court refused to recognize a constitutional distinction between capital and noncapital offenses, holding that the question of military jurisdiction was determined by the "status" of the accused, rather than by the nature of the offense.

In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), it was decided that a discharged soldier could not be tried by court-martial, after his discharge, for an offense committed before his discharge. In this case the court held that the jurisdiction of military tribunals should be restricted very narrowly and allowed only where it was deemed absolutely essential to maintenance of discipline among troops in active service. The court further held that the consideration of discipline was no reason to expand the jurisdiction of courts-martial. Needless to say the majority opinion in the principal cases relied strongly on the *Toth* case.

Mr. Justice Harlan wrote dissenting opinions as to Nos. 22, 21, and 37, and concurred in No. 58, the case involving a civilian employee tried for a capital offense. Mr. Justice Frankfurter joined with him. They considered the *Reid* case correct, but felt that it should be limited to capital offenses. They refused to accept "status" as the sole determining factor of jurisdiction in military courts, and expressed the view that the real test should be the proximity of the relationship between the person affected and the military establishment. They took the position that there was a sufficiently close relationship between civilian dependents and employees to bring such persons within the jurisdiction of courts-martial for noncapital offenses during peace time, though not for capital offenses. They reasoned that due to the finality of capital cases, nonmilitary personnel overseas should not be tried by courts-martial. The Supreme Court has recognized the important difference between such offenses by requiring a state, under the 14th amendment, to appoint counsel for an indigent defendant in a capital case, *Powell v. Alabama*, 287 U.S. 45 (1932), but not in all noncapital cases. *Betts v. Brady*, 316 U.S. 455 (1942). Mr. Justice Whittaker, with whom Mr. Justice Stewart joined, concurred in part and dissented in part. They distinguished between civilian dependents and civilian employees.

They reasoned that the civilian dependents should not be tried by a court-martial for either capital or noncapital offenses, but that civilian employees could be tried in such courts for all offenses. They pointed out historically that as early as the American Revolution the "Articles of War" adopted by the Continental Congress provided for trials by courts-martial of nonmilitary personnel serving with the army. WINTHROPE, *MILITARY LAW AND PRECEDENTS* 961 (1920). They believed that the framers of the Constitution must have had these articles in mind when, in Art. 1, § 8, cl. 14, they authorized Congress to regulate the land and naval forces and intended the provision to include civilian employees.

Now let us examine the effect these decisions will have upon civilian dependents and employees overseas. An American citizen in a foreign country is not guaranteed any constitutional rights as against a foreign sovereign. Such persons are within the exclusive jurisdiction of the foreign sovereign. *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). Under the various status-of-forces agreements, the military authorities are only given jurisdiction over persons subject to the military law. N.A.T.O. Status of Forces Agreement art. VII, para. 1(a) (1951). As a result of the principal cases, the Supreme Court has held that civilian dependents and employees are not subject to military law for any offenses. Therefore, such persons do not fall within the status-of-forces agreements leaving only the foreign governments as competent authorities to exercise jurisdiction over them.

This presents a real dilemma. Has the court actually accomplished a just and desired end? The trials in the principal cases were held to be unconstitutional because they deprived the defendants of certain constitutional rights, such as a trial by jury, but by these decisions such defendants are now placed greatly at the mercy of the foreign sovereign and may be completely deprived of any guarantee of any constitutional rights, not simply a loss of some constitutional rights. Would it not be more advantageous to United States citizens overseas to be tried by fellow citizens under a judicial system based upon the principles of American jurisprudence than by a foreign court whose ideas of justice and punishment might be completely intolerable to Americans?

Possible solutions to this problem may be found in the alteration of treaties and agreements so that the United States might retain jurisdiction of such citizens or such countries might be willing to waive their jurisdiction, as the United States did in the case of

Wilson v. Girard, 354 U.S. 524 (1957). But this does not completely solve the problem, because immediately, in transferring all such cases to the United States for trial, additional problems such as cost, delay and difficulty in obtaining witnesses arise.

It thus appears that, while the Supreme Court was endeavoring to solve one problem, some other problems posing far greater difficulties have arisen. What is to be the fate of the offenders in the principal cases and like offenders in the future? Are they to be tried by the foreign countries in which the crimes were committed? Or will the government attempt to have these countries waive their jurisdiction so that the trials may be had in civilian courts in the United States? Or will the accused persons be set free without any trials?

Is it not possible that the employment and application of the principles of the principal cases may in the years ahead result in roadblocks to justice because of the running of statutes of limitation, the death or disappearance of witnesses, prohibitive costs, discouraging delays and other impediments to orderly and effective judicial administration?

A. M. P.

CONSTITUTIONAL LAW—DUE PROCESS—EVIDENCE REQUIRED TO SUSTAIN CRIMINAL CONVICTION.—*P* was a longtime resident of the Louisville, Kentucky, area and a frequent patron at a cafe in that city. He entered the cafe one evening to enjoy the facilities thereof while waiting for a bus. Two policemen, on a "routine check," inquired of the cafe manager as to how long *P* had been there and whether he had bought anything. The manager replied that he personally had not served anything to *P* (*P*'s testimony was that one of the employees serving him a dish of macaroni and a glass of beer). The officer accosted *P* and "asked him what was his reason for being in there and he said he was waiting on a bus." The officer then informed *P* he was under arrest and took him outside. *P* asked why he was being arrested (the officer testified that *P* was argumentative). *P* had a record of 54 previous arrests. The Police Court of Louisville found *P* guilty of two offenses—loitering and disorderly conduct—and fined him \$10.00 on each charge. Upon examination of *P*'s petition for certiorari, the Supreme Court of the United States found that, although the fines were small, due process questions were substantial and granted certiorari. *Held*, complete