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# Insurance -- Construction of War Exclusion Clause -- Korean Action

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Had the intention been otherwise Congress would not have failed to state the determinative date. The court finds little to fear from the results of non-apprehension of an offender until many years after the violation since by the Federal Act crimes involving capital punishment or life imprisonment are excluded,[23] and a large portion of other offenses would be barred by the three year Statute of Limitations.[24] In addition, the Act clearly places it within the discretion of the Attorney-General as to whether the offender should be proceeded against as a juvenile.[25] The reasonable assumption is that he would do so in a proper case. To construe the statute otherwise, the court finds, might allow the indictment or trial to be delayed to the prejudice of the offender thereby nullifying the purpose of the Act; that is, the recognition that one under eighteen years of age does not have mature judgment and should not be compelled to bear the criminal stigma all his life due to a youthful violation.

The analysis of the problem presented in the instant case follows closely the basic purpose of the Juvenile Delinquency Act, a purpose of reform rather than punishment, and the recognition that a juvenile offense remains just that regardless of the passage of time. Revision of the Juvenile Acts in conformity with those statutes which change the common law,[26] making a juvenile offense delinquency and not a crime, would enlighten and further the true purpose of the Acts.

## INSURANCE — CONSTRUCTION OF WAR EXCLUSION CLAUSE — KOREAN ACTION

Action to recover on a life insurance policy which provided for the payment of double indemnity for accidental death except if insured was engaged in military, air or naval services in time of war. *Held,* the Korean action is at most an *undeclared* war. Since the term "war" is ambiguous, the policy must be construed in favor of the insured. *Harding v. Pennsylvania Mutual Life Ins. Co.,* 90 A.2d 589 (Pa. 1952).[1]

The exemption clause used in this policy depends not only upon the status of the individual, but also upon the status of the country when death occurred. Where such a clause is used, merely "entering into" military service in time of war is sufficient to terminate the double indemnity provi-

23. 62 STAT. 857 (1948), 18 U.S.C. § 5031 (1951).
24. 62 STAT. 828 (1948), 18 U.S.C. § 3282 (1951) (does not run on capital offenses).
25. 62 STAT. 857 (1948), 18 U.S.C. § 5032 (1951), Barnes v. Pescor, 68 F. Supp. 127 (W.D. Mo. 1946), *appeal dismissed* 158 F.2d 800 (8th Cir. 1946).
26. N.Y. DOM. REL. CT. ACT. § 61.

1. See also Beley v. Pennsylvania Mut. Life Ins. Co., 90 A.2d 597 (Pa. 1952) (decided on the same day).

sion,[2] as distinguished from "result" clauses where death must be "caused by" military duties in time of war.[3]

It is well settled that war in its legal sense can never exist without the concurrence of the political departments of the government having the war-making power,[4] and that the power to declare war is fixed solely in Congress.[5] A nation may prosecute its rights by force without either notice or a formal declaration of war,[6] and the distinction between declared and undeclared war has long been recognized.[7] Until there has been some act or declaration creating or recognizing its existence by a department clothed with the war-making power, there can be no war of which a court can take judicial notice.[8] Thus, in cases arising out of the attack on Pearl Harbor on December 7, 1941, it was held that war did not exist until recognized by the formal declaration by Congress on December 8, 1941.[9]

The instant case is apparently the first reported adjudication on the specific question of whether or not the hostilities in Korea constitute a war of which the courts must take judicial notice. The court did not depart from the well established rule of looking to the political departments of the government for the determination of a state of war. Nowhere did they find any act of those departments establishing or recognizing the hostilities as anything other than an "Action in Korea"[10] to which our forces have been committed under the authority of the United Nations Charter.[11] The court rea-

2. State Mut. Ins. Co. v. Harmon, 72 Ga. App. 117, 33 S.E. 2d 105 (1945); Wolford v. Equitable Life Ins. Co. of Iowa, 162 Pa. Super. 249, 57 A.2d 581 (1948).

3. Seleneck, Adm'r v. Prudential Ins. Co. of America, 160 Pa. Super. 242, 50 A.2d 736 (1947); Smith v. Sovereign Camp, W.O.W., 204 S.C. 193, 28 S.E.2d 808 (1944).

4. "Prize Cases," 2 Black 635 (U.S. 1862) (Congress having no power to declare war against a State, the Civil War is the only instance where the courts have looked to the President for a political determination of a state of war); People v. McCloyd, 1 Hill (N.Y.) 377, 407, 25 Wend. 483 (1841).

