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Recent Decisions

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was motivated by personal malice. Lt. Mann then briefly examines three situations in which the majority rule might be applicable.

In combat or under conditions of war in a theater of operations is the first situation that is considered as to a soldier's liability. The common law recognized the right of the military forces to make certain necessary invasions of personal interests and rights to successfully prosecute the war and that view is still in force today. From both adjudicated cases and authorities of the subject it seems to be the weight of judicial opinion that in combat or in actual theaters of operations a soldier may be absolved from civil liability for executing an order which it was illegal or perhaps even criminal to give if such order was given by a superior officer.

During peacetime or during non-combat operations the situation is changed considerably and the consensus is that the soldier's liability in acting in obedience to orders emanating from superior sources is comparable to the liability of a peace officer acting in a similar situation.

The third situation that is considered is that during insurrection or under martial law. Under the general rule, which Mann points out must be qualified in many jurisdictions, an insurrection or rebellion does not vary the position of a citizen or deprive him of the protection of the common law. There are, however, many variations of this general rule with the adjudicated cases falling within two extremes: one line of cases favoring the soldier and the other favoring the civilian. It is apparently a judicial impossibility to reconcile these two extreme views and it appears that this problem will remain with the soldier as long as he is in uniform. Recognizing the situation, many states, as well as Congress, have passed statutes that exempt the soldier from certain types of civil liability and the Federal statute is the most embracing of all the legislative attempts to help solve the soldier's dilemma.

Francis J. Paulson.

RECENT DECISIONS

CHEMICAL PATENTS — VALIDITY AND INFRINGEMENT.—*Dow Chemical Company v. Halliburton Oil Well Chemical Company*, 65 S. Ct. 647.—This was an infringement suit brought by the Dow Chemical Company against the Halliburton Oil Well Cementing Company involving the alleged infringement of the Grebe-Sanford patent No. 1,877,504, of which the Dow Company, petitioner, was the assignee. The conflicting views of two federal appellate courts concerning the validity of this patent led the Supreme Court to entertain certiorari. 139 F. (2) 473; 81 F. (2) 495.

The essence of the Grebe-Sanford patent was the introduction into depleted, low-yield oil wells of a solution of hydrochloric acid under pressure, with fresh water being added later to force the acid further into the subjacent limestone formations, thus releasing from the limestone additional oil embedded therein. This hidden oil, thus released, would permit the resumption of pumping on a profitable basis. Another specification of the patent proposed the use of a small amount of inhibiting agent (an arsenic compound) to check the corrosive effect of the hydrochloric acid on metallic surfaces. The patent expressly acknowledged the existence of the so-called Frasch patent, No. 556,669, but sought to distinguish this alleged invention therefrom on three grounds, viz: (1) The addition of a corrosion inhibiting agent; (2) The use of a dilute rather than a concentrated hydrochloric acid solution (5 to 20 percent concentration as against 30 to 40 percent in the Frasch patent); (3) The use of an ordinary pump tube to convey the acid to the bottom of the well hole instead of the smaller and specially protected supply tube contemplated in the Frasch patent.

Justice Murphy, speaking for the Court, gave play to many considerations in the law of chemical patents, and the opinion affords a clear insight, without being hypertechnical, into the broad principles underlying the determination of this type of case.

The Court took the position that no one of the three above mentioned claims or combination thereof evidenced a degree of skill and ingenuity which constitutes the essential ingredient of an invention, as defined in the statute.

Dealing first with the inhibiting agent, the Court observed that its only purpose was to prevent or restrict the corrosive effect of the acid on the metal well tubing and equipment; that long before the patent in question was issued, inhibiting agents were in general use to protect metals from acid solutions. "The Grebe-Sanford method, in short, involved in this respect no more than a mere *application* of an old process of inhibition to a new and analogous use of protecting metal well equipment from corrosion when the well is being acidized to increase production. Such a process lacks the very essence of an invention. * * * He who is merely the first to utilize the existing fund of public knowledge for new and obvious purposes must be satisfied with whatever fame, personal satisfaction or commercial success he may be able to achieve. Patent monopolies with all their significant economic and social consequence are not reserved for those who contribute so insubstantially to the fund of public knowledge."

The petitioner placed great stress on the fact that the Grebe-Sanford process suggests the use of a dilute hydrochloric acid solution, as distinguished from the greater concentration specified in the Frasch patent. In disposing of this contention the Court said: "Petitioner claims that the dilution recommended by the Grebe-Sanford process substantially

reduces the viscosity of the acid, greatly slows its reaction on limestone (thus allowing the acid to open up channels distant from the well hole instead of spending itself immediately on the nearby rock) and greatly reduces its corrosive action on iron and steel. * * * But * * * the mere addition of water to dilute a known chemical solution does not entitle one to a patent monopoly, at least unless a definite dilution point or range is discovered corresponding to a physical *phenomenon*. * * * No such discovery was made here. The advantages said to accompany a dilute solution do not correspond to any particular dilution point or range."

