

OPINION
45-316

August 23, 1945 (OPINION)

WAR

RE: Duration - Official Termination

Your letter of August 16 addressed to this office has been received and contents of same carefully noted.

You refer to section 24-1301 to 24-1307 of the North Dakota Revised Code of 1943, which provide for the creation of a state highway traffic advisory committee, and also define its powers and duties.

Section 24-1308 provides that the provisions of the foregoing sections--1 to 7 inclusive--shall be in full force and effect for the duration of the war unless sooner terminated by the proclamation of the governor, and the governor, at any time after the cessation of hostilities between the United States and the nations with which it is now at war, may terminate such provisions by proclamation.

You state that it seems clear that the power to make new orders is automatically terminated by said section 24-1308 upon cessation of hostilities between the United States and foreign powers, and you ask for an opinion from this office on this proposition.

I wish to call your attention to the language contained in said section 24-1308. It provides that "The provisions of sections 24-1301 to 24-1307, inclusive, shall be in force and effect for the duration of the war unless sooner terminated by the proclamation of the governor, and the governor, at any time after the cessation of hostilities between the United States and the nations with which it is now at war, may terminate such provisions by proclamation."

It is clear from the language used in section 24-1308 that the provisions of section 24-10301 to 24-1307, inclusive, are in full force and effect for the duration of the war unless sooner terminated by proclamation of the governor. The question then arises what is meant by the "duration of the war".

The general law is to the effect that war in the legal sense continues until and terminates at the time of some formal proclamation of peace by an authority competent to proclaim it. It is the province of the political department, and not of the judicial department of the government, to determine when war is at an end, and a legislative act designating a particular day is that upon which a war closed should be accepted by the courts. In the United States, the power to reestablish peace, like that to declare war, rests exclusively with Congress, and the President has no such authority except as has been given him by Congress. 67 C. J. Sec. 195, p. 429; the Protector (United States) 20 L.ed. 463; Kneeland-Bigelow Co. v. Mich. Cent. R. Co., 174 N.W. 605.

With reference to the phrase, "for the duration of the war," it would

mean from the time that war is declared and until the time when it is formally declared to be terminated by resolution of Congress.

Webster defines "duration" as "continuance in time; the portion of time during which anything exists."

In the case of *Kneeland-Bigelow Co. v. Mich. Cent. R. Co.*, supra, it was held that, "The existence of war and restoration of peace are determined by action of the legislative, supplemented by the executive, department of government. Such determination is conclusive and binding upon the courts. War having been declared, that condition must be recognized by the courts as existent until the duly constituted national power of the country official declares to be contrary, even though actual warfare has long since ceased."

The term "duration of the war" is therefore accepted as meaning the period of time between the formal declaration of war and the formal termination thereof by the proper authority, which in this case would be the Congress of the United States.

However, said section 24-1308 provides that the governor by proclamation, at any time after the "cessation of hostilities" between the United States and the nations with which it is now at war, may terminate such provisions by proclamation. The question then arises as to what is meant by "cessation of hostilities".

it would seem clear that the Legislature distinguished between the meaning of the phrase, "for the duration of the war", and the phrase, "cessation of hostilities", since it gave the governor the power at any time after cessation of hostilities to terminate the provisions of the statutes referred to herein. However, it is rather a difficult matter to determine when hostilities actually cease. According to radio and press reports, desultory fighting is still continuing between the forces of the United Nations and Japan, consequently it cannot be said that there is at this time a complete cessation of hostilities.

It is true that the United Nations have submitted to Japan the terms of unconditional surrender, and while the emperor of Japan has accepted the terms of surrender, nevertheless, as yet they have not been formally signed. From that fact, together with the fact that there is still active armed resistance by Japan, it would follow that at this time it could not be held that there is a cessation of hostilities so as to authorize the governor to act under the provisions of said section 24-1308.

As we have pointed out, the mere cessation of actual hostilities does not terminate the war in the legal sense, until followed by formal proclamation or declaration. It would follow, therefore, that the provisions of sections 24-1301 to 24-1307, inclusive, would be in full force and effect for the duration of the war, except for the qualifying language of section 24-1308 to the effect that, "unless sooner terminated by the proclamation of the governor, and the governor, at any time after cessation of hostilities between the United States and the nations with which it is now at war, may terminate such provisions by proclamation."

The question as to when hostilities cease, therefore, would not be a question of law, but a question of fact, depending upon when the terms of surrender have actually been signed by the belligerents.

In any event, the provisions of sections 24-1301 to 24-1307, inclusive, will continue in force until the war is formally declared by Congress to be at an end, unless under the provisions of section 24-1308 the governor sooner makes a proclamation that the statutes referred to shall no longer be in full force and effect, and such proclamation can be made only if and when hostilities have actually ceased.

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