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BOOK REVIEW

THE CASE OF GENERAL YAMASHITA. By A. Frank Reel, The University of Chicago Press 1949. pp. 324. \$4.00.

In October 1944 Lieutenant General Tomoyuki Yamashita came out of Manchuria to command the Japanese Army defending the Philippine Islands, then under attack by American forces. One year later, the famous Tiger of Malaya surrendered to the American authorities on Luzon, and thus, became the first of the World War II "war criminals".

The War Crimes Division of General MacArthur's Judge Advocate Office had been laboring many months preparing the case against General Yamashita. Able army lawyers had roamed the islands and provinces, taking statements and affidavits from aggrieved citizens, and soldiers all attesting to the extreme brutalities of the Japanese soldiers. On December 7th, four months after the surrender, and on the 4th anniversary of Pearl Harbor, the results of their efforts were realized. A military commission of three majors and two brigadier generals, none of whom was a lawyer, pronounced Yamashita guilty of violating the laws of war, in that he failed to discharge his duty as a commander, and to control the members of his command, permitting them to commit brutal atrocities. In February 1946, General Yamashita was stripped of his uniform and hanged as a common criminal.

Captain A. Frank Reel was an attorney on duty with the Claims Service in the Philippines at the time of Yamashita's surrender. Against his wishes, he suddenly found himself assigned to the task of defending the notorious general. The principal book is his version of the progress and development of this historic trial. While probably written for the lay reader, it is nevertheless a significant contribution to a very controversial field of the law. It is especially another reminder of the serious defects in our system of military justice and martial law. It points out just how counter to the Anglo-American tradition of justice, are trials by military tribunals.

Speed was the keynote of the trial. Yamashita surrendered on Sept. 3rd, 1945. On Sept. 25 he was charged with being a war criminal. Two weeks later he was arraigned and served with a bill of sixty-four particulars, which the Judge Advocate General had been months in preparing. Trial was set for October 29th. The bill of particulars alleged murder, massacre, rape, pillage of innocent noncombatants, mistreatment and starvation of American prisoners and civilian internees, and wanton devastation and destruction of public, private and religious property. On the day set for trial a "supplemental" bill of particulars was filed containing fifty-nine new items, all involving new places, new persons, new witnesses. Confronted with this mass of material to rebut, the hurriedly appointed defense staff

moved for a continuance. Their motion was denied. The Commission did agree not to receive evidence on the supplemental bill until the original bill was disposed of, but they violated this pledge three days after the trial started. This matter of speed particularly impressed the late Justice Rutledge, who said that the burden placed on the defense was not only "tremendous", it was "impossible".

As "a further means of saving time", General MacArthur's headquarters had issued a directive permitting the Commission to admit proof of the alleged atrocities committed by Yamashita's troops through the use of *ex parte* affidavits, depositions, opinion and hearsay, without the personal appearance of witnesses to testify and thus become subject to cross-examination in open court. When witnesses did appear, and defense counsel sought to cross-examine them, the Commission displayed impatience, and at one point ordered that . . . "cross examinations be limited to essentials". They frequently invoked the MacArthur directive to prevent defense attacks on a witness's credibility. Justice Murphy was later to describe the Commission's procedure and attitude as one of "needless and unseemly haste".

Capt. Reel and the other members of the defense staff were quickly convinced that Yamashita was being judicially lynched, and after the initial conferences and interviews with the General and his associates they apparently became convinced that he was not guilty of the things of which he was charged. They had no intention of going along with what they termed a well planned drama, but rather were intent upon fighting for whatever modicum of justice might be available for their man. They continued to object to evidence that they considered improper; they vainly insisted on the right of cross-examination in great detail; they attempted to invoke the safeguards accorded an accused by congressional statutes and international treaties, and by the Anglo-Saxon judicial tradition. In a memorandum attached to their original motion to dismiss, the defense counsel had written: "As officers of the U. S. Army, and as lawyers appointed to defend the accused, defense counsel are charged with a duty to the accused, to the Army, and to the people of the United States to pursue all proper legal remedies open to the defense, including, if warranted, recourse to the Federal Courts, and more particularly, the Supreme Court of the United States."

Groundwork for the expected appeal had been laid with the initial motion to dismiss. It was defense counsel's contention that the Military Commission did not have the power to try the case or conduct the proceedings as it did. This was a jurisdictional attack based on the theory that the power of military tribunals over offenses against the laws of war ends with the cessation of hostilities. They further claimed that such jurisdiction is limited by statutory and treaty requirements and that the charge against Yamashita did not set forth a violation of the laws of war. They contended that the Military Commission did not comply with Article 60 of the Geneva Convention of 1929 (47 Stat 2051), which provides that, before a prisoner of war is tried, the neutral State representing his country

is to be given notice. Switzerland had been the neutral power designated by Japan for the protection of its prisoner, and no notice was ever given to Switzerland. Similarly, they argued that the Commission did not comply with Article of War 25 (41 Stat 792, 10 U.S.C. 1496) which prohibits the use of depositions in a capital case before a military tribunal; that Article of War 38 (41 Stat 794, 10 U.S.C. 1509) which provides that regulations prescribing rules of evidence and procedure in such cases shall not prescribe anything "contrary or inconsistent with" the other Articles of War, and Article 63 of the Geneva Convention of 1929 (47 Stat 2052), which permits trial of prisoners of war only before the same courts and by the same procedure as the nation holding them prisoners uses for its own military personnel. Thus, they argued, General MacArthur's aforementioned directive with respect to depositions, *ex parte* affidavits, hearsay and opinion, transgressed the jurisdictional limitations upon the Commission's authority, and rendered them without power to enter a valid sentence, and since statutes and treaties were thus violated, Yamashita was being deprived of due process of law, guaranteed by the Fifth Amendment.