The "ordinary pump tube" argument as advanced by the petitioner was branded by the Court as "a mere substitution of equivalents which do substantially the same thing in the same way. * * *" To the petitioner's allegation that the Grebe-Sanford process had filled a long felt want and had been a commercial success, the Court said: "But these considerations are relevant only in a close case where all other proof leaves the question of invention in doubt. * * * Here the lack of invention is beyond doubt and cannot be outweighed by such factors."

The Court held that the patent was invalid for want of invention, therefore making it unnecessary to rule on the infringement aspect.

This case, determined adversely to the petitioner, reflects a general inclination toward "tightening up" by the federal courts in their consideration of the validity of chemical patents which are in substance mere adaptations of older combinations and processes, as in the instant case.

David S. Landis.

CONSTITUTIONAL LAW — STATE POLICE POWER REGULATION OF LABOR ORGANIZERS UNDER THE 14TH AMENDMENT.—*Thomas v. Collins*, 89 Law. Ed. 340, 65 Sup. Ct. Rep. 315.—This case, involving R. J. Thomas, U. A. W. president and CIO vice president, has had a considerable play in the public press due to the prominence of the actor and his affiliation as well as the time of the act. To recount the facts briefly, Thomas went to Texas in connection with a drive for workers put on by a Texas affiliate of CIO. His intention was to speak and be on his way, but a short time before he was scheduled to speak he was served with a restraining order that had been issued *ex parte* by the District Court of Travis County which sits at Austin, 170 miles from Houston; hence the order was issued in anticipation of the speech and not subsequent to its rendition. This order had been issued in pursuance of section 12 of House Bill No. 100 of the 48th Legislature, 1943. An effort by the state of Texas to regulate labor unions and their activities by requiring registration of all avowed organizers with the Secretary of State.

Disregarding the order on advice of his attorneys, Thomas proceeded to make the speech and asked persons to join the union generally as well as one man specifically. For this he was held in contempt and sentenced to a short imprisonment. He filed a petition for *habeas corpus*. His petition was denied and on appeal to the Supreme Court of Texas the judgment was affirmed. On further appeal to the Supreme Court of the United States the Texas Court was reversed.

The majority opinion of the Court was delivered by Mr. Justice Rutledge with Justices Douglas, Black, Murphy and Jackson concurring. After stating the issues and pleadings of the parties, Mr. Justice Rutledge continues: "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the state's power begins. . . . The preferred place given in the constitutional system to the freedoms secured by the last amendment gives such liberty a sanctity and a sanction not permitting dubious intrusions, and it is the character of the right not of the limitations which determines what standards govern the choice.

"Any attempt to restrict free speech or free assembly must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger, and the rational connection between the remedy provided and the evil curbed which in other contexts might support legislation against attack on due process grounds will not suffice. . . . That the state has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly. . . . Thomas went to Texas for one purpose and one only — to make the speech in question. Its whole object was publicly to proclaim the advantages of worker's organization and to persuade workmen to join Local No. 1002 as part of a campaign for members. . . . That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. . . . That Thomas chose to meet the issue squarely, not to hide in ambiguous phrasing, does not counteract this fact. . . . The restrictions' effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card . . . as a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. . . . The restraint is not small when it is considered what was restrained. The right is a national right, Federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length

and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede."

Mr. Justice Jackson concurring said in part: "Texas did not wait to see what Thomas would say or do. I cannot escape the impression that the injunction sought before he had reached the state was an effort to forestall him from speaking at all and that the contempt is based in part at least on the fact that he did make a public labor speech."

Mr. Justice Douglas concurring said in part: "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses."

The dissent by Mr. Justice Roberts, was joined in by Mr. Justice Reed and Mr. Justice Frankfurter. . . . In part: "The question before us is as to the power of Texas to call for such registration within limits precisely defined by the Supreme Court of that state in sustaining the statute now challenged. . . . The Act and the injunction which he disobeyed say nothing of speech; they are aimed at a transaction, — that of solicitation of members for a union. This, and this only, is the statutory object which is said to render it unconstitutional. . . . Stripped to its bare bones, this argument is that labor organizations are beneficial and lawful; that solicitation of members by and for them is a necessary incident of their progress; that freedom to solicit for them is a liberty of speech protected against state action by the 14th Amendment and the National Labor Relations Act, and hence Texas cannot require a paid solicitor to identify himself." The opinion concluded with the query whether or not it is the Supreme Court's job to pass on a state statute or to read another interpretation into it which would in effect overthrow its effect.

