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Termination of a War

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peaceful picketing is considered merely free speech. As Justice Schwellenbach of the Supreme Court of Washington has said, "The United States Supreme Court has established this rule: Peaceful picketing is an exercise of the right of free speceh. Organized labor has the right to communicate its views either by word of mouth or by the use of placards. This is nothing more nor less than a method of persuasion. But when picketing ceases to be used for the purpose of persuasion —just the minute it steps over the line from persuasion to coercion—it loses the protection of the constitutional guaranty of free speech, and a person or persons injured by its acts may apply to a court of equity for relief."[46] On the question of regulating peaceful picketing, Justice Douglas in a concurring opinion in the *Wohl* case[47] said, "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

The realm of uncertainty surrounding the status of picketing may grow and recede as the views of our courts shift to adhere to the social and economic conditions prevailing at the particular time they are called upon to settle conflicts between management and labor. The words of Professor Teller seem to be as true today as they were in 1940, when he wrote, "The story whcih comprehends the nature and consequently the extent of legal protection afforded picketing is one which, like a serial, will be told in future installments. It cannot be stated with certainty today that picketing is an instrument primarily in the nature of economic warfare nor can it be said that it is equivalent to the exercise of free speech."[48]

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TERMINATION OF A WAR

Statements that "courts judicially know . . . the date of the termination of the war"[1] are correct but the actual date of which the courts take judicial cognizance is subject to considerable variance. Selection of the actual date follows a definite pattern for actions which might be classified as public;[2] and a different pattern for those actions between private individuals and corporations. One exception to the rule for private actions[3] will be discussed later.

One might think that the segregation of actions into "public" and "private" would cause some trouble; but no case has been found where the court was in

46. Swenson v. Seattle Central Labor Council, 27 Wash. (2d) 193, 177 P. (2d) 873, 880, 170 A.L.R. 1082 (1947).
47. Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769, 776, 62 Sup. Ct. 816, 819, 86 L. Ed. 1178 (1942).
48. 1 TELLER, op. cit. supra note 1, at 442.
1. 31 C.J.S. Sec. 62, p. 640; 20 Am. Juris, Evidence Sec. 62, p. 83.
2. i.e. involving a subdivision of government, or an activity entrusted during a war to a government department.
3. Malbone Garage, Inc., v. Minkin, 272 App. Div. 109, 72 N.Y.S. (2d) 327 (1947).

the least embarrased by difficulty on that score. The only controversies that have reached appellate courts of which reports are available involve contract actions[4] or actions based on statutory rights created or abolished at a date dependent upon the date of termination of a war.[5]

The date of the termination of the Revolutionary War was critical in *Ware v. Hylton*[6] because the case involved rights of a debtor and creditor under a statute of Virginia[7] which provided for the sequestration of property of British subjects. The statute was nullified by the treaty of peace with Great Britain September 3, 1783. "I apprehend that the treaty of peace abolishes the subject of the war . . ." said Mr. Justice Chase.[8] Counsel had contended[9] that the actual hostilities had not ceased since British troops were even then engaged in assisting the Indian tribes in their hostility to the new Republic.

The question appears not to have arisen after the War of 1812, nor after the War with Mexico in 1848.

At the close of the Civil War two cases arose. Both cases involved the relations of the government and fall into the classification of "public" cases in that the result depended on rights created or abolished at a date dependent upon the date of termination of the War between the States.[10] *In U. S. v. Anderson*[11] the court said that the War ended upon a proclamation of the President on August 20, 1866.[12] The case involved the right to recover property impounded during the war. Suits for recovery were barred by statute[13] if brought more than two years after the suppression of the rebellion. Although the "shooting war" had been over for some time, the court said the limitation did not begin to run until the formal declaration of the "suppression of the rebellion."[14]

In *Freeborn v. The Protector*[15] the rule of *Hanger v. Abbott*[16] that a statute of limitation is tolled during the progress of war when the war prevents prosecution of an action, was followed. In order to determine the date at which the tolling of the limitation ceased (i.e. the date on which the war terminated) the court ruled that the end of the war (in a particular state) was to be governed by the presidential proclamation.[17] For the state of Alabama, the war was terminated by the proclamation of April 2, 1866.[18]