5. U. S. CONST. ART. 1, § 8; Youngstown Sheet and Tube Co., 343 U.S. 579 (1952).

6. *In re* Wulzen, 235 Fed. 362 (S.D. Ohio 1916); Hamilton v. McClaughry, 136 Fed. 445 (C.C.D. Kan. 1905); The Parkhill, 18 Fed. Cas. No. 10,755a (E.D. Pa. 1861); Verano v. DeAngelis Coal Co., 41 F. Supp. 954 (M.D. Pa. 1941); Stephen Bishop v. Jones & Petty, 28 Tex. 295 (1866).

7. New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); Bas v. Tingy, 4 Dall 37 (1800).

8. Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (W.D. La. 1944); Verano v. DeAngelis Coal Co., 41 F. Supp. 954 (M.D. Pa. 1941); *In re* Wulzen, 235 Fed. 362 (S.D. Ohio 1916); Fehn v. Shaw, 201 Ga. 517, 40 S.E.2d 547 (1946); Pang v. Sun Life Assur. Co. of Canada, 37 Hawaii 208 (1945); Rosenau v. Idaho Mut. Ben. Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); Janco v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 160 Pa. Super. 230, 50 A.2d 695 (1947); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943); Stephen Bishop v. Jones & Petty, 28 Tex. 296 (1866).

9. Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (W.D. La. 1944); Pang v. Sun Life Assur. Co. of Canada, 37 Hawaii 208 (1945); Rosenau v. Idaho Mut. Benefit Ass'n, 65 Idaho 408, 145 P.2d 227 (1944); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943). *But cf.* New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946).

10. See *Report of the Committee on Foreign Affairs on H. Res. 28*, 82d Cong.; Pub. L. No. 814, 81st Cong., 1st Sess., § 202, (1951) 26 U.S.C. § 22(b), (13) (Supp. 1946).

11. United Nations Charter Article 39, "The Security Council shall determine the existence of any threat to peace, breach of peace, or aggrssion, and shall make recommendations, or decide what measures shall be taken . . . to restore international peace and

soned that even if the action in Korea should be found to be a war, it is at most an *undeclared* war. If the defendant insurance company intended the term "war" to include *undeclared* war its intentions should have been made clear in unambiguous terms. This has been done[12] by other insurance companies since the "Pearl Harbor Cases."[13]

Not being concerned with the *actualities* of the hostilities in Korea, the court's conclusion that they do not constitute a war seems to be well supported. The case also serves to emphasize that where private parties have occasion to contract with reference to war, the term "war" will be construed in its legal sense unless the parties give it some other definition or meaning by contract.

## INTERNATIONAL LAW—LIABILITY OF A FOREIGN SOVEREIGN TO COUNTERCLAIM IN FEDERAL COURTS

Defendants counterclaimed in a United States District Court for libel. Plaintiffs, a foreign nation, moved to have the counterclaim dismissed, asserting sovereign immunity. *Held*, a counterclaim *not arising out of the same transaction would be dismissed. Republic of China v. Pang-Tsu Mow*, 105 F. Supp. 411 (D.D.C. 1952).

Until the early eighteenth century no offset of one debt against another was allowed unless the debts were mutually connected.[1] In the latter part of the eighteenth century a right of set-off in bankruptcy was allowed to abolish certain injustices.[2] Subsequently, statutes pertaining to set-off were enacted governing the right to counterclaim in *any* suit.[3] These statutes tended to confuse the federal courts who failed to distinguish counterclaim, recoupment and set-off.[4]

Recoupment and set-off are derived from the English common and statutory law whereas counterclaim is purely of code origin.[5] Recoupment arose out of the same transaction which formed the basis of the plaintiff's

security." (Under the authority of this article the Security Council resolution of June 27, 1950 recommended "that members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security in the area."); Vol. XXIII, No. 574 Dep't State Bull. 5 (July 3, 1950) (the President's action seeks to accomplish the objective of the Security Council resolution).

12. Stinson v|. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948).

13. See note 9 *supra*.

1. 78 IR L.T. 93 (1944); 26 HARV. L. REV. 490 (Supp. 1932).

2. STAT. 4 & 5 ANNE. c. 4 (1705); STAT. 5 GEO. 1, c. 24 (1718); STAT. 5 GEO. 2, c. 30 (1731).

3. COM. LAW PROCEDURE ACT § 83 (17 & 18 VICT. c. 125) (1854); *In re* Cross, 265 Fed. 769 (N.D. N.Y. 1920); Bankers v. Jarvis, 1 K.B. 549 (1903); 29 HALSBURY'S LAWS OF ENG. 482 n. (u) (2d 1938).

4. 25 MINN. L. REV. 801 (1940); 26 A.J. INT. L. 493 (Supp. 1939).

5. JUDICATURE ACT § 24 (1873); 2 GEO. II c. 22 (1728); Curtis-Warner Corp. v. Thirkettle, 99 N.J. 806, 134 Atl. 299 (1926); HALSBURY'S LAWS, *supra* note 4.