The importance of this decision may be well understood when it is viewed in the light of present and possible post war state legislation and on it may hinge the validity of many union activities.

John D. O'Neill.

WAR—MILITARY JURISDICTION OVER CIVILIAN EMPLOYEES OF WAR DEPARTMENT.—*Perlstein v. United States*, 57 Fed. Sup. 123 (1944).—A recent case particularly interesting to civilian employees accompanying the armed forces into conquered and occupied territory was *Perlstein v. United States* in which military jurisdiction was successfully invoked against a civilian employee. The petitioner had appealed to the ap-

pellate court for a writ of *habeas corpus* but the upper court refused to issue the writ. The facts of the case may be stated briefly:

Petitioner was employed by a salvage company under contract to the United States to do work in Massaua, Eritrea. A provision in his contract provided that his employment might be terminated by the Army at any time and that the company was under obligation to pay his transportation and subsistence back to the United States if his services were cancelled by the Army. He was discharged and ordered to leave Massaua by ship. Before he left the country he committed larceny and forgery and subsequently was arrested by a British constable at Port Tewfik and was brought before a General Court-Martial for trial at Heliopolis, Egypt where he was found guilty and sentenced to fifteen years at hard labor. The Judge Advocate Department later reduced the sentence to ten years and from this judgment the petitioner sought a writ of *habeas corpus*.

The jurisdictional grounds invoked to prosecute the defendant were found in Article of War 2(d), 10 U. S. C. A. which provides:

"Persons subject to military law . . . (d) All retainers to the camp and all persons accompanying or serving with Armies of the United States without the territorial jurisdiction of the United States and in time of war all such retainers and persons accompanying or serving with Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

Petitioner based his writ on three contentions. The first was that the Army was not "in the field" in Eritrea at the time. The court, however, pointed out that Massaua was vital as a supply line and that in 1942 it was subject to the possibility of Italian uprisings since it was an occupied country. It pointed out that an army occupying Italy itself would certainly be an army in the field and an army occupying Eritrea, one of Italy's colonies, would also be an army in the field.

The second contention of the petitioner was that since his employment had ceased he was no longer accompanying the army. The court answered this by pointing out that a person may still accompany an army despite the fact that his period of employment may have ended.

The third contention of the petitioner was that the military authorities had no legal right to try him in Heliopolis, Egypt. This argument was met by the court pointing out that once the military jurisdiction attached, it was not material where the court martial was actually held.

With an ever increasing number of civilian employees following and accompanying the armies into occupied territories, questions like those decided in the instant case will assume more importance and in answering them courts will unquestionably be called upon to make nice distinctions involving the legal rights of such employees.

Francis J. Paulson.

WAR — RIGHT OF RETURNING VETERANS TO REINSTATEMENT IN OLD JOBS.—*Kay v. General Cable Corporation* — September, 1944, 144 F. (2d) 653.—The Selective Training and Service Act of 1940 as amended by the Service Extension Act of 1941 provides that any person who, upon entering the military or naval service of the United States, has left “a position, other than a temporary 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 status and pay, “unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so.”

The plaintiff entered the service of the defendant as medical director on the basis of a full working week at its plant. Six months later this was reduced to three hours a day, although he remained on call by the company at any hour of the day or night and was expected to visit injured employees at their homes or at the hospital. Outside the plant, he maintained his own office where he received his private patients but where he was required also to wait on persons from defendant’s company. He later left his position to enter the Army and was discharged after six months of duty. He applied to the defendant’s company for his former position but was turned down and he then petitioned the court to compel the defendant’s company to reinstate him.

The court awarded plaintiff the judgment and compelled the defendant to reinstate the plaintiff. The main argument on behalf of the defendant consisted in the fact that the doctor who took the place of the plaintiff spent his full time on the job, whereas the plaintiff spent only one-half of his time at the defendant’s company and that therefore the plaintiff must be considered a part time employee as construed under the Service Act of 1940. The court, however, took the liberal viewpoint and decided that men and women returning from military service find themselves in countless cases, in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonged absence, such competition is not a part of a fair and just system, and the intention was to eliminate it as far as reasonably possible. The Act intends that the employee should be restored to his position even though he has been temporarily replaced by a substitute who has been able, either by greater efficiency or a more acceptable personality, to make it desirable for the employer to make the change a permanent one.

Theodore M. Ryan.