4. These are of two types: The public contract in which a governmental subdivision or department is a party; and private contracts in which the parties have agreed that rights and duties would arise or terminate upon the termination of the war.
5. Such actions are invariably governed by the same rule as is applied to public contracts, even though the controversy is between private parties.
6. 3 Dall. 199, 1 Law Ed. 568 (U.S. 1796).
7. An Act of the legislature of the State of Virginia, passed October 20, 1777, from which excerpts are quoted in Ware v. Hylton, supra note 6.
8. Ware v. Hylton, supra note 6 at 230, 1 Law Ed. at 581.
9. Id. at 202-203, 1 Law Ed. at 569-570.
10. See note 4 supra.
11. 9 Wall. 56, 19 L. Ed. 615 (U.S. 1869).
12. 19 L. Ed. at 619.
13. 15 Stat. at L. 75 (1868).
14. U. S. v. Anderson, supra note 11.
15. 12 Wall. 700, 20 L. Ed. 463 (U.S. 1871).
16. 6 Wall. 532, 18 L. Ed. 939 (U.S. 1868).
17. 12 Wall. 700, 702, 20 L. Ed. 463, 465 (U.S. 1871).
18. Ibid.

Actual ratification of the Treaty of Peace by the United States Senate in April, 1899[19] was held to mark the termination of the Spanish-American War.[20] That was an action in tort for the use by the United States Army of a captured Spanish merchant vessel after the suspension of actual hostilities by the protocal of August 12, 1898.[21] The court quotes Kent: "A truce or suspension of arms does not terminate the war, but it is one of the commercia belli which suspends its operations. . . . At the expiration of the truce, hostilities may recommence without any fresh declaration of war."[22]

After the Armistice of World War I, Congress continued to exercise powers founded on the War Powers of the Constitution.[23] An Act of Congress[24] prohibited the withdrawal of whiskey from a warehouse "until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." In a suit[25] brought to test the power of Congress to make such an enactment after the cessation of hostilities, the court speaking through Mr. Justice Brandies said, "In the absence of specific provisions (in the Act) to the contrary the period of war has been held to extend to the ratification of the treaty of peace . . ."[26] So, the court ruled, the prohibition of withdrawal of liquors was a valid exercise of the war powers, even though hostilities had ceased, so long as the treaty of peace had been neither ratified nor proclaimed.[27]

In every instance[28] when a case involved some relation to the Federal Government, World War I was either held to be, or presumed to be, continuing beyond Armistice Day.

When the issue was private[29] or involved litigation with a state, Armistice Day marked the end of the war.[30] Wars prior to World War I apparently did not generate litigation between private parties the result of which litigation depended upon the date of termination of the various wars.

At the end of World War II, the same pattern was followed. When the issue involved relations with the Federal government it is the invariable rule

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19. 30 Stat. at L. 1754 (April 11, 1899).
20. Ribas y Hijo v. United States, 194 U.S. 315, 24 Sup. Ct. 727 (1903).
21. 30 Stat. at L. 1780 (August 12, 1898).
22. 1 Kent. Com. 159, 161 quoted in 194 U.S. 315,—, 24 Sup. Ct. 727, 729, supra note 20.
23. U.S. Const. Art. 1, Sec. 8.
24. 40 Stat. at L. 1045 (1918).
25. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194 (1919).
26. Id. at 165, 40 Sup. Ct. at 111.
27. Id. at 168, 40 Sup. Ct. at 112.
28. The following are typical, but the listing is by no means exhaustive: U.S. v. Minery, 259 Fed. 707 (Conn. 1919); U.S. v. Stein, 48 Fed. (2d) 626 (N.D. Ohio 1921); C. A. Weed & Co. v. Lockwood, 266 Fed. 785 (C.C.A. 2nd, 1920); Dexter & Carpenter, Inc. v. United States, 275 Fed. 566 (Del. 1921); Commercial Cable Co. v. Burleson, 255 Fed. 99 (S.D.N.Y. 1919).
29. See note 4 supra.
30. Lefevre v. Heady, 92 N.H. 162, 26 A. (2d) 681 (1942); State ex rel Peter v. Listman 157 Wash. 229, 288 Pac. 913 (1930).

that the cessation of hostilities does not mark the end of the war.[31] When private contracts have been presented to the courts, the almost invariable result is that the court will construe "end of the war" the same as "termination of hostilities" and take judicial notice of the date on which hostilities ceased, except where the private rights depend upon a federal statute.