The Supreme Court rendered its decision on February 4th, 1946 (327 U.S. 1, 66 S. Ct 340). The entire court was of the opinion that American military tribunals could try captured enemy belligerents. The majority felt that hostilities did not cease until peace was officially established, and that the charge did set out a violation of the laws of war. They held that the Articles of War cited by the defense did not apply to enemy combatants charged with an act of unlawful belligerency, and that the Geneva Convention proceedings related to conduct of prisoners tried for acts after capture, not for "war crimes" committed before capture. Thus having found the statutory and treaty requirements inapplicable, they refused to consider the due process of law element.

The late Justices Murphy and Rutledge joined in a vigorous and outspoken dissent. These dissenting opinions make up the appendix to this book and are termed by the author as a "great contribution to the cause of human freedom". The opinions agree in almost every detail with the theory of the case presented by the defense.

The defense counsel made one last attempt to save their client's life. Since the Supreme Court had not disposed of the case on its merits (the action was for a writ of *habeas corpus*), they felt that General MacArthur might, in view of this fact, and in view of the two very vigorous dissents agree to a commutation of the sentence to life imprisonment. They had previously composed a "recommendation for clemency" arguing that this was the "first time in the history that a commanding officer had been held criminally liable for acts committed by his troops. And that it was the first time in modern history that any man has been held criminally liable for acts which according to the conclusion of the Commission did not involve criminal intent or even gross negligence." Hoping for a commutation, copies of

the opinions of the court were immediately dispatched to General MacArthur, and he was informed of this fact by radio. But before the dispatched opinions had left the U.S., General MacArthur issued a statement to the press in which he disclosed that he had ordered Yamashita to be hanged.

The opening statement of the MacArthur announcement reveals just how "impartial" his review must have been. "It is not easy for me to pass judgment upon a defeated adversary in a major campaign", the statement began. "I have reviewed the proceedings in vain search for some mitigating circumstances on his behalf. I can find none."

Frank M. Davis*

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BOOKS RECEIVED

The following books have been recently received by Dickinson Law Library:

- Brown, Maurice H. (of the Philadelphia Bar). *Pennsylvania Evidence*. George T. Bisel Company, 1949. 374 pp. \$10.00.
- Cutler, A.S. *Successful Trial Tactics*. Prentice-Hall, Inc. 1949. \$3.20.
- Dunlap-Hann Pennsylvania Forms*, v. 3. George T. Bisel, Philadelphia, Clark Boardman Co., Ltd, New York, and Matthew Bender & Company, New York. 1949. \$10.00.
- Goodrich, Herbert F. (Judge, Third Circuit Court of Appeals) *Handbook of the Conflict of Laws*. West Publishing Company. 1949. pp. 729. \$6.50.
- Hall, Margaret E. *Selected Writings of Benjamin Nathan Cardozo*, Fallon Law Book Co. New York. 1947. pp. 456.
- Hoover Commission Report*, McGraw-Hill Book Co., New York, 1949. \$3.75.
- Howard, W. V. *Authority in TVA Land*. Frank Glenn Publishing Co., Kansas City, Mo. 1948. pp. 186.
- Oleck, Howard L. *Creditors' Rights and Remedies*. Harmon Publications, N. Y. 1949 pp. 484.
- Potter, Harold, (Prof. of Law University of London). *The Principles of Liability in Tort*. Sweet & Maxwell Limited, London. 1948. pp. 75.
- Powell, Richard B. *The Law of Real Property*, v. 1. Matthew Bender & Co. N. Y. 1949 pp. 792. \$16.50.
- Putnam, Carlton B. *How To Find The Law*. West Publishing Co., 1949. pp. 740. \$5.00.
- Rabkin, Jacob & Johnson, Mark H. *Current Legal Forms with Tax Analysis*, v. 1. Matthew Bender & Co., N. Y. 1948 pp. 1043. \$16.50.
- Seavey, Warren A. (Prof of Law Harvard University) *Studies in Agency*. West Publishing Company. 1949. pp. 451. \$6.00.
- Stevens, Robert S. *Handbook on the Law of Private Corporations (Second Edition)* West Publishing Co. 1949 pp. 1125. \$7.00.
- Weaver, Samuel P. *Constitutional Law and Its Administration*, Callaghan and Company. 1946. pp. 683. \$7.00