That result in the case of private contract was foreshadowed in *The Elqui*[32] in which the court pointed out that a private contract was not involved and hence dismissed the libel on the authority of *Hamilton v. Kentucky Distilleries*.[33]

Perhaps the closest case in which the end of hostilities rule has been applied is *Mutual Life Insurance Co. of New York v. Davis*.[34] A soldier on duty in Germany was killed in the explosion of an ammunition dump on August 19, 1945. His life had been insured by the appellant with provision for the payment of double indemnity in case of accidental death. The double indemnity liability was to be inoperative "if death resulted . . . from military or naval service in time of war, or from any act incident to war . . . ."[35] The appellant resisted the claim of the soldier's widow for payment of the double indemnity.

The court approved the position of counsel for both litigants that the court will take judicial notice of whether or not World War II was over on August 19, 1945, within the meaning of the contract of insurance. Since the shooting war ended with the unconditional surrender of Japan on August 15, 1945, the hazard against which the military and naval exception clause protecting the insurer ended, and for the purpose of construing this contract of insurance, August 15, 1945, is the date of termination of World War II.[36]

Although the usual rule[37] is for the court to take judicial cognizance of the termination of hostilities and use that date as the termination of the war when the litigation is between private parties, the actual date selected is not always the same for the same war. *In Miller v. Fowler*[38] a private lease contract was under litigation. In establishing the date of September 2, 1945,[39] as the

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31. Application of Yamashita, 327 U.S. 1, 66 Sup. Ct. 340, 90 L. Ed. 343 (1946) (competency of military tribunals); Citizens Protective League v. Byrnes, 64 Fed. Supp. 233 (D.C. 1946) (deportation of enemy aliens); Bowles v. Ormesher Bros., 65 Fed. Supp. 791 (Neb. 1946) (validity of price controls); Ludecke v. Watkins, 335 U.S. 160, 68 Sup. Ct. 1429, 92 L. Ed. 1881 (1948) (denial of judicial review in deportation of enemy aliens. Black, Douglas, Murphy and Rutledge dissenting).
32. 62 Fed. Supp. 764 (E.D.N.Y. 1945).
33. 251 U.S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194 (1919).
34. 79 Ga. App. 336, 53 S.E. (2d) 571 (1949).
35. 53 S.E. (2d) 571, 573.
36. 53 S.E. (2d) 571, 575.
37. See note 4 supra.
38. 200 Miss. 776, 28 So. (2d) 837 (1947).
39. Some courts fix the date of the signing of the Japanese surrender as September 1, 1945, and some as September 2, 1945. The difference is probably due to whether or not the difference in date caused by the International Date Line is given effect. In no case has the one day made a difference. Quaere: Would selection of the correct date depend on the place at which the cause of action arose? Or the date at the place the surrender took place? The problem does not arise in fixing the date of the Italian or German surrender as it might affect litigation in the United States.

end of the war the court said " . . . we must take notice also of the facts . . . that all acts of warfare between our forces and those of Japan did not cease on August 14, 1945, but that on the contrary . . . substantial units of (the Japanese forces) did not learn of the armistice . . . even up to the day of surrender, and that in the meantime they were still in hostile array carrying on war."

Two cases in New York, both involving disputes between a lessor and a lessee, are hard to reconcile. In *Michael Tuck Foundation v. Hazelcorn*[40] it was held that under a lease contract for the duration of the war with Germany plus one year, after which a higher rental was to be paid, a landlord may recover such higher rental upon his demand beginning September 1, 1946.[41] The technical definitions continuing the state of war until the peace treaty is ratified usually do not purport and are not interpreted to refer to rights of individuals arising out of private contracts. The ordinary lay concept of the meaning of the termination of war is the signing of an armistice or the cessation of actual hostilities.[42]

The court in the *Hazelcorn* case cites precise authority for its position[43] and notes no contrary holdings; nor have any been found in this study.

Judgment in the *Hazelcorn* case was affirmed by the Supreme Court, Appellate Term, Second Department on April 10, 1947.[44] The Supreme Court, Appellate Division, Second Department denied a motion for leave to appeal on June 16, 1947.[45] In the interim, on April 28, 1947, judgment was entered in the case of *Malbone Garage, Inc. v. Minkin*,[46] by the Supreme Court Appellate Division, Second Department.[47] Approval was given a holding of the trial court that the words "for the duration of the War" as used in the lease in controversy, should be read in their legal sense as referring to a period which continues to and terminates at the time of a formal proclamation of peace. The holding of the Hazelcorn case was rejected,[48] the court saying that since the lease was a formal written document, prepared by one learned in the law, (i.e. a lawyer), "the parties thereto will be presumed to have intended such words, or terms, to have their proper legal meaning and significance, at least in the absence of a contrary intention appearing in the instrument."[49]

No other case on this point could be located.

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40. 187 N.Y. Misc. 954 (N.Y. City Cts.), 65 N.Y.S. (2d) 387 (1947); aff'd, 71 N.Y.S. (2d) 732.
41. Probably, had the landlord demanded, he could have had the higher rental beginning May 8, 1946, since the court takes judicial notice that Germany surrendered on May 8, 1945.
42. Jones v. Schneer, 270 App. Div. 1027, 63 N.Y.S. (2d) 627 (2nd Dept. 1946).
43. George B. Newton Coal Co. v. Davis, 281 Pa. 74, 126 A. 192 (1924), aff'd 267 U.S. 292, 45 Sup. Ct. 305, 69 L. Ed. 617 (1924) which case is not exactly in point; Jones v. Schneer, supra note 42.
44. 188 Misc. 1046, 71 N.Y.S. (2d) 732 (2nd Dept. 1947).
45. 272 App. Div. 917, 72 N.Y.S. (2d) 412 (2nd Dept. 1947).
46. 272 App. Div. 109, 72 N.Y.S. (2d) 327 (2nd Dept. 1947).
47. Reports in some instances do not indicate the names of judges participating. It is therefore impossible to determine whether or not the same judge or judges participated in decisions at least partially inconsistent.
48. 72 N.Y.S. (2d) 327, 330.
49. Id. at 331.

In a strong dissent, Justice Johnston decrys the attitude of the majority in giving legal significance to words which also have a non-legal meaning, which latter was very much more probably the meaning intended by the parties.[50]

It may be that the parties worked out some equitable resolution of their difficulties. A motion for leave to appeal to the Court of Appeals was granted[51] but there is no record of a disposition of the case on appeal.

In the fields of relations of private parties, the almost invariable rule is that a war is over when the shooting stops. In the fields of relations with government and with rights and duties created by federal statute, a war is over when it is declared over by some action of the legislative or executive departments.

Perhaps the care exercised in the drafting of war powers legislation during World War II is in a measure responsible for the comparatively few cases which have gone up on appeal since World War II on the question of termination of the war. Most war power legislation made specific provision for the duration of its effectiveness and for its termination by resolution of congress or proclamation by the president.

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SUMMARY PROCEDURE AND PUNISHMENT FOR DIRECT CONTEMPT

A recent United States Supreme Court case[1] presented the question as to whether or not a summary conviction and punishment for direct contempt constituted a violation of due process. In a 5 to 4 decision the Court held, that from the facts of the case, it did not, but they indicated that certain conduct of a judge might make a subsequent summary proceeding for contempt against an attorney a violation of due process.[2] The dissent was united in the belief that the actions of the judge constituted a violation of due process.[3] Thus appears a recognition that, under certain circumstances, such a summary proceeding will constitute a violation of due process. This article will attempt to outline and analyze the justifications advanced for allowing the court to exercise such broad and arbitrary powers.

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50. Id. at 333.
51. 272 App. Div. 909, 72 N.Y.S. (2d) 411 (2nd Dept. 1947).
1. Fisher v. Pace, 336 U.S. 155, 69 Sup. Ct. 425 (1949).
2. "We cannot say . . . that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record . . ." Id. 69 Sup. Ct. at 428.
3. Justices Douglas and Black attacked the decision first on the ground that it was a violation of freedom of speech, but concluded, "This lawyer was the victim of the pique and hotheadedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd. That is as much a perversion of the judicial function as if the judge who sat had a pecuniary interest in the outcome of the litigation." Id. 69 Sup. Ct. at 430.